

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JANE DOE

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2012-08575

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging unauthorized disclosure of her medical information. The case proceeded to trial on the issues of liability and damages.

{¶2} At all times relevant, plaintiff was an inmate at the Ohio Reformatory for Women (ORW) in the custody and control of defendant pursuant to R.C. 5120.16. Prior to her incarceration, plaintiff learned that she tested positive for the human immunodeficiency virus (HIV). During her incarceration, plaintiff received medical treatment for HIV. Plaintiff testified that she took her medication in secret and otherwise was very cautious to prevent other inmates from learning of her HIV-positive diagnosis. However, plaintiff revealed her HIV status to at least three of her friends who she believed would not disclose her condition.

{¶3} Plaintiff testified that in June 2011, she attended “sick-call” at the ORW infirmary where Dennis Johnson, a nurse employed by defendant, called plaintiff into his office to assess her vital signs. According to plaintiff, she observed a “chronic care list” showing her name and her HIV-positive diagnosis. (Plaintiff’s Exhibit 8.) Plaintiff testified that Johnson became “nervous” and covered up the document after she inquired about her name and medical information appearing on the list.

{¶4} Later that year, plaintiff was transported to the Ohio State University Medical Center to treat blood clots that had developed in her legs. A few days after her return to ORW, other inmates informed her that inmate Tashika Anderson had observed plaintiff's name and HIV diagnosis listed on paperwork while Anderson was working as a porter in the infirmary. Plaintiff denied being HIV positive and she informed Nurse Hempker about Anderson's comments. On December 13, 2011, plaintiff submitted an informal complaint to defendant wherein she recounted Anderson's conduct and complained that her medical information had been wrongfully disclosed on more than one occasion. (Plaintiff's Exhibit 3.)

{¶5} Anderson testified that in early December 2011, she was working as a porter in the ORW infirmary. While she was cleaning an office, Anderson observed a sheet of paper that listed names and institution numbers of inmates who were being treated for HIV, including plaintiff. Anderson was subsequently informed by a nurse that she had been fired from her porter job for looking at a patient file. Anderson testified that she later had an argument with plaintiff and one of plaintiff's friends, Kimberly Jordan, in the gym and that she became upset and called plaintiff a "sick bitch" for having HIV. According to Anderson, inmates who were in the gym heard her remarks and she told other inmates about the medical record listing plaintiff's name. Anderson testified that she was transferred from ORW to another institution approximately three weeks later.

{¶6} Jordan testified that she has known plaintiff for approximately eight years and that they were cellmates for about eighteen months. Jordan stated that plaintiff told her she was HIV positive and that she did not share that information with anyone else. According to Jordan, approximately 30 to 40 inmates were present during the December 2011 argument in the gym. Jordan testified that plaintiff was humiliated by Anderson's comments and she became sad and depressed to the point where Jordan

worried that plaintiff might harm herself. Jordan related that plaintiff slept often, did not eat much, and stopped participating in recreational activities.

{¶7} Plaintiff alleges that defendant negligently handled her medical records and failed to protect her confidential and privileged medical information. Defendant contends that plaintiff, Jordan, and Anderson have fabricated their testimony.

DISCRETIONARY IMMUNITY

{¶8} Initially, the court notes that defendant argues that that it is entitled to discretionary immunity from tort liability for policies and decisions related to employing and supervising inmates as porters inasmuch as those determinations are characterized by the exercise of a high degree of official judgment or discretion. The court finds that defendant is entitled to discretionary immunity regarding its policies and procedures for employing inmate porters who clean medical facilities. See *Scott v. Ohio Dept. or Rehab. and Corr.*, 10th Dist. Franklin No. 12AP-755, 2013-Ohio-4383, ¶ 25 (finding that institutional policy regarding inmate participation in disposal of trash and supervised access to the dumpster area represented a discretionary planning function.)

However, the court finds that the conduct of defendant's staff in handling defendant's medical records and in supervising Anderson while she performed her duties as a porter relate to mere execution and implementation of policy decisions. Therefore, plaintiff's claims are not barred by the doctrine of discretionary immunity. See *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, ¶ 14 (10th Dist.).

R.C. 3701.244

{¶9} In Count 3 of her complaint, plaintiff alleges wrongful disclosure pursuant to R.C. 3701.244. In Ohio, health care providers are not permitted to "disclose" that an individual has HIV status.

