

Subj:	Re: Plaintiff wins case against Data Bank
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From:	Aschia
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United States District Court,
District of Columbia.

Cuthbert O. SIMPKINS, M.D., Plaintiff,
v.
Donna E. SHALALA, Secretary of Health &
Human Services, et al., Defendants

No. Civ.A.95-1095 (RCL).

March 31, 1998

"Guided by the deference to which HHS's decision is entitled, this court nevertheless is convinced that the Adverse Action Report concerning plaintiff should be removed from the Data Bank due to the arbitrary and capricious action of defendants."

Rich

This is worth reading. It may be useful in future litigation.

Please forward to interested attorneys.

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A physician brought action against the Department of Health and Human Services (HHS), the Secretary of HHS, and the National Practitioner Data Bank, asserting various constitutional, statutory and common law claims in connection with and adverse action report submitted to the Data Bank by a hospital pursuant to the Health Care Quality Improvement Act (HCQI Act), indicating that the physician had resigned his staff privileges during a review of his quality of care. On the defendants' motion to dismiss or, alternatively, for summary judgment, and the physician's cross-motion for summary judgment, the District Court, Lamberth, J., held that: (1) HHS had a duty to review whether the physician's resignation from the hospital and the hospital's actions with regard to the physician triggered the hospital's reporting responsibilities under the HCQI Act; (2) HHS' decision that the physician resigned his clinical privileges when he resigned his employment was not arbitrary and capricious; (3) a supervisor's review of the physician's level of care did not qualify as an investigation by a health care entity under the HCQI Act; (4) physician had no implied private right of action under the HCQI Act; (5) the physician failed to demonstrate the existence of a constitutionally protected liberty or property interest regarding the adverse action report; and (6) the physician's state law claims of libel and tortious interference with contractual, economic, and business relations were barred by sovereign immunity.

Motions granted and denied accordingly.

West Headnotes

[1] Administrative Law and Procedure ⇨676
15Ak676

Judicial review of administrative action under the Administrative Procedure Act (APA) is limited to the administrative record before the agency at the time the agency issues its decision. 5 U.S.C. § 706(2)(A).

[2] Hospitals ⇨6
204k6

The Department of Health and Human Services (HHS) had a duty to review whether a physician's resignation from a hospital and the hospital's actions with regard to the physician triggered the hospital's reporting responsibilities under the Health Care Quality Improvement Act (HCQI Act); the Secretary of HHS could not resolve all concerns about a Data Bank report by simply noting that a dispute existed about the accuracy of the information and including a brief statement by the physician or practitioner setting forth the disagreement regarding the information. Health Care Quality Improvement Act of §986, 423(a)(1), 424, 425(2), 42 §§.C.A. 11133(a)(1), 11134, 11136(2); 45 C.F.R. § 60.14.

[3] Hospitals ⇨6
204k6

Department of Health and Human Services' (HHS) decision that a physician resigned his clinical privileges at a hospital when he resigned his employment, as required to trigger the hospital's reporting responsibilities under the Health Care Quality Improvement Act (HCQI Act), was not arbitrary and capricious, despite the physician's claim that he continued to have clinical privileges at the hospital by virtue of his faculty position at a university; in conversations with the hospital's medical director, the physician expressed a desire to completely disassociate himself from the hospital, he never practiced or sought to practice medicine at the hospital after his resignation, and he stated in his resignation letter that he was resigning and "leaving the hospital." Health Care Quality Improvement Act of 1 423(1)(b), 42 U.S.C.A. § 11133(1)(b).

[4] Hospitals ⇨6
204k6

A supervisor's review of a physician's level of care

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did not qualify as an investigation by a health care entity under the Health Care Quality Improvement Act (HCQI Act), and thus, the Department of Health and Human Services' (HHS) determination that the physician's surrender of his clinical privileges at the hospital occurred while the hospital was reviewing his quality of care, so as to trigger the hospital's reporting responsibilities under the HCQI Act, was arbitrary and capricious; a memo providing for the review was subject to the physician's agreement, the supervisor stated that the review was no greater than any normal review of a physician's care, and investigatory procedures mandated by the hospital's bylaws were never initiated. Health Care Quality Improvement Act of 1986, § 423(a)(1), 431(4)(A), 42 U.S.C. § 11133(a)(1)(B), 11151(4)(A); 45 C.F.R. § 60.3.

