UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS CIVIL ACTION NO: 1:15-cv-13297-NMG

BHARANIDHARAN PADMANABHAN MD PhD)
(Dr Bharani))
- PLAINTIFF)
)
vs.)
)
MAURA HEALEY)
STEVEN HOFFMAN)
CHRIS CECCHINI)
ADELE AUDET)
JAMES PAIKOS)
LORETTA KISH COOKE)
JOHN DOES)
JANE DOES)
- DEFENDANTS)

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U.S. DISTRICT COURT
DISTRICT OF MASS.

MOTION FOR CLARIFICATION OF MEMORANDUM AND ORDER DISMISSING PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM
(Document #50)

Plaintiff Dr Bharani, *pro se*, respectfully submits this motion for clarification of the Court's Memorandum and Order (#50) issued on February 2, 2016.

1 Should Plaintiff understand that this Court agrees that Defendants have indeed violated 28 U.S.C. § 1030 ("CFAA")?

Being *pro se*, Plaintiff Dr Bharani relied on reading through almost every CFAA ruling over the past 10 years, between 2005 and 2015, prior to filing his complaint. In every single ruling where the court held that the $5000 loss threshold had not been met, the court made explicit that the defendants had indeed violated the CFAA but private civil action could not be sustained without showing $5000 in loss.

This Court declared in it's memorandum, based exclusively on case law submitted by

Defendants while failing to address case law relied upon by the Plaintiff, that the Plaintiff did not meet the $5000 loss threshold, but remained non-responsive as to whether the Defendants did indeed violate 105 CMR 700.012 and the CFAA.

Plaintiff Dr Bharani, *pro se*, even without the benefit of liberal discovery rules that he is entitled to in this Court, had submitted evidence to prove that Defendants had certainly accessed the confidential medical PMP database and that said access was in violation of 105 CMR 700.012 and thus the CFAA.

Plaintiff Dr Bharani, *pro se*, also made it explicit to this Court that Defendants proved unable to produce documentary evidence that they complied with the explicit requirements of 105 CMR 700.012(D)(1)(3).

> *(3) A request for information collected pursuant to 105 CMR 700.012 shall be in writing or, if applicable, transmitted electronically pursuant to 105 CMR 700.012(F) and shall be made in accordance with procedures established by the Commissioner or designee to ensure compliance with the requirements of 105 CMR 700.012(D) and (E).*

This Court in it's written memorandum did not address the factual record.

The Third Circuit held in *Auernheimer*:

> "Congress, however, did not define a violation of § 1030(a)(2)(C) in terms of its effects. The statute simply criminalizes accessing a computer without authorization and obtaining information. It punishes only the actions that the defendant takes to access and obtain. It does not speak in terms of the effects on those whose information is obtained. The crime is complete even if the offender never looks at the information and immediately destroys it, or the victim has no idea that information was ever taken."
> *United States v. Andrew Auernheimer*, 13-1816 (3rd Cir. 2014)

Plaintiff Dr Bharani, *pro se*, thus requests this Court to explicitly clarify, based on written evidence before this Court, whether the Defendants were in violation of 105 CMR 700.012 and the CFAA.

2 Did Plaintiff assert a private cause of action specifically on 105 CMR 700.012?

This Court declared in it's memorandum that 105 CMR 700.012 "does not provide plaintiff with a private cause of action." Plaintiff Dr. Bharani, *pro se*, did not assert a private cause of action based specifically on 105 CMR 700.012 and made explicit that 105 CMR 700.012 served as the "Terms of Use" for the PMP database, violation of which gave rise to the CFAA violation.

In their motion to dismiss, Defendants did not submit and proved unable to provide documentary evidence that they were in compliance with the "Terms of Use" at the time they accessed the confidential medical PMP database to look at the confidential prescriptions filled by Plaintiff's patients. The Attorney General does not have *carte blanche* access to the Dept. of Public Health's confidential medical PMP database, only doctors do. The Attorney General, not being a doctor, knew or should have known the mandate to file a written request for authorization, prior to each and every single request to access and view this confidential medical database. The Court was non-responsive to Plaintiff's evidence proving the above.

