IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:00CV502-MCK

PATRICIA KOWALCYZK and KELLY J. KOWALCYZK, Plaintiff, V. GASTON COUNTY D.S.S., ALBERT WENTZY, MARY COOK, And KAY BARKER, Defendants	ORDER

THIS MATTER IS BEFORE THE COURT upon Defendants' motion for protective order (Doc. 16), the response, reply, surreply, and supplemental brief. Oral argument was held on this motion on October 9, 2001, and this matter is now ripe for review.

I. Factual and procedural background

Plaintiffs allege racial discrimination in Defendants' adoption procedures in violation of the Multiethnic Placement Act ("MEPA"), 42 U.S.C. §670-679; the Interethnic Adoption Provisions ("IEP"), 42 U.S.C. § 1996(b); and Title VI of the Civil Rights Act 42 U.S.C. §2000d-1. Plaintiffs have requested discovery of material in defendants' possession relating to procedures used by Defendants in adoption placements. Defendants move for a protective order, arguing that discovery of any information deemed confidential by various state statutes be barred as privileged. Defendants further argue that the requested discovery is overly broad and burdensome. Lastly, Defendants move to prohibit discovery of materials provided

by Defendants to the Office of Civil Rights ("OCR"). Defendants make no relevance objections.

II. Analysis

1. Confidentiality Statutes/Privilege

As noted above, Plaintiffs allege racial discrimination in the adoption placement process conducted by Defendants, arguing that they were denied the opportunity to adopt "Baby H" because Plaintiffs are Caucasian and "Baby H" is African-American. Defendants object to the following information requested by Plaintiffs in discovery: (1) records relating to the procedures followed and the decision-making process in the placement of "Baby H;" (2) statistical information relating to the race of parents and children involved in adoptions processed by DSS; (3) records relating to those children who were in foster care in DSS and were ultimately adopted through DSS; and (4) records of individual DSS employees involved in the adoption placements which relate to placement decisions made, in whole or in part, based on race. As to (2),(3), and (4), Plaintiffs stipulated at the hearing that the relevant time period was from the effective date of MEPA (January 1995) to the present.

A. Rule 501

Federal Rule of Evidence 501 governs privileges in the federal courts. Rule 501 provides in pertinent part:

Except as otherwise provided by the Constitution of the

> United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience....

Fed. R. Evid. 501. Therefore, under the Rules, in federal question cases, state privilege law as such does not apply.

However, because Rule 501 refers to "reason and experience," courts in federal question cases may choose to apply state privilege law by analogy or as a matter of comity, where the application does not conflict with a substantial federal interest. *See, e.g. Lemasters v. Christ Hospital*, 791 F. Supp. 188 (S.D. Ohio 1991), *United States v. King*, 73 F.R.D. 103 (E.D.N.Y. 1976).[1]

B. North Carolina Confidentiality Statutes

Defendants urge this Court to apply the confidentiality provisions contained in various state statutes as a privilege barring discovery in this federal discrimination case. The statutes cited by Defendants, N.C.G.S. §108A-80 (prohibiting disclosure of

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[1] While Plaintiffs have also alleged state law causes of action, the presence of pendent state claims does not determine whether the court should adopt the state privilege law for several reasons. First, courts have concluded that the determination with respect to the federal claims controls discovery for the entire action. *See, e.g., Memorial Hospital v. Shadur*, 664 F. 2d 1058 (7th Cir. 1981). Second, in this case, the evidence sought under the federal claim is the same as that of the state claim, so if the evidence is produced for the federal claim, any state privilege is mooted.

information regarding persons receiving public assistance or social services); N.C.G.S. § 7B-2901 (prohibiting disclosure of records of juveniles placed in protective custody); and N.C.G.S. § 48-9-102 (prohibiting disclosure of adoption records), make it a misdemeanor offense to release information deemed confidential.

C. Privileges in federal court

As an initial matter, the undersigned notes that the confidentiality provisions relied upon by Defendants are not deemed evidentiary privileges by statute, nor has any court found that these provisions constitute a state law evidentiary privilege. *See Brandis on North Carolina Evidence*, Third Ed., §54, p.251-252. For purposes of this motion, the undersigned assumes that the confidentiality provisions would be treated as an adoption record evidentiary privilege by the North Carolina state courts.

As noted, this state statutory adoption record privilege is not conclusive in an action brought in federal court under federal law. *See also, Holland v. Muscatine General*, 971 F. Supp. 385 (S.D. Iowa 1997). Rather, the recognition of new privileges in federal court evolves on a case-by-case basis. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). The analysis should balance "the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege issue." 2 J.

Weinstein, *Weinstein's Evidence*, Ch. 501[03] at 39-41. The balance does not often favor recognition of a new privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). The starting point in this analysis is always the fundamental principle that "'the public ... has a right to every man's evidence.'" *Id., quoting Trammel v. United States*, 445 U.S. 40, 50 (1980). Further, privileges are disfavored in the law and must be strictly construed. *Id; see also Virmani v. Novant Health, Inc.*, 259 F. 3d 284 (4th Cir. 2001).

