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

CARMEN RIGAUD	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-1866**
	:	
JUDY GAROFALO, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **May 2, 2005**

Plaintiff Carmen Rigaud ("Plaintiff"), brings this action against Defendants Judy Garofalo, Suburban Woods Health & Rehabilitation, Brandywine Senior Care, Business Health Services, Dr. Jeffrey Heebner, and Dr. James Nicholson alleging a Health Insurance Portability and Accountability Act ("HIPAA") violation (Count I); common law slander (Count II); and intentional and negligent infliction of emotional distress (Count III); intentional interference with contractual relations against Defendants Business Health Services, Dr. Jeffrey Heebner and Dr. James Nicholson (Count IV); wrongful termination in violation of public policy and retaliation (Count V), wrongful termination in violation of the Age Discrimination in Employment Act (Count VI), wrongful termination in violation of the Americans with Disabilities Act (Count VII), and wrongful termination in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 2000d, et seq., against Defendants Suburban Woods Health & Rehabilitation ("Suburban Woods") and Brandywine Senior Care ("Brandywine") (Count VIII). Now before the Court is the Motion to Dismiss Counts I, II, III and IV of Defendants Dr. Jeffrey Heebner, Dr. James Nicholson and Business Health Services (collectively "Defendants") for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim on which relief

can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the Court will grant the Motion.

I. Background

In the Amended Complaint, Plaintiff alleges: she is a black female over the age of 40. Amended Complaint ¶ 5. She began working at Suburban Woods as a Certified Nursing Assistant on May 25, 2000.[1] Plaintiff's Response to the Motion to Dismiss at 1. On April 8, 2003, she sustained a work related injury which made her eligible for workers' compensation benefits. Id. ¶ 3.[2] She was referred to Dr. Jeffrey Heebner and Business Health Services for treatment. Id. ¶ 5. On or about the same date, Dr. Heebner advised her that she was capable of returning to work on a modified duty restriction. Id. ¶ 6. She returned to full duty on April 12, 2003. Id. ¶ 12.

On April 25, 2003, as part of her ongoing treatment by Dr. Heebner, Plaintiff was prescribed the narcotic Darvocet. Id. ¶¶ 14-15. She alleges that she tendered the prescription at a Rite Aid Pharmacy and inquired about refills. Id. ¶ 16. The pharmacist noted that the prescription indicated that there were refills and contacted Business Health Services to verify. Id. ¶ 17. Business Health Services reviewed Plaintiff's medical chart, which contained a copy of the

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[1] In her Amended Complaint, Plaintiff alleges that she began working for Suburban Woods on May 25, 2004. Amended Complaint ¶ 13. The Amended Complaint later alleges that she worked for Suburban Woods for approximately three years. Amended Complaint Second ¶ 2 (see fn. 3). One of these statements is obviously incorrect. The Court will assume that the start date alleged in Plaintiff's response to the Motion to Dismiss, May 25, 2000, is the correct date.

[2] Inexplicably, Plaintiff begins renumbering her Amended Complaint after paragraph 14. Thus, this is actually the second paragraph 3. Unless otherwise indicated, any numbered paragraph referenced later in this Opinion refers to the second set of numbered paragraphs.

original prescription, and advised the pharmacist the no refills were authorized. Id. The pharmacist informed Plaintiff that there were no refills available. Id.

Plaintiff alleges that, on or about April 29, 2003, Dr. James Nicholson of Business Health Services contacted Suburban Woods and accused her of forging the refill authorization on the prescription. Id. ¶ 18.[3] She further alleges that Dr. Heebner thereafter released information about this incident to her employer in violation of HIPAA's privacy rule. Id. ¶ 19. Plaintiff claims that, as a result, Suburban Woods terminated her. Id. ¶ 24.

In Count I, Plaintiff asserts a cause of action against Defendants pursuant to HIPAA, specifically the Privacy Rule (hereinafter "HIPAA's Privacy Rule"). She further alleges state law claims for slander, intentional infliction of emotional distress and interference with contractual relations claims against Defendants (Counts II, III, IV). For the reasons which follow, all claims against Defendants Dr. Heebner, Dr. Nicholson and Business Health Services arising from Counts I, II, III and IV will be dismissed.

