

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DOROTHY HAWKINS,

Plaintiff,

v.

**SIBLEY MEMORIAL HOSPITAL,
et al.,**

Defendants.

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) **2013 CA 000950 M**
) **Judge Judith N. Macaluso**
) **Calendar 9**
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ORDER GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL:
SCHEDULING ORDER

Before the court is "Plaintiff's Motion to Compel" ("Motion"), filed by Dorothy Hawkins on October 24, 2013. Defendants Sibley Memorial Hospital and Lucy Webb Hayes National Training School for Deaconesses and Missionaries t/a Sibley Memorial Hospital (collectively "Sibley") filed "Defendant Sibley Memorial Hospital's Opposition to Plaintiff's Motion to Compel" ("Opposition") on November 5. Ms. Hawkins filed a reply on November 8. For the reasons stated below, the Motion is granted in part.

A. Applicable Legal Principles

Under Super. Ct. Civ. R. 26 (b)(1), "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . .

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Further, Super. Ct. Civ. R. 37 (a) provides:

Any motion to compel discovery must set forth verbatim the question propounded and the answer given, or a description of the other

discovery requested and the response to this request. The motion must also set forth the reason or reasons the answer or response is inadequate.

B. Discussion

Ms. Hawkins seeks an order compelling Sibley "to provide complete discovery responses." (Mot. 1). Specifically, she asks the court to compel Sibley to produce (1) incident reports; (2) policies and procedures; (3) personnel files, training records and disciplinary information; and (4) substantially similar complaints of negligence. (*Id.* at 4, 13, 15, 16). The court addresses each of Ms. Hawkins's requests below.

1. Incident Reports

In Interrogatory No. 15, Ms. Hawkins asks:

Were any incident reports, witness statements or other investigative documents created regarding Ms. Hawkins or any of the Complaint allegations? If so, please state the name, address, job title and phone number for the person making such report(s), the report's creation date, substance or contents, and the name, address, job title and phone number of each person having custody of such report (and identify whether original or copy). If you claim that any such document or report is privileged, then please provide a privilege log indicating the basis for such privilege and all facts supporting its application in this case, including whether the incident report was ever reviewed by any peer review or Quality Assurance Committee.

(Mot. Ex. 3 at 9). Sibley objects to the interrogatory because it "seeks information protected from disclosure by the peer review privilege." (*Id.*). Under D.C. Code § 44-805:

(a) Except as otherwise provided by this section:

(1) The files, records, findings, opinions, recommendations, evaluations, and reports of a peer review body, information provided to or obtained by a peer review body, the identity of persons providing information to a peer review body, and

reports or information provided pursuant to § 44-802 or federal or other District of Columbia law shall be confidential and shall be neither discoverable nor admissible into evidence in any civil, criminal, legislative, or administrative proceeding. . . .

(2) No person who participated in the proceedings of or provided information to a peer review body shall be compelled to testify or give discovery in any civil, criminal, legislative, or administrative proceeding relating to any matter presented or discussed at those proceedings, or any information provided to or obtained by any reports, records, opinion, evaluation, finding, or recommendation of the body or its members. . . .

(b) Notwithstanding subsection (a) of this section, primary health records and other information, documents, or records available from original sources shall not be deemed nondiscoverable or inadmissible merely because they are a part of the files, records, or reports of a peer review body.

In addition, the D.C. Code provides the following relevant definitions:

"Peer review" means the procedure by which health-care facilities and agencies, group practices, and health professional associations monitor, evaluate, and take actions to improve the delivery, quality, and efficiency of services within their respective facilities, agencies, and professions, including recommendations, consideration of recommendations, actions with regard thereto, and implementation of the actions.

. . . .

"Peer review body" means a committee, board, hearing panel or officer, reviewing panel or officer or governing board of a health-care facility or agency, group practice or health professional association that engages in peer review, the health-care facility, agency, group practice or health professional association which establishes or authorizes or is governed by it, and a director, officer, employee, or member of such an entity.

D.C. Code § 44-801 (5), (6).

