

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL D. FLEURY : CIVIL ACTION
: :
v. : :
: :
UNITED STATES POSTAL SERVICE : No. 00-5550

MEMORANDUM ORDER

This action arises out of defendant's alleged disclosure of plaintiff's confidential information. Plaintiff asserts claims for violation of the Privacy Act, 5 U.S.C. § 552a et seq. Presently before the court is defendant's Motion to Dismiss.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). While well pled factual allegations are accepted as true, a court need not credit bald conclusory assertions or legal conclusions. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). A complaint may be dismissed when the well pled facts and reasonable inferences therefrom are legally insufficient to support the relief sought.

See Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988).

The pertinent alleged facts are as follow.

With a letter dated April 13, 2000, plaintiff, an employee of defendant, transmitted a Form WH-380 by certified mail, containing highly confidential medical information, to Elwood A. Mosely, the District Manager for the South Jersey District of the Postal Service in connection with his request for leave pursuant to the Family and Medical Leave Act. Mr. Mosely's secretary signed for the letter on April 14, 2000.

On July 21, 2000, plaintiff spoke with Barbara O'Neill, an occupational health nurse administrator with defendant, to confirm that this medical information was being maintained in accordance with the Privacy Act. She advised plaintiff that his medical file did not contain the information he was concerned about. On September 24, 2000, Ms. O'Neill again informed plaintiff that she had not received the confidential information in question.

On that same day, plaintiff requested of Mr. Mosely records regarding disclosure of the confidential information pursuant to the Freedom of Information Act under 39 C.F.R. § 266.4(d). Mr. Mosely responded that no disclosure record existed as the information had never been disclosed. Plaintiff appealed on August 3, 2000 to Postal Service Headquarters. He

requested the current and past location of the information and a list of individuals with access to those locations. Elizabeth P. Martin, Chief Counsel for the Consumer Protection and Information Civil Practice Section of the Postal Service, advised plaintiff in a letter dated August 18, 2000 that the Postal Service had no responsive records to his FOIA request and affirmed Mr. Mosely's prior response.

Plaintiff requests that the court direct defendant to maintain his medical documents only in his employee medical folder subject to the constraints of the Privacy Act, instruct all of defendant's supervisors and managers of applicable security and disclosure requirements, and hold these persons accountable for any violations. He also seeks monetary damages for willful and intentional violation of the Act.

Plaintiff specifically asserts that defendant disclosed his confidential information in violation of Postal Service Management Instruction EL-860-98-2 and did not maintain accurate disclosure records as required by 39 C.F.R. § 266.4(d).¹ In his response to the motion to dismiss, plaintiff states that he also meant to assert claims for defendant's failure to secure his confidential medical information in violation of 5 U.S.C. § 522a(e)(9) which requires an agency instruct each person with

¹The management instruction appears to be a summary of applicable regulations in a format designed to provide guidance to managers and supervisors.

respect to the rules and procedures adopted pursuant to the Privacy Act, and § 522a(e)(10) which requires an agency to establish appropriate safeguards to protect the confidentiality of records.

Defendant argues that plaintiff's claims are essentially for alleged failure to maintain accurate records and thus must be brought under subsection C. Subsection C provides a remedy when an agency fails to maintain accurate and complete records resulting in an adverse determination of a plaintiff's qualifications, character, rights, opportunities or entitlement to benefits. See 5 U.S.C. § 522a(g)(1)(D).² Plaintiff's claims based on alleged disclosure or release of his confidential information and defendant's failure to maintain a record of disclosure are not equivalent to failure to maintain claims which indeed must be brought under subsection C. See Deters v. United States Parole Comm'n, 85 F.3d 655, 660 (D.C. Cir. 1996).

Subsection D allows a private action when an agency "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." To sustain such a claim for improper disclosure under 522a(g)(1)(D), a plaintiff must show that the

²Plaintiff has not stated a claim under subsection C, as he does not even allege that he experienced an adverse determination. See Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990); Harry v. United States Postal Service, 867 F. Supp. 1199, 1204 (M.D. Pa. 1994).

information is a record contained in a system of records; the agency improperly disclosed the information; the disclosure had an adverse effect on the plaintiff; and, the disclosure was willful and intentional. See Quinn v. Stone, 978 F.2d 126, 131 (3d Cir. 1992); Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995).

While plaintiff makes many conclusory allegations, his claims are predicated on his single specific factual averment that he sent confidential information to Mr. Mosely which was received by his secretary and not received by Ms. O'Neill to whom plaintiff expected the information would be forwarded. Plaintiff appears to assume that an unauthorized disclosure occurred because Ms. O'Neill, the ultimate intended recipient, does not have the information. If this is the sum and substance of plaintiff's case, he cannot prevail.

A claim cannot be sustained on conjecture and speculation. From proof that plaintiff's information did not reach Ms. O'Neill, one cannot reasonably infer that an unlawful disclosure occurred, that defendant did not maintain an accurate disclosure record as required by 39 C.F.R. § 266.4(d).³ Such proof also would not establish that defendant failed to instruct

³There is, of course, no need to maintain a record of a disclosure that did not occur. The absence of a record of disclosure alone is as consistent with the absence of a disclosure as with an unrecorded disclosure.

supervisors and managers regarding Privacy Act requirements in violation of 522a(e)(9) or failed to establish appropriate safeguards to ensure the security and confidentiality of records in violation of § 522a(e)(10).⁴ If there are specific facts which plaintiff can allege to support a claim, he has not done so.⁵

ACCORDINGLY, this day of August, 2001, upon consideration of defendant's Motion to Dismiss (Doc. #2) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the complaint is **DISMISSED** without prejudice to assert any claim which plaintiff in good faith can plead consistent with the requirements of Fed. R. Civ. P. 11.

BY THE COURT:

JAY C. WALDMAN, J.

⁴Indeed, the Management Instruction on which plaintiff relies shows that defendant did provide such instruction and safeguards. Proof that on a single occasion one secretary may have misplaced or destroyed a piece of information would not establish a violation by defendant of its general obligation to provide instruction and safeguards.

⁵It is axiomatic that statements or suggestions in briefs are not a substitute for well pled facts in a complaint.

