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K.V. & S.V v. Women's Healthcare Network, LLC, (June 6, 2007)

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A Note to the Reader: Please use the information contained in this document for informational purposes only. This document is NOT intended as legal advice. Please consult an Attorney before relying on any information presented in this document.

Memorandum

The Health Insurance Portability and Accountability Act, (or the HIPAA Privacy rule), is being used to justify private lawsuits ranging from negligence and negligence per se, to the severe infliction of emotional distress.

K.V. & S.V v. Women's Healthcare Network, LLC, (June 6, 2007). [1]

1 CASE LAW ANALYSIS - SUMMARY

The Women's Healthcare Network, (or the defendant in this case), attempted to prevent the plaintiffs from bringing a negligence lawsuit, (involving a potential HIPAA violation as a part of the case), in a state court in Missouri. The defendant unsuccessfully attempted to ensure that this case was adjudicated on the federal level because numerous federal courts have prevented private lawsuits based on HIPAA.

Again, the federal district court that decided this case addressed the issue of whether a plaintiff can bring a private lawsuit involving HIPAA in a state court. The court allowed the case to proceed on the state level even though it involved HIPAA.

This decision strengthens Acosta v. Byrum [2]and Sorensen v. Barbuto[3], which both allowed private lawsuits for negligence in the States of North Carolina and Utah. In other words, federal trial courts will not prevent plaintiffs from bringing negligence lawsuits using HIPAA as a standard of care in private lawsuits in state courts.

2 CASE LAW ANALYSIS – DETAIL

The Federal District Court in this case stated, *"the mere presence of a federal issue in a state cause of action does not automatically confer federal jurisdiction. See Merrell Dow v. Thompson, 478 U.S. 804, 813 (1986). Merrell Dow indicated that a state law claim based on the violation of a federal law that lacks a private cause of action may not give rise to*

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[1] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)
[2] Acosta v, Byrum, 638 S.E.2d 246, (2006)
[3] Sorensen v. Barbuto 143 P.3d 295, (2006)

federal question jurisdiction. Here, the parties concede that various courts around the country have determined that there is no express or implied private cause of action under HIPAA."[4] The court outlined all of the federal cases that decided a "private cause of action" does not exist under HIPAA. Those cases can be found directly below in footnote number five. [5]

The Federal District Court went onto to state: *"additionally, the state law claim raised in Count IX does not raise a substantial federal question of great federal interest. The privacy standards imposed by HIPAA are not uniquely federal and do not raise any issue of great federal interest. Further, it is not clear that resolution of Count IX necessarily depends on resolution of a substantial question of federal law as it states an alternate state-law based theory of recovery that does not depend on resolution of a federal question at all. Accordingly, the Court finds that the Petition in this case did not invoke the federal courts' "arising under" jurisdiction."*[6]

This statement is very significant; the court allowed plaintiffs to use a potential HIPAA violation in a negligence lawsuit on the state level. This represents an alternative method of using HIPAA in a private cause of action alleging negligence that all organizations subject to HIPAA should be aware of, and understand.

In the Women's Healthcare Network case, the plaintiffs *"filed a multi-count Petition for Damages in the Circuit Court of Jackson County, Missouri related to the alleged disclosure of certain private or confidential information by Defendants"* [7]

In addition, the court defined the specific count in the petition or "Count IX of the Petition" entitled "Negligence & Negligence Per Se." Also, *"plaintiffs claim that the access to and the disclosures of confidential health information were made in violation of Mo. Rev Stat. § 491.060 and HIPAA."*[8]

The defendants on the other hand attempted to "remove" the case to the federal level

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[4] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)

[5] FN1. *See, e.g.*, *Acara v. Banks,* 470 F.3d 569 (5th Cir.2006); *Agee v. United States,* 72 Fed. Cl. 284 (2006); *Walker v. Gerald,* 2006 WL 1997635 (E.D. La. June 27, 2006); *Poli v. Mountain Valleys Health Ctrs., Inc.*, 2006 WL 83378 (E.D.Cal. Jan. 11, 2006); *Cassidy v. Nicolo,* 2005 WL 3334523 (W.D.N.Y.Dec.7, 2005); *Johnson v. Quander,* 370 F.Supp.2d 79 (D.D.C.2005); *Univ. of Colo. Hosp.*, 340 F.Supp.2d 1142 (D.Colo.2004); *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F.Supp.2d 1176 (D.Wyo.2001); *Means v. Ind. Life & Accident Ins. Co.*, 963 F.Supp. 1131 (M.D.Ala.1997); *Wright v. Combined Ins. Co. of Am.*, 959 F.Supp. 356 (N.D.Miss.1997).