Applying these guiding principles, the analysis turns to the question: Should this Court apply North Carolina's confidentiality provisions as an adoption record privilege in federal court? This is a case of first impression, and, for the following reasons, the undersigned finds that the federal courts should not recognize a privilege for adoption records.

Defendants argue generally that confidentiality of these records is necessary to encourage adoptions and that the public policy favoring adoption outweighs Plaintiffs' need for the information. Defendants' argument is unpersuasive for the following reasons: (1) Defendants produced no compelling evidence in support

of the argument;[2] (2) Defendants made no showing that the confidentiality concerns and public policy interest favoring adoption could not be protected by the production of the information under a strict confidential protective order; and (3) Defendants concede that without the requested discovery, Plaintiffs cannot prove their discrimination case.

Further, while no court has addressed whether federal courts recognize an adoption record privilege, in federal civil rights actions, the overwhelming majority of courts have concluded that state law privileges must yield to the federal interest of full disclosure. *See, e.g., University of Pennsylvania v. EEOC, supra, Virmani, supra, King v. Conde*, 121 F.R.D. 180 (E.D.N.Y. 1988). Further, where it is alleged that the state has acted in a discriminatory manner, courts are even more reluctant to recognize a state privilege. *See, Burka v. New York City Transit Authority*, 110 F.R.D. 660, 666 (S.D.N.Y. 1986)("[B]ecause the federal civil rights laws are designed in part designed to protect individuals against illegal state action, it would be anomalous to permit state law privileges to interfere with their enforcement"); *Kelly v. City of San Jose*, 114 F.R.D. 653 (N.D.Cal. 1987).

In *Virmani*, the Fourth Circuit refused to recognize a medical

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[2]The only evidence to support Defendants' argument are three affidavits from interested parties which conclusorily assert that disclosure would cause "great harm."

peer review privilege as weighed against a claim of racial discrimination. In *Virmani*, after evaluating the state's public policy reasons for enactment of the statutory privilege (as evidenced by the legislative history of the statute and caselaw construing the privilege in state courts); other states' enactment of a similar privilege; court decisions recognizing the privilege; evidence of the specific harm disclosure would cause; and evidence that Congress favored such a privilege, the Court found the federal interest outweighed that of the state.

Defendants here cannot show any of the *Virmani* factors listed above. Further, as noted above, Defendants make no showing that the confidentiality interest could not be adequately protected by a confidential protective order. Indeed, as Defendants conceded at the hearing, much of this information has already been released by Defendants to the Office of Civil Rights without objection or court order and apparently, without any confidentiality agreement in place. As the cow is apparently out of the barn, Defendants' request that this Court "shut the door" is unpersuasive.

For the foregoing reasons, this Court should not apply the state law confidentiality provisions as a federal privilege barring discovery in this case.

2. Overly Broad and Burdensome Objections

The pleadings were unclear as to which specific discovery

requests Defendants were asserting overly broad and burdensome objections. However, generally Defendants argued that the time period referenced in the discovery requests was overly broad because it went back to 1990. At the hearing, Plaintiffs stipulated that the relevant time period was from the effective date of MEPA to the present. According to Defendants' uncontested supplemental brief, Defendants submit that the effective date of MEPA in North Carolina was January 1, 1996. Thus, the relevant time period for discovery in this case is January 1, 1996, to the present.

Defendants objected to production of statistical information and information on other completed adoptions as burdensome. However, as Defendants conceded at the hearing, this type of information has been produced to the OCR and the state Department of Human Services. Also, as this Court has narrowed the relevant time period by half, Defendants' argument that production is burdensome is unpersuasive.

4. Personnel Files

Plaintiffs concede that nothing in Defendants' employees' personnel files is relevant except any information regarding actions taken in the placement of an adopted child wherein race was a factor. Thus, any such information, whether concerning Baby H or any other child, shall be provided subject to the relevant time period.

5. FOIA request

Defendants move for a protective order barring discovery of materials given to OCR by Defendants that may be provided to Plaintiffs by the OCR under Freedom of Information Act ("FOIA") requests. As Defendants have no standing to object to such requests, the motion is denied on this matter.

6. Possession of Documents

Defendants argued that they were not in possession or control of certain requested documents including employee files and court files. Pursuant to Federal Rule of Civil Procedure 34(a), a party does not have to produce documents which are not in "possession, custody or control." Thus, any such documents do not have to be produced.

III. Conclusion

For the foregoing reasons, the motion for protective order is **GRANTED, IN PART, and DENIED, IN PART. IT IS FURTHER ORDERED THAT** the parties submit a protective order which provides for production which is both confidential and consistent with this ruling within 15 days of the date of this Order for entry by this Court.

IT IS SO ORDERED, this 12th day of October, 2001.

H. BRENT McKNIGHT
UNITED STATES MAGISTRATE JUDGE

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United States District Court
for the
Western District of North Carolina
October 15, 2001

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:00-cv-00502

True and correct copies of the attached were mailed by the clerk to the following:

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Date: 10/15/01

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