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The Medical Peer Review Privilege in *Adkins v. Christie*

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Last year, in *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), the Eleventh Circuit joined the Seventh and Fourth Circuits by rejecting the application of a state medical peer review privilege in federal civil rights cases. See *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981). In *Adkins*, an African-American staff physician with privileges at the Houston Medical Center (HMC) claimed that HMC and several HMC physicians discriminated against him based on his race in their implementation and utilization of HMC's peer review and physician disciplinary process.

As part of his claims, Adkins alleged that HMC deliberately mishandled the care of one of his patients and later used this case as grounds to begin peer review of his practices, leading to an inaccurate determination regarding his care of the patient and disproportionately harsh penalties, including his suspension and termination.

During discovery, Adkins requested documents relating to peer review of all physicians at the hospital during the seven years he was a member of the hospital staff. In response, the defendants sought a protective order arguing that the documents sought were protected by the Georgia medical peer review privilege.

The Eleventh Circuit reversed the district court decision, which recognized the medical peer review privilege, holding that “the medical peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases.” Guided by the Supreme Court’s decision in *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Eleventh Circuit weighed the parties’ competing needs to determine if the privilege was applicable in federal civil rights cases and considered four factors set forth in *Jaffe*, including (1) the needs of the public good; (2) whether the privilege is rooted in the imperative need for confidence and trust; (3) the evidentiary benefit of the denial of the privilege; and (4) consensus among the states.

The defendants argued that the privilege supported the public good and that the absence of the privilege would encourage supervising physicians to be less candid in their performance evaluations, thereby causing the quality of oversight and healthcare itself to suffer. The court agreed that the recognition of the privilege would support important interests, such as vigorous oversight of physician performance, but found that this interest did not outweigh the plaintiff’s right to discover evidence essential to his discrimination claims.

While the court acknowledged that a medical peer review privilege is recognized in all fifty states and the District of Columbia, it also found that the state statutes creating the privilege were primarily concerned with balancing the need for confidentiality in peer review with a plaintiff’s access to evidence in a medical malpractice suit. The Eleventh Circuit stated that a plaintiff’s interests in a civil rights suit were markedly different from those in a malpractice case and required a different analysis. In *Adkins*’ case, his claims were based on alleged racial discrimination within the peer review process itself. The court stated that the “only way that *Adkins* [could] demonstrate the existence of disparate treatment in his case . . . [was] to compare his peer review with the peer review files of other physicians at HMC.” In addition, the Eleventh Circuit held that the production of records should not be limited only to physicians in the same department as *Adkins*. The court held that *Adkins* was entitled to compare his treatment with the general standard for all hospital physicians to establish that his punishment was excessive.

The court noted that its decision not to recognize the privilege did not inevitably lead to a complete lack of protection for the documents at issue. The court stated that in the absence of the privilege, a district court retains its authority to protect a hospital’s interests by issuing protective orders, supporting confidentiality agreements, and conducting in-camera reviews of the documents prior to disclosure.

By choosing not to recognize the privilege, the Eleventh Circuit exposed medical peer review records to disclosure in federal civil rights suits. The *Adkins* decision leaves the amount of protection afforded medical peer review records to the discretion of the district courts, which are charged with the duty of applying discovery safeguards to ensure that the lack of privilege does not lead to the unnecessary disclosure of all aspects of these confidential records. Given the discretion left to the federal trial court, hospitals are faced with the reality that portions of these now discoverable records may end up as admissible evidence in the trial record.

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