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United States District Court,
N.D. California.

Mary BULL, et al., Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants.

No. C-03-1840 CRB(EMC). | Oct. 27, 2003.

Attorneys and Law Firms

Casper, Meadows & Schwartz, Walnut Creek, CA, Mark E. Merin, Esq., Jeffrey I. Schwarzschild, Law Office of Mark E. Merin, Sacramento, CA, for Plaintiffs.

Ingrid M. Evans, City Attorney's Office City & County of San Francisco City Hall, Rebecca Lynn Katz, City Attorney's Office SF Sheriff's Dept., Sherri Sokeland Kaiser, David B. Newdorf, Robert A. Bonta, Office of the City Attorney City Hall, San Francisco, CA, for Defendants.

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND DENYING MOTION FOR PROTECTIVE ORDER

CHEN, Magistrate J.

*1 Having reviewed the parties' briefs and accompanying submissions and having considered the arguments of counsel, and good cause appearing therefor, the Court hereby GRANTS Defendants' motion to compel production of documents and DENIES their motion for a protective order.

In their motion to compel, Defendants seek production of two documents, more specifically, an encounter report, dated December 23, 1999, authored by Marilyn Valius, CN, and a second encounter report, dated March 21, 2003, authored by Chris Bolt, RN. Both Ms. Valius and Mr. Bolt are employees of Jail Medical Services. Both encounter reports contain medical information about Plaintiff Mary Bull. As is evident from the encounter reports that Ms. Bull produced to Defendants, such a report is generated as part of an intake screening which allows the San Francisco County jail to determine where to place an individual. According to Defendants, the two withheld documents should be produced because they are

relevant and any psychotherapist-patient privilege has been waived since Ms. Bull's mental condition is at issue, not only with respect to liability but also damages.

At the hearing on Defendants' motion to compel, Ms. Bull clarified that she was not asserting the psychotherapist-patient privilege because the privilege is not applicable. According to Ms. Bull, the documents should not be produced because they are not relevant and because she has a privacy interest in the nondisclosure of her personal information.

The Court agrees with Ms. Bull that, under the circumstances, the psychotherapist-patient privilege is not applicable. Under *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the privilege protects only "confidential communications between a licensed psychotherapist [or social worker] and her patients in the course of diagnosis or treatment." *Id.* at 15. Even if the Court assumes that confidential communications between a nurse and patient are covered by the privilege, the privilege does not apply for several reasons. First, based on the Court's examination of the two withheld documents (which Ms. Bull submitted for *in camera* review), there was no psychotherapy involved. Second, the communications between the nurses and Ms. Bull did not take place during the course of diagnosis or treatment. That is, Ms. Bull was not seeking a diagnosis or treatment from the nurses; rather, the nurses were seeking information from Ms. Bull as part of intake screening, more specifically, for the purpose of determining where to place her in the jail. Third, for similar reasons, Ms. Bull did not have a reasonable expectation of confidentiality in the communications. She was not speaking to the nurses for the purpose of diagnosis or treatment but rather to the nurses as representatives for the jail.¹

¹ That the medical personnel work for a contractor of the jail and are not jail employees does not materially change Plaintiff's expectation of privacy.

The Court, therefore, turns to the issues of relevancy and privacy. The Court concludes that the two withheld documents may be relevant. First, the documents may be relevant to damages. In her complaint, Ms. Bull has alleged emotional distress because of Defendants' actions, and the documents may be probative of the cause or extent of her emotional distress. Second, the documents are relevant to liability. Ms. Bull has alleged in her complaint that, on November 18 and 19, 2002, she was confined in a "cold room" in the San Francisco County jail pursuant to Defendants' policy of using such confinement "as punishment for non-violent, non-suicidal, and non-destructive detainees who are dubbed 'non compliant.'" Comp. ¶ 16. If Ms. Bull was confined in the

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cold room because she was violent, suicidal, or destruction-*i.e.*, not for purposes of punishment-then this basis for liability alleged in the complaint may be defeated. Ms. Bull's mental condition may also inform the procedural due process analysis to the extent such a claim is asserted. Ms. Bull's apparent condition and behavior on other occasions at the jail may be probative to determining her condition during the incarceration at issue.

*2 Ms. Bull has argued that, at most, only those encounter reports on or about the days of her confinement are relevant, and she has produced those documents to Defendants. According to Ms. Bull, the two withheld documents are too remote in time from the days of her confinement to be relevant. The Court agrees that the encounter reports close in time to the days of Ms. Bull's confinement are relevant and that, as a general matter, the more remote in time documents are the less relevant they are. *Cf. Cuoco v. United States Bureau of Prisons*, No. 98 Civ. 9009(WHP), 2003 U.S. Dist. LEXIS 4766, at *10-11 (S.D.N.Y. Mar. 27, 2003) (in discussing waiver of psychotherapist-patient privilege, noting that waiver should apply to records dating a "reasonable and relevant time" within date of incident at issue). However, that does not necessarily make the documents at issue-one three years before the dates of her confinement, the other four months after the dates of her confinement-so remote in time as to be irrelevant as a matter of law.