[6] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)

[7] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)

[8] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)

"in their Notice of Removal." The *"defendants assert that jurisdiction exists under 28 U.S.C. § § 1331 and 1441 because of Plaintiffs' reference to the Health Insurance and Portability and Accountability Act ("HIPAA")."*[9]

Ultimately, the Federal District Court granted the plaintiff's motion and "remanded" or sent the case down to the state level for adjudication. The Court stated, *"Accordingly, the Court GRANTS Plaintiffs' motion and REMANDS this case to the Circuit Court of Jackson County, Missouri."*[10]

Puno v. Mount Dessert Island Hospital, (June 28 2007) [11]

1 Case Law Analysis - Summary

This case involved a HIPAA whistleblower that sued Mount Dessert Island Hospital for employment discrimination based upon race and gender, a retaliatory discharge claim based upon a compliant she made against another co-worker for violating HIPAA. In addition, the plaintiff brought a whistleblower's claim under state law.

In this case, the United States Magistrate made some significant recommendations involving the defendant's motion for summary judgment, (which is a technical method of preventing the case from going to trial), to the United States District Court. The US Magistrate stated, *"Elisa E. Puno sued her former employer, Mount Desert Island Hospital, in state court for allegedly subjecting her to employment discrimination based upon her gender and race and a retaliatory discharge based on a complaint she made to supervisors concerning a co-worker's violation of certain patient privacy precepts imposed on the hospital under federal law. I recommend that the Court deny the defendant's pending motion for summary judgment (Docket No. 7) as to both the state whistleblower's claim and the employment discrimination claims under federal and state law."*

Although the defendant has appealed these recommendations, at present this case may represent another method that plaintiff's attorneys may use HIPAA in a private lawsuit involving state and federal level legal claims.

In one portion of the Magistrate's recommendations she used some of the "language" garnered from the record presented to the court, directed at the plaintiff by her co-worker, and not acted upon by that co-worker's supervisor, (her supervisor), after the

[9] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)
[10] Slip copy, KV & SW v. Women's Healthcare Network LLC 2007 WL 1655734 (W.D.Mo.)
[11] Puno v. Mount Dessert Island Hospital, 2007 WL 1875830 (D.Me.)

plaintiff complained to her supervisor, that merits attention. The explaicatives that appeared in this "public record" have not been included in this memorandum due to their severely offensive nature.

The United States Magistrate stated as follows: *"I nevertheless conclude that, taken collectively, and viewed in the light most favorable to Puno as they must be at this stage of the proceedings, these facts are sufficient to permit a reasonable person to conclude that this focused effort to terminate Puno's employment was a species of abuse reflecting severe hostility toward her person on account of her status not only as a whistleblower, but more to the point, as a "_ _ _ _ _ _ _ _ _, Asian, Filipino, _ _ _ _ _, _ _ _ _"* **[explicatives deleted]** *woman who had the audacity to blow the whistle against a favored white male employee and then expected to be taken seriously when she complained of bigoted retaliatory conduct targeting her race, sex and place of origin. Accordingly, I recommend that the Court DENY summary judgment in favor of MDIH in relation to the hostile work environment claims set forth in counts I and II of the complaint. I extend my recommendation to the state law hostile work environment claim (count II) because MDIH correctly asserts that the same legal standard governs, see Paquin v. MBNA Mktg. Sys., Inc., 233 F.Supp.2d 58, 64 (D.Me.2002); Bowen v. Dep't of Human Servs., 606 A.2d 1051, 1053 (Me.1992), and Puno makes no contrary assertion."*[12]

Again, these recommendations have been appealed by the defendant and await disposition by the court, however, it should be obvious to the reader that further litigation involving HIPAA

[12] Puno v. Mount Dessert Island Hospital, 2007 WL 1875830 (D.Me.)