[5] Action ↻3
13k3

A physician had no implied private right of action under the Health Care Quality Improvement Act (HCQI Act) in connection with an adverse action report submitted to the National Practitioner Data Bank by a hospital, indicating that the physician resigned his staff privileges during a review of his quality of care; the physician was not in a class of persons for whose especial benefit the HCQI Act was enacted, and there was no legislative intent to create a separate cause of action for physicians, even those wronged as a result of an action taken pursuant to the HCQI Act. Health Care Quality Improvement Act of 19 411 et seq., 42 U.S.C.A. § 11101 et seq.

[6] Action ↻3
13k3

The determination of whether a private right of action may be implied from a statute is governed by four factors: (1) whether the plaintiff is a member of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy; (3) whether it would be consistent with the underlying purposes of the legislative scheme to imply a remedy; and (4) whether the cause of action is one traditionally relegated to state law in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law.

[7] Constitutional Law ↻275(1)
92k275(1)

[7] Constitutional Law ↻277(1)
92k277(1)

[7] Physicians and Surgeons ↻10
299k10

A physician claiming a due process violation in the alleged lack of any meaningful notice or opportunity to contest his listing in the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act (HCQI Act) failed to demonstrate the existence of the requisite constitutionally protected liberty or property interest. U.S.C.A. Const.Amend. 14; Health Care Quality Improvement Act of 19 411 et seq., 42 U.S.C.A. § 11101 et seq.

[8] Constitutional Law ↻254.1
92k254.1

[8] Constitutional Law ↻277(1)
92k277(1)

To trigger due process protections, a court must find that the challenged action impinged on a constitutionally protected interest--life, liberty, or property. U.S.C.A. Const.Amend. 14.

[9] United States ↻50.3
393k50.3

[9] United States ↻78(9)
393k78(9)

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), the Federal Tort Claims Act (FTCA) was the exclusive remedy for a physician's state law claims of libel and tortious interference with contractual, economic, and business relations, asserted against federal employees in connection with an adverse action report submitted to the National Practitioner Data Bank, and those claims fell within an exception to the FTCA's general waiver of immunity, such that the claims were barred by sovereign immunity, even though the physician sought only injunctive and declaratory relief, not damages. 28 U.S.C.A. §§ 2679, 2680(h).

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[10] United States 50.3
393k50.3

A plaintiff's sole remedy for action taken by government employees acting within the scope of their duties is against the government, even if the government would not be liable due to sovereign immunity. 28 U.S.C.A. § 2679.

*108 Coburn & Schertler, Washington, DC, for plaintiff.

Daniel F. Van Horn, Assistant United States Attorney, Washington, DC, Sandra Pressman, Office of the General Counsel, U.S. Department of Health & Human Services, Washington, DC, for defendants.

MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter comes before the court on the defendants' motion to dismiss or, in the alternative, for summary judgment, and the plaintiff's cross-motion for summary judgment.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). This case is proper for summary judgment as it does not present any disputed issues of material fact. For the reasons set forth below the court grants the plaintiff's motion for summary judgment in part and denies it in part. The defendants' motion to *109 dismiss or, in the alternative, for summary judgment is likewise granted in part and denied in part.

I. Background

Plaintiff Cuthbert O. Simpkins, M.D., is a former medical officer at the District of Columbia General Hospital ("D.C.General"). This suit arises out of a series of events occurring during plaintiff's employment at D.C. General and the hospital's subsequent report of these events to federal authorities.

1. The Prior Related Lawsuit and Procedural Posture of this Case

Before addressing the specific issues before the

court and the factual circumstances out of which they arise, it may be useful to review the procedural posture of this case and the prior suits involving these and other associated parties.