Any remoteness in time here is tempered by the fact that the two withheld encounter reports involve Ms. Bull's detainment in the same exact setting as the November 18 and 19 detainment (*i.e.*, the San Francisco County jail) and were authored by two of the same nurses who later evaluated Ms. Bull on November 18 and 19. The latter fact is especially important. Because the withheld encounter reports were authored by two of the same nurses, they may be additionally probative of, *inter alia*, those nurses' practices, potential biases, thoroughness, accuracy of observation, etc. They might also refresh their recollections.

Having concluded that the two encounter reports may be relevant, the Court now turns to the issue of Ms. Bull's privacy interests. The Supreme Court has recognized a constitutional right to privacy, more specifically, a constitutional right to nondisclosure of one's personal information. *See Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). In *Whalen*, the plaintiffs challenged a New York statute which directed that the names and addresses of individuals who obtained certain prescription drugs be compiled in a centralized database to aid in law enforcement. The Supreme Court determined that there was a privacy interest in one's medical records but ultimately concluded that the state program did not "pose

a sufficiently grievous threat to [that] interest to establish a constitutional violation." *Whalen*, 429 U.S. at 600. As *Whalen* indicates, a potential disclosure of medical records raises constitutional concerns regarding privacy, but the right to nondisclosure of one's personal information is not absolute and is subject to a balancing test. *See also Crawford v. United States Trustee*, 194 F.3d 954, 959 (9th Cir.1999). *Compare Jaffee*, 518 U.S. at 17-18 (explicitly stating that the psychotherapist-patient privilege is not subject to a balancing test).

*3 The Court determines that, in the case at hand, the interests in favor of disclosure outweigh the interests against disclosure. Ms. Bull does have a privacy interest in avoiding disclosure of personal information. However, that privacy interest is attenuated given the circumstances. As discussed above, Ms. Bull did not have a reasonable expectation that the communications with the nurses in this setting would be confidential as to the jail. Moreover, the Court has reviewed the documents *in camera* and concludes that they do not contain the kind of highly sensitive information that is often found in *e.g.* psychotherapy or other medical treatment notes. They contain largely cursory notes about objective facts. Finally, Plaintiff initiated this lawsuit and placed her mental state at issue by alleging that her confinement in the cold room was for punishment only rather than for her own safety; this further lessens her privacy interests in these records.

The Court therefore grants Defendants' motion to compel and orders Ms. Bull to produce the two withheld documents to Defendants prior to the depositions scheduled for October 28, 2003.² In order to protect Ms. Bull's privacy interest, the Court orders that the documents are to be shown only to Ms. Bull, the two nurses who authored the documents (*i.e.*, Ms. Valius and Mr. Bolt), to retained experts, and to counsel (including counsel's staff).³ In addition, the Court orders that the documents shall be used solely for purposes of this litigation and shall to be returned to Ms. Bull within thirty days after termination of this action.⁴

² Given the time limitations, copies of these documents may be served by fax.

³ Although Defendants may not show the two documents to *e.g.* the four Jail Psychiatric Services employees. Unless Defendants establish the predicate fact that these deponents saw and considered these two documents in rendering their conclusions during Plaintiff's incarceration at issue, the Court sees no need to disclose these documents to these deponents. However, Defendant may pose hypotheticals to the employees based on the information contained in the documents in order to elicit opinion testimony.

4 Ms. Bull has suggested that, if the Court permits disclosure of the two encounter reports, the floodgates will open and Defendants will have free rein to go through not only all of her medical records but also all the medical records of any class members. The Court disagrees. The Court has ordered production of the two documents given the particular circumstances-*e.g.*, the documents do not reflect confidential communications with a psychotherapist and do not contain highly sensitive information, the communications were not made during the course of diagnosis or treatment, the communications were made to jail representatives rather than treating nurses or physicians, and they were authored by medical personnel Plaintiff seeks to depose.

The only issue remaining is Defendants' motion for a protective order. In their motion, Defendants asked that the depositions of Ms. Valius, Mr. Bolt, and four Jail Psychiatric Services employees (all percipient witnesses to the events of November 18 and 19, 2002) be postponed until after production of the two encounter reports at issue. Given the ruling above, the Court denies Defendants' motion for a protective order as moot.

IT IS SO ORDERED.