UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NAJAM AZMAT, M.D. PLAINTIFF

v. CIVIL ACTION NO. 3:99CV-487-S

DONNA E. SHALALA, SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the defendant, Donna E. Shalala, Secretary, Department of Health and Human Services (hereinafter "HHS"), to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6).

The action arose from the submission of an adverse action report concerning the plaintiff, Najam Azmat, M.D. (hereinafter "Azmat"), to the National Practitioner Data Bank. The report stated:

> Due to a concerning rate of intraoperative and post [sic] operative complications and concern with appropriateness of procedures, the practitioner voluntarily agreed to comply with stipulations of obtaining a second opinion before all elective surgery cases are scheduled, and by obtaining a second assistant surgeon for vascular surgery cases and some specific major general surgical cases until further review is accomplished. (National Practitioner Data Bank Adverse Action Report #5500000008105039).

The report was submitted by Hardin Memorial Hospital purportedly because it was required to do so under the provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133(a)(1)(A)("Each health care entity which takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days...shall report to the Board of Medical Examiners, in accordance with 11134(a) of this title, the information described in paragraph (3)").

On June 17, 1998 Azmat sought review of the data bank entry by the Secretary. On September 15, 1998 HHS notified Azmat that "[a]fter review of the available information, the Secretary finds no basis on which to conclude that the report should not have filed [sic] with the data bank." He was informed in the same letter that he had the right to submit a brief statement for inclusion in the data bank report, and was advised that the Secretary would include a brief statement that it had found no merit to Azmat's dispute over the submission. On October 14, 1998, Azmat submitted a statement for inclusion in the data bank record. In early 1999, counsel for Azmat attempted to obtain copies of correspondence received by HHS concerning the data bank entry. Azmat claims that the documents were not made available to him.

On July 27, 1999 Azmat filed suit under the Privacy Act, 5 U.S.C. § 552a, et seq. (counts I and II); the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (count III); the Fifth and Fourteenth Amendment to the United States Constitution (count IV); and the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, et seq. (count V).

HHS has moved to dismiss all claims on the ground that they fail to state a claim upon which relief may be granted. The court agrees with HHS with respect to counts IV and V.

Azmat raises a procedural due process claim in count IV, alleging that he suffered diminution of his reputation and consequently his ability to practice medicine. The United States Supreme Court has held that there is no constitutional protection for the interest in reputation and damages which flow therefrom. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), *citing, Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Count IV will be dismissed.

Azmat urges that an implied private right of action for physicians should be recognized under the Health Care Quality Improvement Act of 1986. The courts that have considered this question have decided to the contrary. In *Hancock, M.D. v. Blue Cross - Blue Shield of Kansas*, 21 F.3d 373, 374-75 (10th Cir. 1994), the court stated

> A weighing of the factors outlined in *Cort v. Ash* leads the court to conclude that Congress did not intend to create a cause of action for the benefit of physicians to enforce provisions of the HCQIA. From a reading of the HCQIA and its legislative history, the court concludes that Congress merely intended, in enacting the HCQIA , to ensure effective professional peer review of physician competence by providing immunity from damage suits to those professional peer review groups that comply with the HCQIA. [citations omitted]. Since the court concludes that the HCQIA was not enacted to benefit physicians subject to peer review, such as plaintiff, plaintiff cannot persuade the court that an implied cause of action exists for him under the HCQIA [citation omitted]. The few courts that have addressed this issue have arrived at the same conclusion [citations omitted].

See also, Goldsmith, M.D. v. Harding Hospital, Inc., 762 F.Supp. 187 (S.D. Ohio 1991). Count V will be dismissed.

HHS contends that counts I and II brought under the Privacy Act should be dismissed on the grounds that 1) the court lacks jurisdiction because Azmat did not obtain a "d(3) determination" in satisfaction of 5 U.S.C. § 552a(g)(1)(A), 2) the claim seeks to challenge the merits of the hospital's reporting action which is beyond the scope of Privacy Act review, and 3) Azmat failed to exhaust administrative remedies.

Contentions numbered 1 and 3 above have not been established to the satisfaction of the court. With respect to ground 1, subsection d(3) of §552a merely requires a refusal to amend, a request for review, a denial by the reviewing official, and the opportunity for the filing of a statement by the individual. HHS has failed to inform the court how the procedures utilized in Azmat's case did not follow the requirements of § 552a(g)(1)(A). With respect to ground 3, the court has been provided no authority for the proposition that Azmat was required to seek reconsideration of the Secretary's denial, an avenue of which he was apparently unaware, in order to be found to have exhausted his administrative remedies. The court has been provided no legal authority to suggest that such an exhaustion requirement exists, or that reconsideration under the provisions of the Guidebook constitutes a step in the exhaustion process.

With respect to ground 2 above, HHS contends that Azmat seeks impermissibly to challenge the underlying action taken by the hospital. A review of the allegations of the complaint establishes

that Azmat's claims are based upon 1) the alleged failure of HHS to provide him access to records, and 2) various challenges to the review process utilized by HHS. These allegations do not appear to challenge to the underlying decision by the hospital to report and thus do not reach beyond the scope of Privacy Act review. The motion to dismiss will be denied as to counts I and II.

With respect to count III of the complaint, HHS contends that "It was reasonable and proper for the Secretary to determine the report resulted from a professional review action and, since Defendant is charged both with interpreting the Data Bank statute and carrying out its purposes, Defendant is entitled to great deference in this regard." HHS brief at pg. 11. This statement is argument of counsel on the merits of the claim and is therefore not a ground for dismissal of the claim as insufficient under 12(b)(6). Taking the allegations of count III as true, Azmat claims that HHS acted arbitrarily and capriciously and otherwise contrary to law with regard to the adverse action report. The motion will be denied as to count III.

For the reasons set forth hereinabove and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant, Donna E. Shalala, Secretary, Department of Health and Human Services, to dismiss is **GRANTED** to the extent that it seeks dismissal of courts IV and V of the complaint. In all other respects the motion is **DENIED**.

This _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record