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Central Jurisdiction
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NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS
IN THE COURT OF CENTRAL JURISDICTION

COURT OF APPEALS

Raymond Stern,

Appellant,

vs.

Mille Lacs Band of Ojibwe Indians,

Respondent.

Case No. 11APP08

**DECISION OF THE
COURT OF APPEALS**

INTRODUCTION

The present case is an appeal from a final judgment of the District Court of the Non-Removable Mille Lacs Band of Ojibwe ("District Court"). Raymond Stern and the Mille Lacs Band of Ojibwe Indians each appealed the judgment of the District Court for different reasons. Mr. Stern appealed the judgment because the District Court concluded that it was without authority to award monetary damages, even though it concluded that Mr. Stern was wrongfully terminated from his employment. Mr. Stern asks the Court of Appeals to award him monetary compensation as a result of his wrongful termination.

The Mille Lacs Band appealed the District Court's judgment because it disagrees with the lower court's conclusion that Mr. Stern was wrongfully terminated. The Mille Lacs Band asks the Court of Appeals to reverse the District Court's judgment that Mr. Stern was wrongfully terminated from his employment. In an effort to avoid confusion, the Court of Appeals will refer to Mr. Stern as Appellant; and will refer to the Mille Lacs Band as Respondent. This case was submitted to the Court of Appeals without oral argument.

STANDARD OF REVIEW

This Court accords substantial deference to the District Court's findings of fact because the lower court had an opportunity to observe the witnesses, and weigh the credibility of the witnesses' testimony. This Court will not disturb the District Court's findings of fact unless such findings represent a clear abuse of discretion.

This Court does not accord any deference to the District Court's conclusions of law. Instead, this Court considers *de novo* the conclusions of law that are applied to the facts of a particular case.

PROCEDURAL BACKGROUND

Appellant Stern was previously employed as a Lab Manager at the Mille Lacs Band's Ne Ia Shing Clinic. Dr. Salina Rizvi, Health Director, was Appellant's supervisor. On March 8, 2011, Appellant's employment was terminated for the following reasons: 1) Mishandling a pre-employment urine sample and sharing the results of the test with co-workers in violation of the Mille Lacs Band's Nondisclosure of Confidential Information Policy and the Health Insurance Portability and Accessibility Act of 1996 (HIPAA); 2) Violating the Mille Lacs Band's Business Ethics and Work Rules Policy by impersonating a supervisor; and 3) Violating the Mille Lacs Band's Business Ethics and Work Rules and Harassment Policies by harassing an applicant for a job at the Ne Ia Shing Clinic.

Pursuant to the Mille Lacs Band Personnel Policy, Appellant Stern appealed his termination through the Grievance Committee. The Grievance Committee upheld Appellant's termination. Appellant then timely filed a complaint with the District Court. The District conducted an evidentiary hearing with respect to the three reasons listed in Appellant Stern's notice of termination, and ultimately decided that none of the reasons were supported by the

evidence. The District Court concluded that Appellant Stern was wrongfully terminated from his position at the Ne Ia Shing Clinic. The Respondent Mille Lacs Band appealed to this Court, and argues that the District Court should be reversed because each of the three reasons listed in Appellant's notice of termination are meritorious. Appellant Stern also appeals the decision of the District Court because the lower court concluded that it was without authority to award monetary damages, and Appellant argues that he is entitled to compensation as a result of his wrongful termination.

DISTRICT COURT'S JUDGMENT

The District Court determined that there was no basis for terminating Appellant Stern's employment for impersonating a supervisor because there was no written policy putting him on notice that he was prohibited from making an employment offer to a prospective employee. Additionally, the District Court determined that there was no basis for terminating Appellant Stern's employment for a violation of the Mille Lacs Band's harassment policy because his action of delivering pre-employment paperwork to a prospective employee's home was not prohibited; and because the prospective employee testified at the trial that she did not feel threatened by Stern's actions. Finally, the District Court concluded that no HIPAA violation occurred when Appellant Stern conducted a pregnancy test on a urine sample submitted by a prospective employee as a pre-employment drug test because the donor of the sample is unknown, and because no personally identifiable health information was disclosed.

