

Riddick v City of New York

2001 NY Slip Op 30024(U)

June 22, 2001

Supreme Court, New York County

Docket Number: 0102820/8201

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.
Justice

PART 51

Reddick
- v -
City PD

INDEX NO. 102820-99
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Vacate order

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted to
afford set forth in accompanying
decision/order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/22/01

Marcy S. Friedman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

<p>ERNEST RIDDICK,</p> <p style="text-align: right;"><i>Plaintiff(s)</i></p> <p style="text-align: center;"><i>against</i></p> <p>THE CITY OF NEW YORK, et al.,</p> <p style="text-align: right;"><i>Defendant(s)</i></p>

Index No.:102820/1999

Motion Seq. No.: 003

DECISION/ORDER

Present: Hon. MARCY FRIEDMAN
Acting Justice, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to/for:

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
Notice of Cross Motion and Affidavits Annexed	<u> </u>
Answering Affidavits	<u>2</u>
Reply Affidavits	<u>3</u>
Other – D. Memo of Law	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action for employment discrimination, plaintiff alleges that he was terminated from his employment as a police officer based on his disability of alcoholism. Defendants City of New York (“City”) and New York City Police Department move to vacate a prior discovery order on the ground that the information sought by plaintiff is protected from disclosure by federal law.

At issue here is information initially sought by plaintiff in interrogatories dated February 28, 2000. Interrogatory No. 1 states: “Enumerate each and every actively employed police officer, since January 1, 1990, who was arrested for the crimes of assault in the third degree, resisting arrest or any crime of domestic violence. With reference to each, enumerate the police

officer's command, the disposition of the criminal action and what, if any disciplinary action was taken against such police officer."

Interrogatory No. 2 states: "For each such police officer identified in response to #1, state whether defendants have any knowledge of any such police officer claiming that he/she suffered from any alcoholism, from any alcohol related disease or whether any such police officer claimed that the actions resulting in the arrest were related to alcohol consumption."

Pursuant to an order of this court dated May 2, 2000, defendants were directed to respond to Interrogatory No. 1. On consent, the May 2, 2000 order also provided: "With respect to Plaintiff's Interrogatory No. 2, defendants agree that if information regarding the alcoholism of those individuals identified in Interrogatory No. 1 is available then information will be produced by June 15, 2000." At a compliance conference held on August 1, 2000, defendants were granted an extension until August 30, 2000 to respond to plaintiff's interrogatories.

Subsequently, in response to the first interrogatory, the City provided documents with certain information, including names, redacted. However, by letter dated September 12, 2000, the City advised plaintiff that, in response to the second interrogatory, it had "conducted a search of the Department Advocate's files of thirty individuals who were deemed to be similarly situated to the plaintiff *** and it was discovered that no information regarding alcohol counseling or alcoholism was available." In the same letter, the City also stated that any further information regarding the alcoholism or alcohol counseling of these individuals would not be produced "[b]ecause it is the defendants' position production of any information relating to the alcoholism and alcohol counseling received by those individuals identified in defendants' response to plaintiff's interrogatory no. 1 is prohibited" by 42 USC 290dd-2.

At another compliance conference held on October 17, 2000, defendants raised their objection to plaintiff's second interrogatory based on 42 USC 290dd-2. By order of the court

dated October 17, 2000, defendants were granted leave to make the instant motion.

At the outset, the court rejects plaintiff's contention that defendants are estopped from seeking to vacate the discovery order in view of their prior agreement to produce the requested information. An agreement may be vacated or modified upon a showing of good cause. (See, Matter of Frutiger, 29 NY2d 143 [1971].) Here, although defendants previously consented to produce the information requested by Interrogatory No. 2, the existence of a federal statute addressing the privacy interests of persons receiving treatment or counseling for alcoholism is a sufficient basis, as set forth below, for modification of the court's prior order.

Section 290dd-2(a) provides: "Records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States shall * * * be confidential and be disclosed only for the purposes and under the circumstances expressly authorized" by the statute and its implementing regulations.

