

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHELLE R. KAPLAN, et al.,)
)
Plaintiffs,)
)
v.) 1:14-cv-00276-DBH
)
)
BLUE HILL MEMORIAL HOSPITAL,)
)
Defendant)

**MEMORANDUM OF DECISION ON
DEFENDANT’S ASSERTION OF PEER REVIEW PRIVILEGE**

In this action, Plaintiffs Michelle and Mark Kaplan allege retaliatory discharge and additional related claims regarding their employment with Defendant Blue Hill Memorial Hospital. The matter is before the Court on Plaintiffs’ request for certain documents for which Defendant claims a privilege.

Through discovery, Plaintiffs requested that Defendant produce (1) sentinel event reports during Plaintiffs’ tenure at the hospital, and (2) all records of the quality committee regarding other doctors employed at the hospital during Plaintiffs’ tenure. Defendant objects to the production of the documents based in part on the confidentiality provisions of Maine’s Health Security Act, 24 M.R.S. §§ 2501 et seq. As explained below, the Court declines to adopt and apply the state law privilege to the circumstances of this case.

In support of its objection, Defendant cites 24 M.R.S. § 2510-A, which states in relevant part:

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are

not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the written professional competence review process.

While Plaintiffs question whether sentinel review records constitute “professional competence review records,” Plaintiffs’ request for records of the quality committee clearly encompasses documents that are within the scope of the confidentiality afforded by the statute.¹ The issue is whether this Court should apply the statutory privilege in this case.

Federal Rule of Evidence 501 governs whether a federal court should recognize a claimed privilege. Rule 501 specifically provides:

The common law – as interpreted by the United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Because the asserted privilege is not based on the constitution, a federal statute, or a Supreme Court rule, this Court must look to the common law.

For sound policy reasons, federal courts scrutinize closely any request to recognize a new privilege. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court wrote:

We do not create and apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence[.] Inasmuch as testimonial exclusionary rules and privileges contravene the fundamental principle that the public ... has a right to every man’s evidence, any such privilege must be strictly construed.

¹ “Professional competence review records” means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings and work product prepared at the request of or generated by a professional competence review committee relating to professional review activity. Records received or considered by a professional competence committee during professional competence review activity are not “professional competence review records” if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee. 24 M.R.S. § 2502(8).

493 U.S. at 189 (citations and internal quotation marks omitted).

Consistent with the Supreme Court's direction, the court in *Virman v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001), declined to recognize a medical peer review privilege in a discrimination action despite the fact that the records were arguably privileged under state law. While acknowledging that the privilege is in part designed to promote candor in the peer review process, the court noted that a plaintiff in a discrimination case "advances important public interests in addition to his personal interests," and found that the need for the evidence outweighed the objectives of the privilege. *Id.* at 291.

The *Virman* court's reasoning is instructive and persuasive. Here, the interests in the probative evidence are significant. Plaintiffs allege that Defendant terminated their employment after Plaintiffs alleged numerous violations of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. In response, Defendant maintains in part that Plaintiff Mark Kaplan's employment was terminated due to quality of care concerns. Plaintiffs contend that Defendant's stated reasons for termination are pretextual. For Plaintiffs to have a legitimate opportunity to contest Defendant's contention, access to peer review records of other physicians, which records document performance issues, is essential. In fact, through its defense of Plaintiffs' claims, Defendant has enhanced the need for Plaintiffs' access to the records.

The Court is not insensitive, however, to the general need to maintain confidentiality of the peer review process. The Court, therefore, orders Defendant to produce the requested records subject to the following conditions:

1. Defendant shall redact all personally identifiable information regarding any patients.

2. Defendant shall redact reference to and personally identifiable information regarding the physicians who are the subject of the peer review proceedings that are reflected by the records. Defendant shall, however, reference each physician in the same way throughout the records (e.g., Dr. John Doe shall be referred throughout the records as Dr. # 1). Defendant shall also state whether each physician was one of Defendant's employees or employed by another entity.
3. The records shall be deemed "confidential-subject to protective order" pursuant to the Confidentiality Order in this matter. (ECF No. 26.)

CERTIFICATE

Any objections to this Memorandum of Decision shall be filed in accordance with Fed. R. Civ. P. 72.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 15th day of September, 2015.

KAPLAN et al v. BLUE HILL MEMORIAL
HOSPITAL
Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAGISTRATE JUDGE JOHN C.
NIVISON
Cause: 28:1331 Fed. Question

Date Filed: 07/10/2014
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights:
Other
Jurisdiction: Federal Question

Plaintiff

MICHELLE R KAPLAN

represented by **BRETT D. BABER**
LANHAM, BLACKWELL &
BABER, P.A.
133 BROADWAY
BANGOR, ME 04401
207-942-2898
Fax: 207-941-8818
Email:

bbaber@lanhamblackwell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

SUZANNE N RUSSELL
LANHAM, BLACKWELL &
BABER, P.A.
133 BROADWAY
BANGOR, ME 04401
207-942-2898
Email:
srussell@lanhamblackwell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

MARK D KAPLAN

represented by **BRETT D. BABER**

SUZANNE N RUSSELL

V.

Defendant

**BLUE HILL MEMORIAL
HOSPITAL**

represented by **ADRIA YVONNE LAROSE**
EATON PEABODY
P. O. BOX 1210
BANGOR, ME 04402
(207) 992-4318
Email: alarose@eatonpeabody.com
ATTORNEY TO BE NOTICED

THAD B. ZMISTOWSKI
EATON PEABODY
P. O. BOX 1210
BANGOR, ME 04402
947-0111
Fax: 942-3040
Email:
tzmistowski@eatonpeabody.com
ATTORNEY TO BE NOTICED