Plaintiff Dr. Bharani, *pro se*, respectfully requests this Court to clarify that he did not assert a private cause of action under 105 CMR 700.012.

Plaintiff Dr. Bharani, *pro se*, further requests this Court to clarify, based on evidence in the record, whether defendants were in compliance with 105 CMR 700.012 or not, at the time they accessed the confidential medical database to look at the confidential prescriptions filled by Plaintiff's patients.

3 This Court considered only case law submitted by the Defendants and not case law submitted by the *pro se* Plaintiff, to wit:

This Court should officially recognise the ruling in *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F.Supp.2d 1114 (E.D. Va. 2011)

This Court should officially recognise the ruling in *United States v. Andrew Auernheimer*, 13-1816 (3rd Cir. 2014)

It is unreasonable that in it's memorandum this Court did not mention at all the case law relied upon by the Plaintiff to show he meets the $5000 loss threshold. This Court exclusively considered the case law submitted by the Defendants. This is made explicit by this Court in it's memorandum, which makes this Court's order very different from all other rulings in CFAA cases that dismissed plaintiffs' claims for not meeting the loss threshold. The loss specified clearly in the complaint was also not examined by this Court before dismissing the case.

This Court's failure to address case law relied upon by the *pro se* Plaintiff not only directly violates the standard established by both the Supreme Court and this District about construing *pro se* complaints liberally and giving guidance to *pro se* Plaintiffs but also the standard for examining <u>both sides</u> of CFAA cases.

In October 2015, *Animators* was considered by the District Court in Maryland when deciding on a motion to dismiss: "When appropriate, a court may also grant jurisdictional discovery to ensure that the record is fully developed. See, Animators at Law, Inc. v. Capital Legal Solutions, LLC, 786 F. Supp. 2d 1114, 1115 n.2 (E.D. Va. 2011) (granting jurisdictional discovery to allow consideration of pivotal issue on a more complete record)" *Wikimedia Foundation et al* v. *National Security Agency / Central Security Service et al*. Case No. l:15-cv-662. In explicit contrast, this Court failed to do so.

The defendant in *Auernheimer* was charged by the United States and convicted by a federal jury in November 2012 with violating the CFAA based on a loss of $73,167 that was spent on mailing letters in response to said CFAA violation.

> “The principal point of contention at the hearing was the amount of loss sustained by AT&T. A762. The Court found that Auernheimer was responsible for a loss of $73,167, which resulted in an eight-level increase in his total offense level. A770-71, A786.” Brief for United States, Document: 003111395511

The conviction was later vacated by the Third Circuit in a precedential opinion exclusively on the basis of venue and not on the basis of qualifying loss. What is good for AT&T and the United States surely must be good for the *pro se* Plaintiff here.

> “We note our concern regarding the district court's failure to address the arguments against transfer Chatman-Bey stated explicitly in his response to the show cause order: "[P]rinciples of fairness suggest that a plaintiff receive some indication that the court considered and for good reason rejected his arguments." In re Scott, 709 F.2d at 721 n. 11. In this case, even more conspicuously than in *Scott,* the petitioner received no indication that his contentions were even examined.” *In re Wilton Chatman-Bey, Petitioner* 718 F.2d 484 (D.C. 1983)

Plaintiff Dr Bharani, *pro se*, respectfully requests this Court to clarify why the court rulings in both *Animators* and *Auernheimer* were not addressed in it’s written memorandum, given that Plaintiff Dr Bharani, *pro se*, explicitly relied on “on-point case law,” and to clarify if *not* considering the rulings in *Animators* and *Auernheimer* is the present posture/position/ doctrine within the District of Massachusetts.

4 Should Plaintiff understand that this Court gave a pass to the Defendants’ failure to comply with LR 7.1 even though the rules should apply equally and the standard for attorneys should be higher than for a *pro se* plaintiff?

Is it the finding of this Court that Defendants and their Counsel did violate the local rule requiring the filing of a mandatory Certificate of Compliance? In it’s memorandum the Court did not address Defendants’ failure to file the mandatory Certificate of Compliance. The Court has discretion to consider harmless errors but not non-compliance with a mandatory requirement.