On or about August 24, 1992, plaintiff filed a civil action in the Superior Court for the District of Columbia against the District of Columbia, four D.C. General officials, the National Practitioner Data Bank ("Data Bank"), and Louis W. Sullivan, M.D., who had been the Secretary of the United States Department of Health and Human Services ("HHS") at the time of the report. Plaintiff alleged breach of contract, deprivation of procedural and substantive due process, libel and slander, intentional infliction of emotional distress, constructive discharge, civil conspiracy, and violations of federal law in connection with D.C. General's report to the Data Bank. The federal defendants subsequently removed the case to this court and the United States substituted itself for the Secretary of HHS on the common law tort claims. The Secretary remained a defendant to the extent the complaint asserted constitutional tort claims against the Secretary. [FN1] This court granted the joint motion of the United States and the Secretary of HHS to dismiss under Fed.R.Civ.P. 12(B)(6), dismissing all the claims against these defendants with prejudice *Simpkins v. District of Columbia Government* ("Simpkins I"), Civil Action No. 92-2119(RCL), Memorandum Opinion and Order (D.D.C. July 7, 1994) *aff'd in part rev'd in part*, 108 F.3d 366 (D.C.Cir.1997). This court dismissed the claims against the Data Bank without prejudice for failure to prosecute. *Id.* In light of the dismissal of the federal parties, this court also declined to exercise supplemental jurisdiction over the rest of the case and so those claims were dismissed without prejudice. *Id.*

FN1. The Federal Tort Claims Act does not apply to a civil action against a government employee "which is brought for a violation of the Constitution of the United States." 28 U.S. §. 2679(b)(2)(A).

While an appeal *Simpkins* was pending, plaintiff filed the present action against the Secretary of HHS and HHS, later amending his complaint to add the Data Bank as a defendant. In this case, plaintiff alleges several violations of law, asserting that these violations should result in removal of D.C. General's Adverse Action Report

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from the Data Bank, either by order of this Court or, in the alternative, upon remand to the administrative agency administering the Data Bank, HHS. On October 5, 1995, defendants filed a renewed motion to dismiss or, in the alternative, for summary judgment, contending that plaintiff's claims were barred by *res judicata* and that the plaintiff's claims lacked substantive merit. The decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C.Circuit") in *Simpkins v. District of Columbia Government* ("Simpkins II"), 108 F.3d 366 (D.C.Cir.1997), holding that certain claims against the federal defendants should have been dismissed without prejudice instead of with prejudice, eliminated the grounds for defendants' *res judicata* argument *see id.* at 370-371, and defendants therefore withdrew this argument. Nevertheless, defendants continue to maintain that plaintiff's arguments lack substantive merit.

2. The Facts

During 1990-1991 questions arose concerning plaintiff's conduct in approximately three to four cases at D.C. General. At that time, Dr. Bernard Anderson, the Chairman of the Department of Surgery at D.C. General directed Dr. Jean-Jacques, the Section chief and Dr. Simpkins' immediate supervisor, to review Dr. Simpkins' level of care to determine whether an adjustment in Dr. Simpkins' clinical privileges was warranted. By memorandum dated May 30, 1991, Dr. Jean-Jacques recommended (1) monitoring plaintiff's cases for six months, (2) encouraging plaintiff to consult with Dr. Anderson and Dr. Jean-Jacques as plaintiff deemed necessary, and (3) further recommendations at the end of six months. These recommendations were to be effective on June 17, 1991, subject to the agreement of Dr. Anderson, Dr. Simpkins, and all other interested parties. Plaintiff's resignation, effective June 17, 1991, rendered any further action with respect to these recommendations moot.

On October 4, 1991, D.C. General submitted an Adverse Action Report concerning plaintiff Simpkins to the Data Bank, which is administered by HHS pursuant to the Health Care Quality Improvement Act of 1986 ("HCQI Act"), 42 U.S.C. § 1110 *et seq.* The Data Bank was established by Congress to address the problems

that can result when doctors who are identified by their peers as being incompetent or unprofessional are able to move and continue their medical careers without anyone being aware of their previous incompetence or unprofessional actions. 42 U.S.C. § 11101(1) & (2).

The Adverse Action Report submitted to the Data Bank by D.C. General indicated that Dr. Simpkins resigned his staff privileges at D.C. General during a review of his quality of care. Plaintiff disputed the accuracy of the report and requested review by the Secretary of HHS. Following that review, the Secretary determined that the report was accurate. Plaintiff was permitted at that time to submit a statement indicating his dispute with the Adverse Action Report, and plaintiff did so.

