

A Federal District Court in Kentucky Recognizes the Broad Scope of the Patient Safety Quality Improvement Act's Privilege Protections Beyond Malpractice Actions.

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In a wrongful termination suit brought under the Americans with Disabilities Act, Plaintiff, a pharmacist, demanded that Norton Healthcare, Inc. (Norton), her former employer, produce Root Cause Analysis (RCA) documents and other records related to her alleged errors as a pharmacist and information about any patient harm supposedly caused by these errors and those of her peers. Asserting the federal patient safety work product privilege (PSWP) under the Patient Safety Quality Improvement Act of 2005 (PSQIA) found at 42 U.S.C. §299b-22, Norton declined to produce the RCAs and other requested documents arguing that they were not subject to discovery or admissibility into evidence in this federal proceeding. The former employee asserted that Congress intended for the PSQIA to only apply in medical malpractice actions and not suits for wrongful termination in violation of federal law.

Although the Court agreed with the plaintiff's contention that the genesis of the PSQIA was a Congressional concern about limiting the medical malpractice exposure of health care providers who collect and report patient safety information to a patient safety organization (PSO) certified by the Agency for Healthcare Research and Quality within its patient safety evaluation system (PSES), the first step in any analysis was to determine whether the scope of protections is reflected in the plain language of the PSQIA. Contrary to the plaintiff's argument, the Court determined that Congress clearly intended the PSWP privilege to apply in all "federal, state, local civil, criminal or administrative proceedings" (42 SC § 299b-22(a)(2)) with limited exceptions, none of which applied in this case. Therefore, Norton correctly argued that the privilege applied in this federal discrimination lawsuit.

Satisfied with application of the privilege outside of medical malpractice actions, the Court next considered whether the information contained in Norton's privilege log satisfied the necessary requirements for PSWP. Federal Rules of Civil Procedure, Rule 26(b)(5)(A)(ii) requires that the nature of the privileged information be described in a manner that will allow the opposing party to assess the claimed privilege. Plaintiff's counsel asserted that the lack of detail in Norton's privilege log prevented it from determining the relevancy of the withheld information. The Court agreed that a generic description of the privileged documents may prevent any relevancy analysis but the Court concluded that relevancy is not an element of the statutory PSWP privilege.

The privilege log submitted by Norton provided minimal information but sufficient to establish the statutory privilege's requirements for each item withheld. While the Court did perform an in camera review of the withheld information, it concluded that the columns of the privilege log satisfied Rule 26(b)(5)(A)(ii) and the elements of the PSWP privilege as set forth in the PSQIA. The Court affirmed that the privilege log need only permit an evaluation of whether the statutory elements of PSWP are met, which Norton's privilege log had satisfied.

Tinal v. Norton Healthcare, Inc.

The significance of this opinion cannot be understated as it is the first time a federal court has explicitly evaluated the scope of the PSQIA privilege protections and its application in both state and federal proceedings as well as the elements of the patient safety work product privilege. Licensed providers who have yet to participate in a PSO for fear of its limited scope and acceptance by the courts should reconsider this option. Furthermore, the Court's acceptance of the privilege log underlines the importance of articulating and proving the elements of the PSWP privilege when appropriate in responding to a discovery request such as the use of affidavits and other documentation to establish that the requested documents were collected within the provider's PSES and reported to a PSO.