The District Court determined that Appellant Stern was wrongfully terminated from his employment. The District Court also concluded that by enacting the Mille Lacs Band of Ojibwe Personnel and Policy Procedures the Band had waived its sovereign immunity and consented to be sued by a former employee who appeals a decision of the Grievance Committee. The District

Court further concluded that the Mille Lacs Band did not waive its sovereign immunity so as to permit an award of monetary damages to an employee who was wrongfully terminated. The District Court explained that it is restricted to issuing a decision as to whether Appellant Stern was wrongfully terminated. Accordingly, the District Court denied any monetary damages to Appellant Stern.

On appeal, the parties continue to dispute the harassment and impersonating a supervisor issues; and the Respondent Band raises additional technical issues such as its disagreement over the manner in which Appellant Stern's lay advocate conducts his written advocacy; and the failure of the District Court to make specific findings of fact and conclusions of law. However, the primary issue over which the parties strenuously disagree is whether Appellant Stern violated HIPAA. This Court will now turn to the HIPAA issue.

THE HEALTH INSURANCE PORTABILITY AND ACCESSIBILITY ACT OF 1996

(HIPAA)

HIPAA was enacted by the United States Congress for the purpose, among other things, of protecting the privacy of individual's health information. Congress established a federal standard for the use and disclosure of individual health information. HIPAA is codified in federal law (42 USC Section 201, *et seq.*) and federal regulation (45 CFR Sections 160, 162, 164). HIPAA laws and regulations are applicable to health care providers. Because the Ne Ia Shing Clinic is a health care provider, the clinic is subject to the requirements of HIPAA. Additionally, all employees of the clinic, including Appellant Stern, are subject to HIPAA requirements. HIPAA protects all "individually identifiable health information" (protected health information) in its privacy protections. Protected health information includes any information relating to a medical condition that can reasonably be used to identify an individual.

In general, protected health information cannot be used or disclosed unless it falls within an exception to HIPAA's Privacy Rule, or if the test subject authorizes disclosure of the protected health information in writing. Federal regulations define "use" of protected health information as "the sharing, employment, application, utilization, examination, or analysis of such information with an entity that maintains such information". 45 CFR Section 160.03. Federal regulations define "disclosure" of protected health information as "the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information. *Id.*"

A covered health care provider may disclose protected health information without the consent of the test subject for specific reasons, such as for treatment or payment for medical services. *See*, 45 CFR Section 164.502 and 45 CFR Section 164.506. Protected health information may also be disclosed without a patient's consent or authorization for certain specific public purposes, such as when disclosure is required by law, 45 CFR Section 164.51 (a); the disclosure is pursuant to a court order for judicial or administrative proceedings, 45 CFR Section 164.512 (e); the disclosure is for law enforcement purposes such as a search warrant, 45 CFR Section 164.512 (f); or other specified purposes. If the disclosure of private health information is not permitted pursuant to a specific exception to the privacy rule, such information may be disclosed only through an authorization by the individual who is the subject of the private health information. 45 CFR Section 164.50. A valid authorization must include a specific description of the health information to be disclosed, together with a specific person or organization to whom the disclosure is to be made. Where HIPAA permits protected health information to be used or disclosed, the information may only be used or disclosed to the degree "minimally necessary". *See*, CFR Sections 164.502 (b), 164.514 (d).

The facts of the present case are relatively undisputed. Appellant Stern was employed as a Lab Manager at the Mille Lacs Band's Ne Ia Shing Clinic; and his employment responsibilities included the collection of urine samples for pre-employment drug testing. On February 28, 2011, a new employee of the Mille Lacs Band presented herself at the Ne Ia Shing Clinic for pre-employment drug testing. The employee was hired to work in a division of Band government other than the Ne Ia Shing Clinic. The new employee completed the necessary paperwork, including all personal information and the employee's consent for her urine sample to be tested for drug and alcohol screening. The employee listed that she was taking prenatal vitamins on the drug screen form. When the employee returned the sample cup with her urine specimen to Appellant Stern, he observed that the temperature indicator on the side of the sample cup appeared to have been defaced. Appellant Stern did not request the new employee to provide a new urine sample. Appellant Stern made a decision to conduct a pregnancy test on the urine sample provided by the new employee. The employee did not give her consent for the pregnancy test; nor did she have any knowledge that the pregnancy test was being conducted. After completing the pregnancy test, Appellant Stern shared the results with two Mille Lacs Band Human Resources Department employees, one of whom knew the identity of the test subject.