3. The Issues

Plaintiff's amended complaint contains five counts. Plaintiff charges that defendants have violated the Administrative Procedure Act (Count One), the HCQI Act (Count Two), and the Fifth Amendment to the United States Constitution (Count Three). Plaintiff also contends that defendants have libeled him (Count Four) and tortiously interfered with plaintiff's contractual, economic, and business relations (Count Five). All of plaintiff's charges arise from HHS' decision to include the D.C. General Adverse Action Report concerning plaintiff Simpkins in the Data Bank.

II. Discussion

A. The Administrative Procedure Act

The Court shall first consider plaintiff's allegations under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 *et seq.* Plaintiff argues that the defendants' actions with regard to the Adverse Action Report were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Plaintiff claims that HHS's review of the Adverse Action Report was improper, and that a more thorough examination by HHS would have revealed that neither of the predicate conditions for a Data Bank report, as established by Section 11133 of the HCQI Act, were present. Defendants respond that judicial review of HHS's actions under the APA is highly deferential and that HHS's obligations under the

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HCQI Act are narrow and limited.

[1] Defendants correctly point out that judicial review of administrative action under the APA is limited to the administrative record before the agency at the time the agency issues its decision. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Defendants assert that under the APA the "standard of review is a highly deferential one, which presumes the agency's action to be valid. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C.Cir.1981) (citations omitted). Nevertheless, the D.C. Circuit in *Costle* also asserted:

[W]e must be assured that the agency action was "based on a consideration of the relevant factors," and that "the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." Our inquiry into the facts must also be searching and careful.

657 F.2d at 283 (citations omitted). Hence, it is this Court's task to determine whether HHS exercised reasoned decision making *111 whether it considered the relevant factors, and whether the facts have some basis in the re *National Treasury Employees Union v. Horn* 854 F.2d 490, 498 (D.C.Cir.1988).

Applying these principles of law to the present dispute, this court must consider plaintiff's claim that HHS acted arbitrarily and capriciously in concluding that the information contained in D.C. General's Adverse Action Report should be entered into the Data Bank. Defendants firmly adhere to their administrative action, arguing:

Plaintiff had resigned from his position at the hospital, such action by a physician normally implies a surrender of clinical privileges, and plaintiff presented no evidence to indicate that he was still willing to practice medicine at D.C. General despite the hospital's report to the contrary. In addition, the documentation submitted to HHS by plaintiff, taken as a whole, indicated that an investigation concerning plaintiff's professional competence was being conducted by D.C. General at the time plaintiff resigned, and was discontinued only because of plaintiff's resignation.

Defendants Consolidated Reply Memorandum and

Opposition To Plaintiff's Cross-Motion For Summary Judgment ("Def.Mem.") at 8.

Section 11133 of the HCQI Act requires a report to the Board of Medical Examiners by "[e]ach health care entity which ... (B) accepts the surrender of clinical privileges of a physician (i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or (ii) in return for not conducting such an investigation or proceeding...." 42 U.S.C. § 11133(a)(1). The Board of Medical Examiners is required to submit this information to the Secretary or in the Secretary's discretion, to an appropriate private or public agen § 42 U.S.C. § 11134.

[2] Defendants appear to argue that they did not need to review the accuracy of the information submitted to the Data Bank. The defendants phrase this argument as support for the contention that plaintiff was given meaningful notice or opportunity to contest his listing in the Data Bank. Nevertheless, this court disagrees with the implication of defendants' argument, namely that the Secretary could resolve all concerns about a Data Bank report by simply "noting that a dispute exists about the accuracy of the information and including a brief statement by the physician or practitioner setting forth the disagreement regarding the information." Def. Mem. at 9 (citing H.R. Rept. No. 903, 99th Cong., 2nd Sess., at 19, reprinted in 1986 U.S.Code Cong. & Admin News at 6402). As defendants recognize, the HCQI Act requires HHS to establish procedures to govern disputes concerning the accuracy of information contained in the Data Bank. 42 U.S.C. § 11136(2). Pursuant to this requirement, HHS issued 45 C.F.R. § 60.14, which describes how to dispute the accuracy of Data Bank information. These regulations provide that if the reporting entity does not revise the reported information, the Secretary will, upon request, review the written information submitted by both parties, and if the Secretary concludes that the information was incorrect, send corrected information to previous inquirers. *See* 45 C.F.R. § 60.14. This indicates that in certain circumstances the Secretary's duties under the HCQI Act are broader than the defendants imply.