II. Legal Standard

A. Fed. R. Civ. P. 12(b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court must distinguish between motions that attack the complaint on its face and those that attack the existence of subject matter jurisdiction in fact. Mortensen v. First Fed. Sav. & Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977). A facial attack is considered under the same standard as a motion to dismiss under Rule 12(b)(6); all allegations in the complaint are taken to

[3] Plaintiff nowhere in her Amended Complaint or her Response to the Motion to Dismiss contends that the prescription was not in fact altered.

be true. Id. If the attack is factual, however, Plaintiff's allegations are not presumed to be true. Id. The Court may look beyond the pleadings and make its own determination as to whether it has the power to hear the action. Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000). Further, the Plaintiff bears the burden of proving that jurisdiction does in fact exist. Mortensen, 549 F.2d at 891.

B. Fed. R. Civ. P. 12(b)(6)

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. Analysis

A. Count I – Violation of HIPAA's Privacy Rule

Plaintiff asserts federal question jurisdiction under HIPAA's Privacy Rule, 45 C.F.R. 160.103, et seq. However, the existence of a private cause of action is a "prerequisite for finding federal question jurisdiction." Stephen v. High Voltage Maintenance Co., 323 F. Supp. 2d 650, 653 (E.D. Pa. 2004) (holding that the court lacked federal subject matter jurisdiction because OSHA did not provide a private cause of action); Smith v. Industrial Valley Title Insurance Co.,

957 F.2d 90, 93 (3d Cir. 1992) (holding that the court lacked subject matter jurisdiction because the Internal Revenue Code did not provide for a private federal remedy); see also Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress ..."); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) (finding no private cause of action under the Food, Drug and Cosmetic Act and thus no federal subject matter jurisdiction).

While the Third Circuit has not specifically addressed the issue whether there is an express or implied private right of action under HIPAA, several other federal courts have held that there is no such right. See O'Donnell v. Blue Cross Blue Shield of Wyoming, 173 F. Supp. 2d 1176, 1179-80 (D.C. Wyo. 2001); Brock v. Provident Am. Ins. Co., 144 F. Supp. 2d 652, 657 (N.D. Tex. 2001); Means v. Indep. Life and Accident Insurance Co., 963 F. Supp. 1131, 1135 (M.D. Ala. 1997); Wright v. Combined Insurance Company of Am., 959 F. Supp. 356, 362-63 (N.D. Miss. 1997). HIPAA's Privacy Rule itself provides specific enforcement mechanisms for aggrieved parties. See 145 C.F.R. § 160.306 (stating an aggrieved party may complain to the Secretary and that the Secretary may investigate the complaints filed under the Section). The Privacy Rule also provides an administrative process by which the Secretary may investigate and impose civil monetary penalties for a failure to comply with the Privacy Rule. See 45 C.F.R. §§ 160.500 - 160.570. Based on HIPAA's failure to provide for a private federal remedy and the absence of any legislative intent to create a private right of action, this Court concludes that it lacks subject matter jurisdiction over the instant matter.

Even if the Court construed HIPAA to create a private right of action, Plaintiff would be barred because she failed to exhaust her administrative remedies. HIPAA expressly provides

defendants a right to notice and a hearing before an Administrative Law Judge, and the opportunity voluntarily to cooperate with the Secretary to resolve the matter through informal means. See 45 C.F.R. §§ 160.500 - 160.570. Moreover, the Privacy Rule under HIPAA provides an explicit exception for disclosures made in accordance with the laws relating to workers' compensation. See 45 C.F.R. § 164.512(l) (permitting the disclosure of health information made for workers' compensation purposes without an individual's authorization). Under Pennsylvania's Worker's Compensation Act, a healthcare provider who treats an injured employee is required to report to the employer the employee's history, diagnosis, treatment, prognosis and physical findings. See 77 P.S. § 531. A provider has a continuing obligation to supplement its report as long as treatment continues. See id. Thus, even accepting Plaintiff's allegations that Dr. Heebner and/or Dr. Nicholson contacted her former employer regarding the altered prescription as true, the doctors would not have violated HIPAA.

Additionally, HIPAA provides that a covered entity may use or disclose protected health information, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the use or disclosure of the information. See 45 C.F.R. § 164.510. At each visit, Plaintiff signed a consent form specifically authorizing the release to Suburban Woods of all information relating to her treatment. See Defendants' Motion to Dismiss at Exhibit B. Accordingly, Plaintiff's claim in Count I for a violation of HIPAA's Privacy Rule will be dismissed.