On this record, Sibley has produced no evidence to establish that the incident reports, witness statements or other investigative documents that Ms. Hawkins seeks are protected under the peer review privilege. For instance, Sibley has not

demonstrated that the incident in which Ms. Hawkins was injured was submitted to a peer review body. Sibley shall therefore respond to Interrogatory No. 15.

2. Policies and Procedures

Ms. Hawkins seeks full responses to Requests for Production of Documents Nos. 21, 22, 23, 24, 26e, 26h, 26k, and 26l. (Mot. 13). The court addresses each request below.

a. Request for Production No. 21

Ms. Hawkins requests "A copy of any guidelines, rules, regulations, protocols, and procedures regarding the assessment of fall risks and fall prevention in effect during Dorothy Hawkins' Sibley stay." (Mot. Ex. 2 at 7). Sibley responds that the request is "[n]ot applicable to the issues in this case." (*Id.*).

Ms. Hawkins contends that Sibley's policies about the assessment of fall risks and fall prevention are relevant because "Plaintiff alleges that Defendant's staff did not undertake a proper fall risk assessment[] for Plaintiff, which would have placed her at a higher fall risk and triggered more aggressive fall prevention strategies." (Mot. 13). Sibley counters:

Plaintiff argues that the reason she requires additional fall policies to support her theory of the case, is that she should not have been assessed as "independent" and that "a proper assessment of Plaintiff's fall risk may have shown that she required" additional assistance. . . . These considerations are not demonstrated by hospital policy, however. Rather, these very points must be established with expert testimony.

(Opp'n 7). Sibley has not, however, shown that Ms. Hawkins's discovery request and the need for expert testimony are mutually exclusive. On this record, fall risk assessment and fall prevention policies are relevant or reasonably likely to lead to

the discovery of admissible evidence. Sibley shall therefore respond fully to this request.

b. Request for Production No. 22

Ms. Hawkins requests "A copy of any guidelines, rules, regulations, protocols and procedures regarding bed safety and bed rails in effect during Dorothy Hawkins' Sibley stay." (Mot. Ex. 2 at 7). Sibley responds that the request is "[n]ot applicable to the issues in this case." (*Id.*).

Ms. Hawkins argues, "Bed safety protocols are relevant because Ms. Hawkins was transferred from bed before she was bathed." (Mot. 13-14). Sibley asserts:

Both parties agree that the fall took place when Plaintiff was in her room with a clinical nursing assistant, and that she was standing from the chair in her room, as opposed to her bed. . . . Accordingly, the Hospital's policies about bed safety . . . bear no relevance to this action.

(Opp'n 7). It is not apparent that the bed safety protocols are irrelevant to this case simply because Ms. Hawkins may have been "standing from the chair in her room" immediately before she fell. Sibley shall respond fully to this request.

c. Request for Production No. 23

Ms. Hawkins requests "A copy of any guidelines, rules, regulations, protocols and procedures regarding gait belts or patient transferring devices in effect during Dorothy Hawkins' Sibley stay." (Mot. Ex. 2 at 7). Sibley responds that the request is "[n]ot applicable to the issues in this case." (*Id.*).

Ms. Hawkins contends that Sibley's policies and procedures about gait belts are relevant because "a proper assessment of Plaintiff's fall risk may have shown that she required a two person assist or the use of a gait belt." (Mot. 13). Sibley counters:

Both parties agree that the fall took place when Plaintiff was in her room with a clinical nursing assistant, and that she was standing from the chair in her room, as opposed to her bed, without the use of a gait belt. Accordingly, the Hospital's policies about . . . gait belts bear no relevance to this action.

(Opp'n 7). The parties appear to agree that Ms. Hawkins was moved without a gait belt; therefore, on this record, Sibley's policies and procedures about gait belts would be relevant to the issue of whether a transferring device should have been used. Sibley shall respond fully to this request.

d. Request for Production No. 24

Ms. Hawkins requests "A copy of any guidelines, rules, regulations, protocols and procedures regarding response or emergency care for patients suffering injuries from a fall in effect during Dorothy Hawkins' Sibley stay." (Mot. Ex. 2 at 7). Sibley responds that the request is "[n]ot applicable to the issues in this case." (*Id.*).