5 Did this Court find that the PMP database is indeed a “protected computer” under the CFAA?

This Court noted that defendants "dispute that the computers hosting the PMP database are "protected computers" " but was non-responsive on this vital important crucial point of law.

Plaintiff Dr. Bharani, *pro se*, respectfully requests this Court to clarify whether it determined that the PMP database is a protected computer as defined by CFAA and whether Prof. Orin Kerr (Fred C. Stevenson Research Professor of Law, George Washington University) is accepted as a credible authority on CFAA matters within this District and Circuit.

6 Did this Court construe *pro se* Plaintiff's complaint liberally?

Per Rule 8 the plaintiff is required to present a short and plain statement of the claim showing he is entitled to relief. Plaintiff Dr. Bharani's *pro se* complaint more than complied with this Rule as well as the standard set by the Supreme Court via *Twombly* and *Iqbal*. *Bell Atlantic Corp*. *v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Ample clear and convincing evidence was provided in the record to overcome the dicta against 'the mere possibility of misconduct and threadbare recitals of the legal elements supported by mere conclusory statements.'

Furthermore, in this district, as nationwide, *pro se* complaints are to be liberally construed. *Estelle et al v. Gamble*, 29 U.S. 97 (1976), *Haines v. Kerner*, 404 U.S. 519 (1972), *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004), *Vartanian v. Monsanto Co*., 14 F.3d 697 (1st Cir. 1994), *Hart v. Mazur*, 903 F.Supp. 277 (D.R.I. 1995).

No one reading this Court's memorandum and order dismissing Plaintiff Dr. Bharani's *pro se* complaint would have any idea that the complaint, opposition and every single motion was filed by a *pro se* victim/Plaintiff.

The Supreme Court ruled "[i]n addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic*

Corp., supra, at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("This simplified notice pleading standard relies on liberal discovery rules . . . to define disputed facts and issues and to dispose of unmeritorious claims.")." *Erickson v. Pardus*, 127 S. Ct. 2197 (2007)

In this case here, despite a clear directive from the Supreme Court, not only was there no discovery allowed at all, the *pro se* Plaintiff's case law brief was suppressed and there was not even one short *pro forma* perfunctory oral hearing despite *pro se* Plaintiff Dr. Bharani requesting one. Instead, contrary to the explicit holding of the Supreme Court, this Court considered exclusively the case law submitted by the Defendants and dismissed without a hearing a very meritorious claim that is supported in the record by clear and convincing evidence. Accordingly, the defendants failed on <u>process</u> by not filing a mandatory certificate and on <u>merit</u> by failing to prove they did have authorized access to the confidential medical PMP database which is the crux of the case.

Once again,

> "In this case, even more conspicuously than in *Scott,* the petitioner received no indication that his contentions were even examined." *In re Wilton Chatman-Bey, Petitioner* 718 F.2d 484 (D.C. 1983)

Given the existing legal standards for examining a motion to dismiss a *pro se* complaint, which balances the interests of all parties, dismissal required an oral hearing with guidance from the Court as to perceived deficiencies in the *pro se* complaint as well as discovery to define disputed facts and whether a reasonably prudent person would find if the evidence presented was ambiguous or subject to interpretation. Plaintiff Dr. Bharani, *pro se*, respectfully requests this Court to clarify why this legal standard was not observed.

7 In view of the facts and circumstances was this Court's warning to *pro se* Plaintiff necessary?

This Court writes: "Furthermore, the Court forewarns plaintiff, once again, that he will be subject to the imposition of sanctions himself if he continues to make gratuitous, inflammatory and groundless charges against defendants and their counsel." Doc. 50

It should be emphasised that Plaintiff Dr Bharani, *pro se*, in his complaint and opposition recited the factual record. Plaintiff Dr Bharani, *pro se,* did not attack anyone's person or resort to name-calling. As required, he recited conduct that was inappropriate, unethical and disrespectful to the court and the court process. Statements should be deemed "gratuitous, inflammatory and groundless" only when they are not true. Plaintiff has also submitted sworn affidavits attesting to the veracity of his pleadings.