B. Count II – State Law Claim for Slander

Plaintiff alleges that she was defamed, in part, because Dr. Nicholson confirmed that the prescription that she was given differed from the one she submitted to Rite Aid. However, a

conditional privilege attaches to communications "made on a proper occasion, from a proper motive, in a proper manner, whenever circumstances are such as to lead any one of several persons having a common interest in a particular matter correctly or reasonably to believe that facts exist which another sharing such a common interest is entitled to know." Tucker, 102 Fed. Appx. at 254 (citing Maier v. Marrietti, 671 A.2d 701, 706 (Pa. Super. 1995)). Here, the communications between Defendants and Plaintiff's employer related to Plaintiff's treatment and care and are therefore conditionally privileged as a matter of law. See Elia v. Erie Ins. Exch., 634 A.2d 657, 659 (Pa. Super. 1993) (holding that the report of a doctor hired by an insurance provider to examine plaintiff was conditionally privileged as the doctor reported it only to those who had a specific interest in evaluating the validity of plaintiff's claim). Defendants had a contractual relationship with Plaintiff's employer to examine employees who sustained on the job injuries. As part of the agreement, and with the consent of the employees, Defendants reported to the employer regarding its employees' treatment. See Defendants' Motion to Dismiss at 19-20. Accordingly, Defendants' communications with Plaintiff's employer regarding her treatment, condition and prognosis are conditionally privileged.

For the foregoing reasons, Plaintiff's defamation claim in Count II against Defendants Dr. Heebner, Dr. Nicholson and Business Health Services will be dismissed.

C. Count III – Intentional and Negligent Infliction of Emotional Distress

Plaintiff next claims that Defendants intended to cause her emotional distress when they reported the altered prescription to her employer. She asserts that Defendants acted with reckless disregard for the truth, that their conduct was extreme and outrageous, and that the "emotional distress suffered by the Plaintiff were [sic] severe and of such a nature that no reasonable person

could be expected to endure it." Amended Complaint ¶¶ 45-47. However, Plaintiff has not pled any physical injury as a result of Defendants' alleged conduct. See Hart v. O'Malley, 647 A.2d 542 (Pa. Super. 1994) ("it is clear that in Pennsylvania, in order to state a claim under which relief can be granted for the tort of intentional infliction of emotional distress, the plaintiff must allege a physical injury"); Rudas v. Nationwide Mut. Ins. Co., 1997 WL 11302, at *6 (E.D. Pa. Jan. 10, 1997) (dismissing claim for intentional infliction of emotional distress where the plaintiff had not alleged physical injury). It is not enough to merely allege severe distress. Fewell v. Besner, 664 A.2d 577 (Pa. Super. 1995) (affirming the grant of preliminary objections as to plaintiff's claim of intentional infliction of emotional distress where plaintiff failed to allege physical injury).[4]

Because Plaintiff alleges no physical injury, her claims in Count III for intentional and negligent infliction of emotional distress will be dismissed.

D. Count IV – Intentional Interference with Contractual Relations

Plaintiff alleges that Defendants intentionally interfered with her contractual relationship with her employer, Suburban Woods. To state a claim for intentional interference with contractual relations, a plaintiff must establish, inter alia, the existence of a contract. Triffin v. Janssen, 626 A.2d 571, 574 (Pa. Super. 1993). In Pennsylvania, "an at-will employee environment is the norm, absent a contract to the contrary, and thus can be terminated for ... no reason at all. An exception to the at-will employment rule will apply if an employee and

[4] Pennsylvania law likewise establishes that a claimant may not recover for negligent infliction of emotional distress in the absence of physical injury. See Rolla v. Westmoreland Health System, 651 A.2d 160, 163 (Pa. Super. 1994).

employer enter into a valid contract which expresses an intention to overcome the presumption."[5] Nix v. Temple University, 596 A.2d 1132, 1135 (Pa. Super. 1991) (finding the presumption not overcome where complaint did not allege the employment was pursuant to a clear and definite contract, even if all of the plaintiff's allegations were taken as true); see also Ferguson v. Allstate Engineering Co., 1992 WL 211534, at *2 (E.D. Pa. Aug. 24, 1992) (dismissing the claim for tortious interference with employment contract where the plaintiff never alleged the existence of a clear and definite contract).

Plaintiff fails to allege the existence of a clear and definite contract. Accordingly, her claim in Count IV for intentional interference with contractual relations will be dismissed.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). An appropriate Order follows.

[5] The Amended Complaint fails to allege any oral or written employment contract.

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ORDER

AND NOW, this 2nd day of May, 2005, upon consideration of the Motion to Dismiss Counts I, II, III and IV of Defendants Dr. Jeffrey Heebner, Dr. James Nicholson and Business Health Services (docket no. 18) and Plaintiff's response thereto (docket no. 20), it is **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.