Ms. Hawkins asserts that "[e]mergency response protocols are relevant because they explain how Defendant reacted to the fall and may provide insight into how information is included in the record." (Mot. 14). Sibley counters:

[A]s to the [emergency response procedures], which may appear on first glance to relate to some of the facts at issue in this matter, the medical records and the testimony of the health care providers listed in those records – not the Hospital policies – will provide Plaintiff with an understanding of what treatment was and was not provided to Plaintiff. Following a careful review of this information, Plaintiff's experts will be able to render opinions about what portions of the treatment actually provided fell below the standard of care. The Hospital's policies, particularly those unrelated to the facts alleged in the instant case, have no bearing on whether or not any actor on behalf of Sibley breached the standard of care.

(Opp'n 8). Sibley has not shown that the emergency response procedures are either irrelevant or unlikely to lead to the discovery of admissible evidence.

Consequently, Sibley shall respond fully to this request.

e. Request for Production No. 26e

Ms. Hawkins requests "A copy of the following policy and procedure manuals for Sibley in effect during Dorothy Hawkins's Sibley stay: . . . (e) Service or care planning." (Mot. Ex. 2 at 7-8). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive and seeks documents not relevant or calculated to lead to the discovery of admissible evidence. Without waiving said objections, Defendant responds: See the attached documents. Additional documents have been requested and, if applicable to the issues of this case, will be produced.

(*Id.* at 8).

Ms. Hawkins asserts that service or care planning policies are relevant because "[n]ursing care begins with care planning, which provides the foundation and basis for instructing the nurse aides." (Mot. 13). The court agrees with Sibley that the request is overly broad, seeking all service or care planning manuals, whether they pertain to Ms. Hawkins or not. Additional production of documents will not be ordered.

f. Request for Production No. 26h

Ms. Hawkins requests "A copy of the following policy and procedure manuals for Sibley in effect during Dorothy Hawkins's Sibley stay: . . . (h) All requirements and/or policies and procedures relating to implementing Doctor's orders for patients." (Mot. Ex. 2 at 7-8). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive and seeks documents not relevant or calculated to lead to the discovery of admissible evidence. Without waiving said objections, Defendant responds: See the attached documents. Additional documents have been requested and, if applicable to the issues of this case, will be produced.

(*Id.* at 8).

Ms. Hawkins contends that protocols about implementing doctors' orders are relevant because "Plaintiff's doctor had ordered that she wear a leg brace, which was not present at the time of her fall." (Mot. 14). The court agrees with Sibley that the request is overly broad as seeking all protocols about implementation of doctors' orders, whether they pertain to Ms. Hawkins or not. Additional production will not be ordered.

g. Request for Production No. 26k

Ms. Hawkins requests "A copy of the following policy and procedure manuals for Sibley in effect during Dorothy Hawkins's Sibley stay: . . . (k) All requirements and/or policies and procedures related to documenting, reporting, and responding to family member or third party concerns." (Mot. Ex. 2 at 7-8). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive and seeks documents not relevant or calculated to lead to the discovery of admissible evidence. Without waiving said objections, Defendant responds: See the attached documents. Additional documents have been requested and, if applicable to the issues of this case, will be produced.

(*Id.* at 8).

The request is overly broad on its face, encompassing "third party concerns," a nebulous description that could include insurance company inquiries. Additional production will not be ordered.

h. Request for Production No. 261

Ms. Hawkins requests "A copy of the following policy and procedure manuals for Sibley in effect during Dorothy Hawkins's Sibley stay: . . . (1) All requirements and/or policies and procedures related to resident charting." (Mot. Ex. 2 at 7-8).

Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive and seeks documents not relevant or calculated to lead to the discovery of admissible evidence. Without waiving said objections, Defendant responds: See the attached documents. Additional documents have been requested and, if applicable to the issues of this case, will be produced.

(*Id.* at 8).