The statute applies to federally assisted programs, which include those "supported by funds provided by any department or agency of the United States by being: * * * [c]onducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program." (42 CFR 2.12[b][3][ii].) While there is nothing in this record that demonstrates that federal funds have been allocated to defendants' program, federal regulations provide that " 'whenever a State or local government is assisted by the Federal government by way of revenue sharing or other unrestricted grants, all of the programs and activities of the State or local government are thereby indirectly assisted, and thus meet that aspect of the statutory criteria for coverage.'" (Town of Huntington v. New York State Drug Abuse Control Comm'n,

84 Misc2d 138, 143 [Sup Ct, Suffolk County 1975][citing federal regulations]. See, Smalls v. Fallon, 1995 U.S. Dist. LEXIS 61 [SDNY 1995][NYPD alcohol treatment program covered by statute]; Moore v. City of New York, 2001 U.S. Dist. LEXIS 2191 [SDNY 2001][records concerning alcohol treatment programs sponsored by NYPD subject to protections of statute].) In any event, it does not appear that plaintiff disputes the applicability of the federal statute to defendants' alcohol counseling program.

Clearly, whether viewed in light of 42 USC 290dd-2 or state privacy laws (e.g., Civil Rights Law 50-a), information pertaining to an individual's treatment in an alcohol or other substance abuse program is extremely sensitive material subject to protection from disclosure. Such protection "furthers the objectives of the Federal statute addressing drug and alcohol abuse prevention, treatment and rehabilitation by not chilling the willingness or discouraging the readiness of individuals" to seek treatment. (Matter of the Commr. of Social Servs. v. David R.S., 55 NY2d 588, 593 [1982].)

Nonetheless, disclosure of alcohol treatment records may be permitted in certain limited circumstances. Pursuant to 42 USC 290dd-2, disclosure¹ of confidential information will be allowed "[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor * * *. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." (42 USC 290dd-2[b][2][C].) Further, regulations implementing Section 290dd-2 provide that confidential communications between a patient and an alcohol treatment facility will be permitted only where "disclosure is necessary to protect against

¹"Disclosure" as defined in the implementing regulations "means a communication of patient identifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified." (42 CFR 2.11.)

an existing threat to life or of serious bodily injury;" "disclosure is necessary in connection with investigation or prosecution of an extremely serious crime;" or "disclosure is in connection with litigation * * * in which the patient offers testimony or other evidence pertaining to the content of the confidential communications." (42 CFR 2.63.)

Contrary to plaintiff's contention that he is not seeking "records" encompassed by the statute, to the extent that plaintiff is seeking "information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program," such information is protected. (42 CFR 2.11.) Nor has plaintiff demonstrated sufficient grounds to require disclosure of any such confidential information, notwithstanding its relevance to his claim of employment discrimination based on alcoholism. (See, Smalls v. Fallon, supra; Carr v. Allegheny Health, Educ. and Research Found., 933 F Supp 485 [WD Pa 1996].)

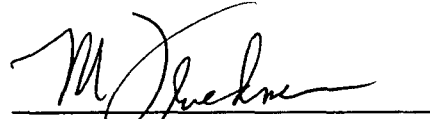
However, the statute does not prohibit disclosure of information that is not "patient identifying information." (See, 42 CFR 2.11.) Here, plaintiff asserts that he is not seeking the identity of any individual police officers receiving counseling or treatment. Thus, plaintiff is entitled to information responding to Interrogatory No. 2 to the extent that "patient identifying information" is excluded. Defendants therefore must answer whether they have knowledge pertaining to the alcoholism or alcohol-related disease or claims "that the actions resulting in the arrest were related to alcohol consumption" of the police officers identified in Interrogatory No. 1, including how many cases identified in response to Interrogatory No. 1 are also responsive to Interrogatory No. 2. Further, if information responsive to Interrogatory No. 2 can be matched with the information provided in response to Interrogatory No. 1 without exposing the identity of the individual police officers, defendants are also directed to provide such information. It appears unclear whether, having provided tax identification numbers in response to plaintiff's Interrogatory No. 1, defendants can provide such matching information without identifying

individuals. To the extent that it is possible, by means of redaction of identifying factors or otherwise, information matching up with the responses to Interrogatory No. 1 must be provided.

Accordingly, defendants' motion is granted to the extent that defendants are directed to respond to plaintiff's Interrogatory No. 2 in accordance with the above.

This constitutes the decision and order of the court.

Dated: New York, New York
June 22, 2001



MARCY FRIEDMAN, J.S.C.