{¶10} R.C. 3701.243 provides in pertinent part:

{¶11} “(A) Except as provided in this section or section 3701.248 of the Revised Code, no person or agency of state or local government that acquires the information while providing any health care service or while in the employ of a health care facility or health care provider shall disclose or compel another to disclose any of the following:

{¶12} “* * *

{¶13} “(3) The identity of any individual diagnosed as having AIDS or an AIDS-related condition.”

{¶14} Pursuant to R.C. 3701.244, a private cause of action may be brought against those who disclose the identity of individuals diagnosed with AIDS-related conditions.

{¶15} 3701.244 (B) provides, in part:

{¶16} “A person or an agency of state or local government that knowingly violates * * * division (A) of section 3701.243 * * * of the Revised Code may be found liable in a civil action; the action may be brought by an individual injured by the violation.”

{¶17} The Tenth District Court of Appeals has held in analyzing this statute in a similar context, “[t]hat statute provides that a state agency, such as [defendant], is liable only for *knowing* violation of R.C. 3701.243(A) and an agency such as [defendant] may act only through its employees.” (Emphasis added.) *Ackerman v. Med. College of Ohio Hosp.*, 113 Ohio App.3d 422, 426 (10th Dist.1996).

{¶18} Inasmuch as defendant’s unauthorized disclosure in this case was inadvertent, rather than knowing and intentional, plaintiff cannot prevail on her claim under R.C. 3701.244.

UNAUTHORIZED RELEASE OF MEDICAL INFORMATION

{¶19} “In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.” *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, paragraph one of the syllabus. The Supreme Court of Ohio recognized the tort in *Biddle* based upon the policy that “[i]n general, a person’s medical records are confidential. Numerous state and federal laws recognize and protect an individual’s interest in ensuring that his or her medical information remains so.” *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, ¶ 9. “Indeed, even a prison inmate’s personal medical records are qualifiedly protected from disclosure and are not ‘public’ records per se.” *Wilson v. Ohio Dept. of Rehab. & Corr.*, 73 Ohio App.3d 496, 499 (1991).

{¶20} The Tenth District Court of Appeals has rejected the argument that “‘unauthorized’ disclosure under *Biddle* equates to ‘intentional’ disclosure.” *Scott v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. Franklin No. 12AP-755, 2013-Ohio-4383, ¶ 29. In *Scott*, the court determined that “supervised inmate access to trash containing unshredded medical documents does not constitute ‘disclosure’ for purposes of the tort of unauthorized disclosure of medical information as defined by *Biddle*.” *Id.* However, the court of appeals noted that, under certain circumstances, inadvertent disclosure might fulfill the elements of *Biddle*. *Id.* at ¶ 30.

{¶21} With regard to the Anderson’s testimony that she observed plaintiff’s medical documents and subsequently confronted her during the December 2011 argument in the gym, ORW’s investigation appeared to confirm the disclosure of the medical information. Marta Raneri, who was an inspector at ORW, investigated plaintiff’s complaint about disclosure of her medical records. Raneri testified that she interviewed David Pennington, ORW’s medical operations manager and determined that ORW’s medical department violated “policy 07-ORD-11 Access and Confidentiality

of Medical, Mental Health, and Recovery Services Information, by having [plaintiff's] file where the third shift inmate porter could access it.” (Plaintiff’s Exhibit 5.)

{¶22} In general, violation of an internal policy, without more, does not constitute a finding of negligence or breach of a duty of care. *Bickerstaff v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 13AP-1028 and 13AP-1029, 2014-Ohio-2364, ¶ 30. However, the results of Raneri’s investigation support plaintiff’s assertion that her confidential medical information was accessible to Anderson when she cleaned the office. Furthermore, following ORW’s investigation of the allegations concerning plaintiff’s medical records, Anderson was removed from her job as a porter and she was later transferred to another institution.

{¶23} Pennington testified that medical staff are trained on confidentiality of medical records and he explained the process for maintaining such records. According to Pennington, inmate porters are supervised by either one or two corrections officers (COs), who are required to perform rounds during each shift. Although nursing staff are not responsible for supervising inmates, they are trained to observe inmate workers. Pennington recalled being questioned by Raneri and he testified that ORW staff understood that inmates who work in medical offices should be supervised closely and remain within eye-sight.

{¶24} Kimberly Augsburger, the CO who was on duty the night that Anderson observed plaintiff’s medical information, testified that she typically supervised one to four inmate porters during third shift. According to Augsburger, the level of supervision required for inmate porters varied according to the work being performed. Augsburger testified that an inmate working in a medical office should remain within the CO’s line-of-sight.