This request appears reasonably limited in scope, addressed solely to practices required of resident physicians. Sibley shall respond fully to this request.

3. Personnel Files, Training Records, and Discipline Procedures

Ms. Hawkins identifies Requests for Production Nos. 42 and 61 with respect to her assertion that Sibley should be compelled to produce personnel files, training records, and discipline procedures.

a. Request for Production No. 42

Ms. Hawkins seeks "A copy of the personnel files for Defendant Sibley's staff that cared for or was scheduled to care for Plaintiff on the day that she fell – March 15, 2011." (Mot. Ex. 2 at 12). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive, seeks documents not relevant or calculated to lead to the discovery of admissible evidence and seeks documents protected from disclosure by the peer review and other statutory privileges.

(*Id.* at 13).

With respect to Sibley's first objection, Ms. Hawkins asserts that she "is willing to compromise on the scope of production and proposed the production of six personnel files for direct care staff of Plaintiff, absent payroll information." (Mot. 15). Her offer appears reasonable, and Sibley does not address the offer in its Opposition; therefore, on this record this request is not "overly broad, burdensome and oppressive."

As to Sibley's second objection, Ms. Hawkins argues:

Personnel files are uniquely relevant in this case because they will lead to the discovery of admissible evidence on several fronts. While Defendant may argue the actions of only one nurse aide are relevant, such an argument ignores the actual practices of a large hospital. The nurse aide works under the supervision of a Charge Nurse and is guided by a written nursing care plan that should address fall prevention.

(Mot. 15). Sibley does not contest her assertion that the personnel files of employees who provided direct care on the date of her injury are relevant; accordingly, Sibley's relevancy objection is unavailing.

Finally, Sibley objects that the personnel files are protected by "peer review and other statutory privileges." On this record, Sibley has produced no evidence to establish that the personnel files that Ms. Hawkins seeks are protected under the peer review privilege. For instance, Sibley has not demonstrated that information in the personnel files was provided to a peer review body. Additionally, while Sibley claims "other statutory privileges" apply to Request for Production No. 42, Sibley does not specify the privileges or provide evidence to establish their applicability. Ms. Hawkins's request to compel a response to Request No. 42 is therefore granted, subject to the limitations described in her proposed order.

b. Request for Production No. 61

In Request for Production No. 61, Ms. Hawkins requests:

If any employee or agent of Defendant(s) who cared for Dorothy Hawkins was ever warned (orally or in writing) or disciplined for matters relating to substandard resident care, Plaintiff's March 15, 2011 fall, or any matters involving the allegations contained in the Complaint of this case, then produce all such documents reflecting the nature of the conduct and Defendant's disciplinary response, if any.

(Mot. Ex. 2 at 16). Sibley responds that the request is "[n]ot applicable." (*Id.*).

Sibley's response is reasonably interpreted to mean that no such documents exist because no disciplinary matters resulted from Ms. Hawkins's fall on March 15, 2011. Ms. Hawkins asserts, however, that she "has reason to believe that Nurse Aide Marva (who was present at the time of the fall) was disciplined and these documents may lead to the discovery of admissible evidence." (Mot. 15-16). Ms. Hawkins provides no evidence to support her claim; on this record, the court has no reason to conclude that Sibley has documents responsive to Request for Production No. 61. Ms. Hawkins's request to compel a response is therefore denied without prejudice.

4. Substantially Similar Complaints of Negligence

Ms. Hawkins specifically identifies Requests for Production Nos. 46, 47, 49, and 50 with respect to her assertion that Sibley should be compelled to produce substantially similar complaints of negligence. The court addresses each request below.

a. Request for Production No. 46

In Request for Production No. 46, Ms. Hawkins provides:

Plaintiff has alleged specific neglect in the areas of fall assessment and prevention, response to patients with serious fracture injuries, care planning, implementation of physician's orders, physician and

responsible party notification, patient monitoring or supervision, patient transfers, patient charting and/or recording and retention. Limited to Ms. Hawkins's Sibley stay and one year prior, produce all complaints, deficiencies, or other documents referencing complaints or concerns in the above-referenced care areas. You may redact the names of other patients to protect their privacy.

