

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Janet Phelps,)
)
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Plaintiff,)
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vs.)
)
Pembina County Memorial Hospital,)
and Kulvinder Sumra,)
)
Defendants.)
)
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**MEMORANDUM OPINION
DISMISSING CLAIM UNDER RULE
12(b)(1)**

File No. 2:05-cr-65

Before this Court is Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction under Rule 12(b)(1). Plaintiff raises three claims, the first, Count I, is a claim under the Health Insurance Portability and Accountability Act (HIPAA), Count II is a state law claim that alleges violation of North Dakota’s “whistleblower statute,” § 34-01-20 (2005) of the Century Code, and Count III is a common law claim for “Tortious Interference with Employment and Prospective Economic Relations.”

Background

Plaintiff Janet Phelps began working for Pembina County Memorial Hospital (Pembina) in 2000. She was terminated from her position as a Radiology Department Manager at Pembina by Defendants Pembina and Dr. Kulvinder Sumra (Sumra). Plaintiff claims the termination occurred in retaliation for her filing of a complaint with Health and Human Services, Office of Civil Rights where she alleged a violation of patients’ right of privacy. Specifically, on February 10, 2004, she complained that some physicians, including Dr. Sumra, had been improperly using an area to view patients x-rays and/or place patients in. This area was marked as for “authorized personnel only.” Phelps made an oral complaint to her supervisor and the hospital administrator. She also prepared

a sign that read “this is not a patient area” and placed it underneath the x-ray viewer. Plaintiff alleges that Dr. Sumra became angry at this and began making derogatory statements about Phelps to other staff members. Around July 14, 2004, Phelps met with Pembina administration officials to inform them of her situation and that she had filed a complaint with the Office of Civil Rights. Two days later, the Board of Directors for Pembina met and Phelps was in attendance. Plaintiff alleges that the Board urged her to drop her HIPAA complaint in exchange for them stopping Sumra’s harassment. Phelps was terminated on July 21, 2004.

Analysis

On a motion to dismiss for lack of subject matter jurisdiction, the Plaintiff bears the burden of proving that the Court indeed has jurisdiction over the case. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Here, the determination of whether this Court may properly exercise subject matter jurisdiction is wholly dependant on whether Plaintiff properly brought a claim under HIPAA. In order for such a claim to be brought, the statute itself must authorize a private right of action. This action may be either express or implied.

As to the former, there can be no question that HIPAA does not create an express private cause of action, as there is no reference of mention of such private actions anywhere within the statute. As to whether there is an implied private right of action, every court that has addressed this question has found that there is not. See Runkle v. Gonzalez, 391 F. Supp 2d 210, 237 (D.D.C. 2005); Means v. Independent Life and Acc. Ins. Co., 963 F. Supp. 1131, 1135 (M.D. Ala. 1997); Brock v. Provident American Ins. Co., 144 F. Supp. 652, 657 (N. D. Tex. 2001); Wright v. Combined Ins. Co. of America, 959 F. Supp. 356, 362-63 (N.D. Miss. 1997).

In Cort v. Ash, the United States Supreme Court has set forth four factors relevant to determining whether a private remedy is implicit in a statute where one is not explicitly provided. 422 U.S. 66, 78 (1975). These factors are (1) whether the Plaintiff is or was a member of the class

of people the statute is designed to benefit, (2) the existence of either explicit or implicit legislative intent, (3) whether it would be consistent with the underlying purposes of the legislative scheme to imply a private remedy and (4) whether the cause of action was one traditionally rooted in state law. Id. The Court subsequently consolidated these four factors into a single, fundamental inquiry, namely whether Congress intended to create a private right of action. Touche Ross & Co. v. Reddington, 442 U.S. 560, 575 (1979). It is well settled that the best indication of Congressional intent is the language of the statute itself. “The preeminent canon of statutory interpretation requires us to ‘presume what [the] legislature says in a statute what it means and means in a statute what it says there.’” BedRoc, Ltd. LLC v. United States, 541 U.S. 176, 183 (2004) (citing Conneticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992)). The Court’s inquiry thus begins and ends with the statutory text, provided such text is unambiguous. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (a court is to enforce a statute according to its terms provided said terms are not absurd) (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)). This Court reads the language of the statutory text as granting enforcement power exclusively to the individual states, under subsection (a), or alternatively, in subsection (b), to the Secretary of Health and Human Services. The fact that the law sets forth contingency plans for enforcement (i.e. the Secretary is to enforce when the states have failed to do so) that omit any reference to private enforcement demonstrates Congress did not intend to create a private cause of action. See O’Donnell v. Blue Cross Blue Shield of Wyo., 173 F. Supp 2d 1176, 1179 (2001); Logan v. VA, 357 F. Supp. 2d 149, 155 (2004).

Plaintiff contends that Jackson v. Birmingham Bd. of Ed. mandates a finding of a private right of action. 544 U.S. 167 (2005). In Jackson a high school girl’s basketball coach was fired after complaining that the schools’ boys and girls athletic programs received disparate attention and resources. The Defendant moved to dismiss on the basis that there was no private cause of action. The district court found no private right of action, and the Eleventh Circuit affirmed. In reversing

the judgment of the Eleventh Circuit, the Court held that “[b]ecause Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.” Id. at 175.

Plaintiff’s reliance on Jackson, however, is misplaced. Jackson pertained to claims under Title IX, and there is no indication that the decision contemplated HIPAA in any fashion. Further, attempts to create implied rights of action post-Jackson in the context of other, non-Title IX statutes have been fruitless. See Jones v. United Parcel Serv., Inc., 378 F. Supp. 2d 1312 (D. Kan. 2005); In re Eaton Vance Mut. Funds Fee Litig., 403 F. Supp. 2d 310, 312-13 (S.D.N.Y. 2005). This Court must be mindful not to inadvertently create new rights Congress never intended to exist. The Supreme Court has warned that such rulings are beyond the scope of federal tribunals and should be avoided, no matter how seductive the public policy rationale. Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001). This Court finds no private of action and therefore **DISMISSES** Count I.


Absent the HIPAA claim, this Court must determine whether to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a). Typically, when a court has resolved all federal claims before trial, the state claims should be dismissed. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). Such state claims should only be preserved when the interests of fairness to the parties, judicial economy, and convenience are served by maintaining the state claims, in light of the extent of pretrial proceedings. Univ. Of Colo. Hosp. Auth. v. Denver Publ. Co., 340 F. Supp. 2d 1142, 1146 (2004) (citing Thatcher Enter. v. Cache County Corp., 902 F.2d 1472, 1478 (10th Cir. 1990)). Here, there have been virtually no pretrial proceedings. This Court therefore **DISMISSES** Counts II and III.

Conclusion

There exists no private right of action under HIPAA and therefore Counts I is **DISMISSED** with prejudice. Counts II and III are state law claims and are **DISMISSED** without prejudice.

IT IS SO ORDERED.

Dated this 1st day of June, 2006.


Ralph R. Erickson, District Judge
United States District Court