{¶25} Although defendant argues that its employees cannot “watch every inmate every second,” such vigilance is not required to protect medical records that are properly secured in a locked cabinet or office. Pennington acknowledged that

defendant has a duty to safeguard confidential inmate medical records. Augsburger testified that both COs and medical staff are responsible for ensuring that medical files are not left open when inmate porters are cleaning medical offices.

{¶26} Based upon the totality of the evidence and upon consideration of the credibility of each witness, the court finds that Anderson had access to the open medical record which showed plaintiff's positive HIV status. Furthermore, in light of "the known propensity of some inmates to ingeniously and maliciously exploit any opportunity for leverage over staff or fellow inmates," the court finds that it was foreseeable that allowing an inmate to have access to confidential medical records would lead to the disclosure of the information contained therein. *Scott, supra* at ¶ 30. Therefore, under the circumstances presented in this case, the court finds that allowing Anderson access to plaintiff's medical information constitutes unauthorized disclosure for the purposes of the tort of unauthorized disclosure of confidential medical information as defined by *Biddle, supra*.

DAMAGES

{¶27} Plaintiff alleges that defendant's unauthorized disclosure resulted in substantial emotional and physical harm. According to plaintiff, prior to the incident at issue, no inmate at ORW had harassed her about her HIV status. Plaintiff testified that after the incident, she was subjected to constant harassment by inmates who had heard or were aware of Anderson's comments. Plaintiff related that she became severely depressed and isolated herself from other inmates by staying in bed and sleeping, discontinuing exercise, work, and recreational activities. Plaintiff testified that her emotional trauma caused her to lose her appetite, resulting in weight loss. Plaintiff sought mental health services; however, she testified that she was subjected to sexual

harassment from her counselor. Plaintiff testified that the unauthorized disclosure had a debilitating effect on her day-to-day life, resulting in suicidal ideations.

{¶28} Defendant argues that plaintiff's HIV status was already known among the inmate population inasmuch as she had previously disclosed her condition to several inmates. The court finds that the close proximity in time between the unauthorized disclosure and the incident in the gym supports Anderson's testimony that her comments were based upon information obtained from the unauthorized disclosure, rather than from a prior disclosure by plaintiff.

{¶29} Although the court is persuaded that plaintiff suffered harassment and emotional distress as a result of the unauthorized disclosure, the court finds that her testimony regarding the severity of her distress was overly exaggerated. Plaintiff testified that she experienced one of the worst moments of her life and had suicidal thoughts after hearing Anderson's comments; an incident which does not seem to compare with her experiences in committing and being convicted of aggravated murder, being sentenced to a term of life without parole, or learning of her HIV diagnosis. Plaintiff contends that she sustained "irreversible harm" and continues to struggle to return to her prior life; however, the court notes that plaintiff's counseling records show that by April 12, 2012, plaintiff reported that her mood was "good" and that although "there are people who still make comments * * * she has not been sad or victimized recently." (Defendant's Exhibit G.)

{¶30} Regarding plaintiff's inactivity and weight loss, the evidence shows that plaintiff experienced significant pain in her leg in November 2011 and she was diagnosed with blood clots which were treated with medication that was administered at the infirmary on a daily basis. Inmate Sonya McKibbon testified that she was housed with plaintiff and that plaintiff stopped exercising at the gym after she injured her leg. Plaintiff also took medication that on occasion made her dizzy and nauseous.

{¶31} Based upon the totality of the evidence, the court finds that plaintiff is entitled to damages attributable to the unauthorized disclosure in the amount of \$7,500.

Although defendant urges the court to apportion damages against Anderson, the court finds that defendant was singularly responsible for ensuring that plaintiff's confidential medical records were not disclosed without proper authorization; particularly to inmates who were under its custody and control. Accordingly, judgment is recommended in favor of plaintiff in the amount of \$7,525, which includes the filing fee paid by plaintiff.

{¶32} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ANDERSON M. RENICK
Magistrate

cc:

Christopher L. Bagi
Peter E. DeMarco
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Amna Akbar
Civil Litigation Clinic
The Ohio State University
Moritz College of Law
55 West 12th Avenue, #255P
Columbus, Ohio 43210

David A. Singleton

Case No. 2012-08575

- 10 -

DECISION

Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, Ohio 45202

Filed August 6, 2014
Sent To S.C. Reporter 11/04/15