(Mot. Ex. 2 at 14). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive and seeks documents not relevant or calculated to lead to the discovery of admissible evidence.

(Id.).

Ms. Hawkins asks that Sibley be compelled to respond to this Request because it is "focused on prior instances of negligence that are related to falls or the allegations in Plaintiff's case." (Mot. 17). Sibley counters:

Fall assessment, care planning, implementing physician's orders, monitoring patients and recoding important information in the patient's medical chart take place with every single patient in the Hospital. Thus, these matters are not in any way tailored to produce materials related to the case at hand. Moreover, some of this material may well be protected by the peer review privilege for the reasons previously set forth.

(Opp'n 9). The court agrees that, as phrased, Request for Production No. 46 is overly broad, just as are Request Nos. 26e, 26h, and 26k, which are incorporated into Request No. 46. Additional production will not be required.

b. Request for Production No. 47

In Request for Production No. 47, Ms. Hawkins seeks:

A copy of minutes or reports of meetings where concerns or problems with resident care or staffing were addressed or discussed in the areas that we have asked in other requests, such as resident, patient falls, improper or fault patient transfers, implementation of Doctor's orders, resident admission or discharge, fall assessment and prevention, failure to timely respond to urgent care needs of patients, patient monitoring or supervision or problems with resident care, charting,

responsible party notification or lack of staffing, including but not limited to: regional meetings, in-service meetings, staff development meetings, department head meetings, staff meetings, nurses' meetings, nurses aides' meetings, incident report meetings, safety meetings, resident council meetings, family council meetings and fall prevention meetings. These minutes and reports of the meetings may be limited to Dorothy Hawkins's stay and one year prior thereto. Defendant may redact resident names (other than Dorothy Hawkins) to protect their privacy.

(Mot. Ex. 2 at 14-15). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive, seeks documents not relevant or calculated to lead to the discovery of admissible evidence and seeks documents protected from disclosure by the peer review and other statutory privileges.

(Id.).

For the same reasons pertaining to Request No. 46, this request is overly broad. Additional production will not be required.

c. Request for Production No. 49

In Request for Production No. 49, Ms. Hawkins requests that Sibley:

Produce all statistical or other data or reports that the Defendants keep on the patients who suffer falls and include all available data fields (where the data is in electronic format). This material is sought for 2009 through 2011, broken down by month and by unit or floor. Where the reports reference a resident's name, you may redact the name of the resident to protect their privacy.

(Mot. Ex. 2 at 15). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive, seeks documents not relevant or calculated to lead to the discovery of admissible evidence and seeks documents protected from disclosure by the peer review and other statutory privileges.

(Id.).

Ms. Hawkins asks the court to compel Sibley to respond to this Request because:

[Request No. 49] focused on prior instances of negligence that are related to falls or the allegations in Plaintiff's case. [Request No. 49 seeks] statistical data on the incidence of falls, limited in time. Prior complaints are relevant to show that Defendant had knowledge of dangerous conditions that required correction. Defendant's knowledge of ongoing staffing deficiencies or neglect in the preventing patient falls could give rise to an administrative duty to correct such deficiencies.

(Mot. 17). Sibley counters:

In addition to the objections already referenced herein, this request is not in any way limited to occurrences "under *substantially similar circumstances*" to the facts alleged in this case, instead seeking data about all falls sustained by Sibley patients. This case involves allegations of a fall taking place under very specific circumstances. It was not a typical situation of an unassisted fall taking place when a patient attempted to get out of bed by herself or a patient falling while being transferred to a wheelchair. Thus, [Request No. 49] far exceed[s] the scope of this particular case. Moreover, the time frame set . . . extends for some nine and one-half months *after* Plaintiff's fall took place, on March 15, 2011. No reasonable argument can be made that any of the information maintained for the time period *after* the fall could be introduced to demonstrate knowledge on the part of the facility. As such, the time frame far exceeds anything that could be deemed reasonably calculated to yield admissible evidence.