Plaintiff Dr Bharani, *pro se*, used the court process with the expectation that this Court would serve as a neutral finder of fact before harshly threatening a *pro se* victim/Plaintiff with sanctions for reciting the factual record.

Plaintiff Dr Bharani agrees this Court would be justified in harshly warning a *pro se* Plaintiff if the facts were impartially examined and found to be false, meaning that Defendants and their Counsel actually did file a Certificate of Compliance with their motion to dismiss (they did not), did not falsely blame Plaintiff for the missing Certificate (they did blame Plaintiff), and did not make numerous misrepresentations (they did) that Plaintiff detailed and rebutted in his opposition.

Plaintiff Dr. Bharani, *pro se*, is using the court for it's intended purpose and demands the equal application of laws. Plaintiff Dr. Bharani, *pro se,* purchased and paid for entry into the court system with the expectation that he would receive equal justice under the law, a phrase

engraved onto the Supreme Court, "a societal ideal that has influenced the American legal system" and which is conspicuously absent in this case.

8 How did this Court determine that the "psychotherapist-patient privilege" did not apply in this case?

This Court declared: "The SJC decision in Kobrin addresses the scope of the psychotherapist-patient privilege under M.G.L. c. 233, § 20B, an issue that is not presented by the facts of this case. See Kobrin, 395 Mass. at 284-85."

Given that Plaintiff Dr Bharani, *pro se*, is a Board-certified neurologist and given that neurologists and psychiatrists have overlapping interests and patients and given that both psychiatrists and neurologists are certified by a unified American Board of Psychiatry and Neurology, how did this Court find that the "psychotherapist-patient privilege" did not apply to **immediate access** to the **un-redacted complete page-by-page medical records**, both paper and electronic, that Defendant Attorney General Maura Healey demanded via the physical arrival and presence at Plaintiff Dr Bharani's home of two **Medicaid Fraud investigators**, one of whom refused to identify herself when politely asked to?

This Court's "finding" that the "psychotherapist-patient privilege" does not apply to this case is unreasonable especially given that not even limited discovery was allowed and not even one oral hearing was held before this *pro se* complaint was dismissed.

Plaintiff Dr Bharani, *pro se*, respectfully requests this Court to clarify how it arrived at it's ruling that the "psychotherapist-patient privilege" does not apply to this case.

9 Should the Court be concerned about far greater collateral implications of conduct operating out of the top law enforcement office in the Commonwealth *vis a vis* "Unclean Hands" and obligations concerning 18 U.S.C. 4?

This Court declared: "General and vague statements that the alleged conduct violated 18

U.S.C. § 4 and other unidentified federal statutes also do not suffice to set forth a plausible claim for relief."

This Court further declared: "Conclusory statements that defendants deliberately committed regulatory and statutory violations and accessed information under the pretext of legitimate investigative activity do not, by themselves, set forth a plausible claim for relief."

This Court did so after Plaintiff Dr Bharani, *pro se*, proved beyond any doubt that Defendants violated 105 CMR 700.012 and the CFAA and did access the confidential medical PMP database. Plaintiff Dr Bharani made explicit to this Court that one of the patients on the list of sixteen was linked to him exclusively via the confidential medical PMP database and a therapeutic relationship could not have been discerned via any other source on earth.

Defendants deny accessing this confidential medical database while at the same time offer their mere *ipse dixit* that if the Attorney General did so it must be legal, despite the explicit mandate of 105 CMR 700.012.

Other than the pharmacist who filled the confidential prescription for Plaintiff's patient, there were only three people who knew about the confidential prescription for Plaintiff's patient - the Plaintiff, the patient (name purposely withheld) and the unauthorized AG's office. Thus, this Court has "plausible evidence" to prove that the AG's office made a conscious decision to violate the mandate of 105 CMR 700.012 and enter the confidential medical PMP database, a method of retaliation against Plaintiff.

Plaintiff Dr Bharani, *pro se*, respectfully requests this Court to clarify how it found that Defendants are not in violation of 18 U.S.C. 4 despite violating 105 CMR 700.012 and the CFAA.

For all the foregoing reasons Plaintiff Dr Bharani, *pro se*, respectfully requests that this Court provide the clarifications sought above.

Respectfully submitted,

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5 February 2016

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