Appellant Stern said that he conducted the pregnancy test because he was suspicious that the urine sample cup appeared to have been defaced; and that the pregnancy test would verify whether the urine sample was provided by the new employee since she said she was taking prenatal vitamins. Appellant Stern reported the results of the pregnancy test to two Human Resources Department employees. A few days later, the new employee provided a second urine sample, which tested positive for marijuana. Appellant Stern opined that his suspicions with

respect to the defaced sample cup were correct - - that the new employee's first urine sample was not her own, and that the new employee was attempting to conceal her use of marijuana.

The parties disagree over the application of law to the facts in this case. Appellant Stern argues that he was justified in conducting the pregnancy test on the new employee's urine sample because the employee was attempting to manipulate the drug testing process. Appellant argues that his good faith motives in conducting that pregnancy test are not inconsistent with HIPAA. The Respondent Band argues that the pregnancy test was not authorized; that no exception to HIPAA applies; and that conducting the pregnancy test and sharing the test results with the Human Resources employees constitutes violations of HIPAA.

The District Court concluded that no HIPAA violation occurred because the identity of the donor of the urine sample was unknown. The District Court reasoned that HIPAA protects all individually identifiable health information; and because the urine donor in this case is unknown, his or her identity and personally identifiable health information was not disclosed.

Because the District Court's conclusion that no HIPAA violation took place is a conclusion of law, this Court reviews the legal conclusion *de novo*; and does not accord any weight to the lower court's decision.

The District Court excuses Appellant Stern's conduct as a HIPAA violation because the identity of the urine donor is unknown. However, after considering the totality of the circumstances this Court concludes that Appellant Stern indeed violated HIPAA because he conducted the pregnancy test without the consent of the test subject and because no exception to conducting the test without consent is applicable. This Court further concludes that Appellant Stern also violated HIPAA when he shared the results of the pregnancy test with other Mille Lacs Band employees. It is not relevant that the identity of the urine donor is unknown. The

HIPAA violations were completed when the unauthorized medical procedure (pregnancy test) was undertaken; and when the results were shared with third persons. The District Court's conclusions of law are hereby reversed.

Appellant Stern argues that he was justified in conducting the unauthorized pregnancy test because he was, essentially, investigating whether the urine donor had provided a fraudulent sample. But other Courts that have been confronted with similar circumstances have rejected a good faith exception to HIPAA's privacy protections. *See, Soussi v. Blue & White Serv. Corp.*, 498 N.W.2d 316, 318 (Minn.App.1993); *Girdeen v. Fairview Red Wing Health Services (Corp)*, 2011, WL 2304028. This Court adopts the reasoning of these Courts, and also rejects the existence of a good faith exception to HIPAA's mandates. Accordingly, the District Court's conclusion of law that no HIPAA violation took place in this case is reversed.

Because this Court now concludes that Appellant Stern did violate HIPAA when he conducted the pregnancy test without consent or authority; and when he shared the results of the pregnancy test, the Court also concludes that Appellant Stern was appropriately terminated from his employment. Accordingly, there is no need for the Court to address the remaining issues over which the parties disagree.

DECISION

The appellant committed violations of HIPAA when he conducted an unauthorized pregnancy test on the urine sample provided by the employee as a part of pre-employment drug testing; and when he shared the test results with other Band employees. No exception to HIPAA's privacy rules is applicable; and no consent to the testing and sharing of results was obtained. Accordingly, the District Court's judgment is reversed, and Appellant Stern's employment termination is UPHOLD.

BY THE COURT OF APPEALS:

Dated: 3-29-12

Kayna Churchill
Kayna Churchill, Chief Justice

Dated: 3-27-12

Clarence Boyd
Clarence Boyd, Associate Justice

Dated: 3-26-12

Brenda Moose
Brenda Moose, Associate Justice