Moreover, this court is convinced that regardless of what HHS's obligations may or may not be to

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review whether a reporting entity acted correctly in a peer review action or an entity's investigation of a doctor, it has a duty to determine whether the events that transpired should have resulted in a Data Bank Report. Imagine a situation in which an entity suspends a doctor's clinical privileges and then files a subsequent report. Surely there is a difference between requiring HHS to review whether the health care entity acted correctly in suspending the doctor and requiring HHS to review whether the entity in fact suspended the doctor. In this case, HHS had a duty to review whether Dr. Simpkins' resignation and D.C. General's actions with regard to Dr. Simpkins triggered D.C. General's reporting responsibilities under the HCQI Act.

Since the present dispute centers on whether the events transpiring as a result of Dr. Simpkins' work at D.C. General constitute *112 reportable acts, this court has no need to determine HHS's responsibilities to review questions such as the validity of a health care entity's decision to suspend a physician's privileges. It suffices to decide that HHS had a duty to determine whether a Data Bank report concerning plaintiff Simpkins should have been submitted.

1. Did Plaintiff Surrender his Clinical Privileges Within The Meaning of 42 U.S.C. 11133(1)(b)?

Turning to plaintiff's contentions under the APA, Dr. Simpkins first asserts that HHS incorrectly determined that his voluntary resignation from staff membership constituted the "surrender of clinical privileges of a physician" within the meaning of 42 U.S.C. 11133(1)(b). The defendant replies that there is no meaningful distinction between the resignation of plaintiff's employment and the surrender of his clinical privileges, arguing that in this case, the plaintiff's clinical privileges were co-extensive with his employment.

An initial matter requiring resolution is whether this issue was presented to the agency for review. Although the defendant does not directly discuss this issue in its submissions to the court, [FN2] the Declaration of Mr. Croft indicates that Dr. Simpkins did not dispute the status of his clinical privileges following his resignation from the hospital and that therefore HHS did not have an opportunity to review these allegations prior to the

filing of Dr. Simpkins' current action. Croft Dec. at * 22. Due to the limited nature of judicial review of administrative action under the APA, plaintiff was required to present this issue to HHS at the time it issued its decision. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

FN2. The defendants' submissions to the court generally discuss plaintiff's grounds for disputing the accuracy of the Adverse Action Report before HHS but do not claim that this issue was not presented to the agency for review.

After considering the record before the agency at the time it issued its decision, the court is convinced that plaintiff presented this contention to HHS for review. In her September 3, 1991 letter to D.C. General, plaintiff's prior counsel argued that "Dr. Simpkins' voluntary resignation from staff membership did not constitute a 'surrender of clinical privileges of a physician' " under the HCQI Act. McDonald Letter, Plaintiff's Exhibit 19. In Mr. Croft's August 28, 1997 Deposition, he concedes that this letter was included as Exhibit 5 to Dr. Simpkins' April 6, 1994 letter to the Secretary. Croft Dep. at 13-15. As a result, this court is convinced that the issue was presented for review.

[3] Next, this court must consider whether HHS acted arbitrarily and capriciously in deciding this issue. Plaintiff argues that despite his resignation of employment at D.C. General, he continued to have clinical privileges at D.C. General by virtue of his faculty position at Howard University. Plaintiff argues that although he resigned his employment at D.C. General, he never surrendered his clinical privileges at the hospital. Plaintiff also contends that the lack of proper notation in plaintiff's D.C. General credentialing file indicates that he did not surrender his clinical privileges. Although plaintiff persuasively argues that D.C. General did not eliminate or revoke his clinical privileges, plaintiff has not adequately shown that his resignation did not result in the surrender of his clinical privileges within the meaning of 42 U.S.C § 11133. After reviewing the evidence before HHS at the time of its decision, this court concludes that HHS' decision that plaintiff resigned his clinical privileges was not arbitrary and capricious.

Plaintiff's contemporaneous conversations with Dr. Lawrence Johnson, who at the time of plaintiff's