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PERSONNEL RECORDS IN NURSING HOME CASES

by Ted Babbitt

In nursing home cases, former employees are often called as witnesses to substantiate allegations of poor staffing and knowledge on the part of the nursing home of warnings of potential injury to residents. In addition, the employees actually involved in the care of the injured resident sometimes have entries in their personnel file which would shed light on their qualifications or lack thereof. The personnel files of relevant employees are often sought in discovery. Up until now the District Courts were divided as to whether or not a nursing home had a right to prevent the production of these personnel files on the grounds of the privacy rights of the employees in question. The First District Court of Appeals in North Florida Regional Hospital, Inc. v Douglas, 454 So.2d 759 (Fla. 1st DCA 1984) and Alterra Healthcare Corp. v Estate of Shelley, 779 So.2d 635 (Fla. 1st DCA 2001) had held that the employer did not have standing to raise the privacy rights of its employees in this context. In direct conflict with these opinions, the Fifth District in Beverly Enterprises-Florida, Inc. v Deutsch, 765 So.2d 778 (Fla. 5th DCA 2000) held that an employer did have standing to assert the privacy rights of its employees in the very same context.

The Supreme Court has now ruled on this important issue in Alterra Healthcare Corp. v Estate of Francis Shelley, 27 F.L.W. 735 (Fla. Sept. 12, 2002). That case involved a nursing home resident who required regular

periodic observations and was nevertheless left for close to eight hours hanging upside down when her foot caught in the footboard of her bed. The plaintiff sought the personnel records of all of the employees who provided any care or service to the resident but agreed to the redacting of certain purely private and confidential information such as home phone numbers, and Social Security numbers. The defendant objected at least in part, on the grounds that the requested production violated the employees' constitutional rights of privacy. The trial court granted a motion to compel and the First District, relying upon North Florida Regional Hospital, Inc. v Douglas, *supra*, denied a petition for writ of certiorari. The Supreme Court accepted conflict jurisdiction with the Fifth District opinion in Beverly Enterprises-Florida, Inc. v Deutsch, *supra*.

The principal question to be decided was whether an employer had a right to challenge the disclosure of nonparty personnel records by asserting the privacy privilege of the employees. The Supreme Court explained that there has been abundant law on the issue of when a constitutional right to privacy can be asserted by someone other than the person in question. Powers v Ohio, 499 U.S. 400 (1991) is probably the seminal case on this issue. There the U.S. Supreme Court held that standing to raise a right of privacy exists only when

the person raising the issue has suffered “an injury in fact,” has a close relationship to the person whose privacy right is in issue and there is some hinderence to that person’s ability to protect their own interests. That precise issue was decided in the negative by the Fourth District and in the affirmative by the Fifth District in the above-cited cases.

In the case at bar, the Supreme Court concluded that standing did not exist but cautioned that trial judges have the obligation to determine both the relevancy of the requested material and the duty to redact unnecessarily intrusive data from the requested documents.

On balance, we conclude that application of the three-part *justertii* analysis, militates against recognizing third-party standing for nonpublic employers involved in requests for production of personnel records to assert their employees’ privacy rights in those records. This does not necessarily mean, however, that such important nonparty rights should not be considered, or that the right to privacy and the right to know should not be weighed, during the discovery process.

The Supreme Court concluded that even though an employer has no standing to raise the privacy interest of its employees, an employer does have standing to oppose production of any information in those files which is not relevant to the pending litigation. The Court concluded that the trial court, upon request, should conduct an in camera inspection of the records and

balance the right of privacy with the right to know. The Court pointed out that the custodian of the records should point out to the Court what type of information the Court should be looking for to determine whether or not it is private and that the party requesting the information is entitled to know what directions are being provided to the Court.

Even though the scope of discovery is broad, it must be relevant to issues properly framed by the pleadings in the litigation. Legitimate employee privacy concerns may also be addressed by a carefully crafted discovery order. However, given the broad scope of discovery pursuant to Florida Rule of Civil Procedure 1.280, if private and confidential information that is not relevant is redacted or withheld from the documents produced, It would be appropriate to require the records custodian to provide to the requesting party details concerning the information withheld, to enable the parties to fully address the issue at the trial level and to challenge the trial court's ruling, if necessary.

The employee, of course, has a right to intervene to protect their own privacy issues, if they so choose. Even if they do not, the employer can prevent the disclosure of personal irrelevant information.

Based upon the foregoing, we approve the decision in *Alterra Health Care Corp.* to the extent it is consistent with this opinion, and disapprove the reasoning in *Deutsch*, with

respect to the issue of whether a private employer has standing to challenge a discovery request based exclusively upon the privacy interest of its employees in their personnel files. In so doing, however, we recognize that nonpublic employees may have a privacy interest in certain information contained in their personnel files, which they may assert as intervenors in the litigation. Moreover, in the appropriate case, the trial court should fully consider the employees' alleged privacy interest – in the context of determining the relevancy of any discovery request which implicates it – regardless of whether the subject employees have intervened or not.

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