(Opp'n 10) (emphasis in original). The court agrees that, by seeking data for two years, including substantial time after Ms. Hawkins's fall occurred, Request is No. 49 is overly broad. Information about incidents after March 15, 2011 would not serve Ms. Hawkins's purpose of demonstrating that Sibley "had knowledge of dangerous conditions that required correction" when she fell. The Motion is therefore denied without prejudice with respect to Request for Production No. 49.

d. Request for Production No. 50

In Request for Production No. 50, Ms. Hawkins seeks "A copy of any reports or documents showing the facility wide incidence for the falls and faulty transfers or ambulation (limited to 2006 through 2011)." (Mot. Ex. 2 at 15). Sibley responds:

Objection: This Request is overly broad, burdensome and oppressive, seeks documents not relevant or calculated to lead to the discovery of admissible evidence and seeks documents protected from disclosure by the peer review and other statutory privileges.

(*Id.*).

Ms. Hawkins asks the court to compel Sibley to respond to this Request

because:

[Request No. 50] focused on prior instances of negligence that are related to falls or the allegations in Plaintiff's case. [Request No. 50 seeks] statistical data on the incidence of falls, limited in time. Prior complaints are relevant to show that Defendant had knowledge of dangerous conditions that required correction. Defendant's knowledge of ongoing staffing deficiencies or neglect in the preventing patient falls could give rise to an administrative duty to correct such deficiencies.

(Mot. 17). Sibley counters:

In addition to the objections already referenced herein, this request is not in any way limited to occurrences "under *substantially similar circumstances*" to the facts alleged in this case, instead seeking data about all falls sustained by Sibley patients. This case involves allegations of a fall taking place under very specific circumstances. It was not a typical situation of an unassisted fall taking place when a patient attempted to get out of bed by herself or a patient falling while being transferred to a wheelchair. Thus, [Request No. 50] far exceed[s] the scope of this particular case. Moreover, the time frame set . . . extends for some nine and one-half months *after* Plaintiff's fall took place, on March 15, 2011. No reasonable argument can be made that any of the information maintained for the time period *after* the fall could be introduced to demonstrate knowledge on the part of the facility. As such, the time frame far exceeds anything that could be deemed reasonably calculated to yield admissible evidence. Finally, the very phrasing of Request number 5 triggers incident reports, which are protected from disclosure already set forth in this Opposition

(Opp'n 10-11) (emphasis in original).

The court agrees that, by seeking data for 2006-2011, including substantial time after Ms. Hawkins's fall occurred, Request is No. 50 is overly broad.

Information about incidents after March 15, 2011 would not serve Ms. Hawkins's purpose of demonstrating that Sibley "had knowledge of dangerous conditions that required correction" when she fell. The Motion is therefore denied without prejudice with respect to Request for Production No. 50.

ACCORDINGLY, it is this 10th day of February 2014,

ORDERED, that "Plaintiff's Motion to Compel," filed by Dorothy Hawkins on October 24, 2013, is GRANTED IN PART. It is further

ORDERED, that Defendants shall have until March 7, 2014 to respond fully to Plaintiff's Interrogatory No. 15 and Requests for Production Nos. 21, 22, 23, 24, 26, 46, and 47. It is further

ORDERED, that Defendants shall have until March 7, 2014 to produce six personnel files pursuant to Plaintiff's Request for Production No. 42. These personnel files shall be subject to a protective order and the parties shall be prohibited from disseminating this information outside the confines of this litigation. Defendants may remove or redact payroll information from these files. It is further

ORDERED, that the parties shall meet and discuss whether discovery should be extended in light of this Order. If the parties decide an extension is necessary, they shall file a motion (preferably by consent) requesting such relief. It is further

ORDERED, that in all other respects the Motion is DENIED WITHOUT PREJUDICE.


Judge Judith N. Macaluso

(Signed in Chambers)

Copies to:

Jeffrey J. Downey
Justin B. Stone
James P. Gleason, Jr.
Joana Jespersen