SCHEDULED FOR ORAL ARGUMENT - NOVEMBER 6, 2012

No. 11-7109

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

KAREN HUDES,

Appellant,

v.

AETNA LIFE INSURANCE COMPANY, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE
AETNA LIFE INSURANCE COMPANY

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Dated: September 5, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellee, Aetna Life Insurance Company, pursuant to D.C. Circuit Rule 28(a)(1), certifies the following:

A. Parties and Amici

All parties appearing before the district court and in this Court are listed in the brief for appellant. There are no intervenors or amici.

B. Rulings Under Review

The ruling under review is the August 30, 2011, order of the United States District Court for the District of Columbia (Boasberg, J.), *see Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180 (D.D.C. 2011), granting defendants' motions to dismiss with prejudice as to all federal claims against all defendants and as to plaintiff's wrongful-termination claim against the International Bank for Reconstruction and Development; and granting defendants' motions to dismiss without prejudice as to all other state law claims. App. 37-60; *see also* Dkt. # 76 (Order of Dismissal).

C. Related Cases

The case on review was not previously before this Court. The undersigned counsel is not aware of any related case involving substantially the same parties and the same or similar issues.

/s/ Michael P. Cunningham
Attorney for Aetna Life Insurance Company

CORPORATE DISCLOSURE STATEMENT

Appellee, Aetna Life Insurance Company, pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, states Aetna Life Insurance Company is a wholly-owned subsidiary of Aetna Inc., a publicly held corporation. No other publicly-held company has a 10% or greater ownership interest in Aetna Life Insurance Company. Aetna Life Insurance Company offers a broad range of insurance and employee benefit products and services.

/s/ Michael P. Cunningham
Attorney for Aetna Life Insurance Company

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GLOSSARY

HIPAA – Health Insurance Portability and Accountability Act

IBRD – International Bank for Reconstruction and Development

SAC – Second Amended Complaint

STATEMENT OF ISSUES

1. Whether Hudes waived her appeal as to Aetna by failing to advance any argument for reversing the judgment dismissing all claims against Aetna?

2. Alternatively, whether the district court properly dismissed Hudes' HIPAA claim on grounds that HIPAA provides no private right of action?

STATEMENT OF THE CASE

On December 17, 2009, Hudes filed this *pro se*[2] lawsuit in the United States District Court for the District of Maryland against "Aetna Corp.," Mark Schreiber, and John and Jane Does 1-100. On March 5, 2010, Hudes filed an amended complaint substituting Aetna Life Insurance Company for "Aetna Corp." and joining the International Bank for Reconstruction and Development ("IBRD") as a defendant. Each of the defendants moved to dismiss the amended complaint. The United States District Court for the District of Maryland transferred the action to the United States District Court for the District of Columbia based on improper venue. (Dkt. # 39.)

[2] Hudes is admitted to practice law in the District of Columbia, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit.

On October 15, 2010, Hudes filed a second amended complaint in the United States District Court for the District of Columbia. App. 23-36.[3] The second amended complaint eliminated certain causes of action and added KPMG LLP as a defendant. *Id*. Each of the defendants moved to dismiss the second amended complaint. As to Aetna, the district court dismissed Hudes' HIPAA claim because there is no private right of action under HIPAA. App. 58-60. The district court declined to exercise pendent jurisdiction over the remaining state law claims. App. 60. Hudes filed a timely notice of appeal. In her opening brief, Hudes failed to advance any argument for reversing the judgment dismissing all claims against Aetna.

STATEMENT OF FACTS

Hudes alleges she was formerly employed in the legal department of the IBRD. App. 29 (SAC ¶ 11). Hudes is a lawyer and claims she was fired for putting the "institutional interests of [the IBRD] ahead of its officers." *Id*. Hudes contends her employment was terminated "illegally in retaliation for reporting corruption and securities law violations." App. 30 (SAC ¶ 13).

Hudes alleges Aetna disclosed her "confidential medical records and treating physician information" to Dr. Demure, a physician in the health department of the

[3] "App." refers to the appendix filed by Hudes. Although Hudes characterizes the appendix as a "joint appendix," each appellee objected to including the materials after page 61. The appendix, therefore, is not a "joint" submission.

IBRD. App. 30 (SAC ¶ 14). Although not specifically alleged, Hudes suggests Aetna disclosed her medical information to the IBRD without her "express authorization." *Id*. Hudes alleges Aetna was "negligent" in its disclosure of her medical information to the IBRD. App. 35-36 (SAC ¶ 29).[4]

Hudes further alleges that one week before she was fired from the IBRD, Dr. Demure contacted her physicians and redisclosed her confidential medical information. App. 30 (SAC ¶ 14). Hudes asserts that Dr. Demure had "illegal telephone calls" with her physicians, made "knowingly false statements" to her physicians, and "maliciously requested" her physicians to inform her that she was "barred" from accessing the IBRD's facilities "for medical reasons." App. 31 (SAC ¶ 15).

Hudes alleges Dr. Demure informed her of his alleged misconduct on July 24, 2007. *Id*. Hudes further alleges that when she "informed Dr. Demure that he was violating medical ethics and breaking the law, Dr. Demure retaliated by recommending that [she] be denied access" to the IBRD's facilities. App. 31 (SAC ¶ 18). Hudes alleges she was terminated illegally the following week. *Id*.

Hudes claims the IBRD "retaliates against employees by requiring submission to psychological fitness for duty examinations." App. 34 (SAC ¶ 25).

[4] Although not alleged in the second amended complaint, Hudes was enrolled in a health benefits plan sponsored by the IBRD. (Dkt. # 15-2, Aff. of J. Gaffney (Mar. 10, 2010) ¶¶ 2, 5.) Aetna provided certain administrative services for the IBRD's self-funded plan. (*Id.*)

Hudes further alleges "Aetna works hand in glove with this abusive retaliation by flagrant breaches in the confidentiality of medical records." *Id*.

With respect to Aetna, Hudes alleged, among other things, that Aetna disclosed confidential medical information to her employer in violation of HIPAA. App. 24, 34-35 (SAC ¶¶ 3, 25, 28). Hudes sought compensatory damages against Aetna in the amount of $1.5 million and punitive damages in the amount of $3 million. App. 35-36 (SAC ¶ 29).

SUMMARY OF ARGUMENT

Hudes waived her appeal as to Aetna by failing to advance any argument in her opening brief for reversing the judgment dismissing all claims against Aetna. Even if her appeal were not waived, the only ruling by the district court pertinent to Aetna was the dismissal of Hudes' HIPAA claim. Hudes failed to challenge the dismissal of her HIPAA claim before the district court and, therefore, failed to preserve this issue for review. Even if Hudes had preserved the issue, the district court properly dismissed the HIPAA claim because HIPAA provides no private right of action. For any one of these reasons, the district court's judgment dismissing all claims against Aetna should be affirmed.

ARGUMENT

I. Hudes Waived Her Appeal With Respect To Aetna.

Hudes failed to advance any reason in her opening brief as to why the district court's dismissal of all claims against Aetna should be reversed. None of the "issues presented for review" pertain to Aetna or the claims asserted against Aetna. (Appellant's Br. 9-10.) Hudes mentions Aetna only three times in her brief—twice in the procedural history and once reciting certain allegations in her second amended complaint. (*Id*. 11, 18.) No argument is made regarding the dismissal of her claims against Aetna and, therefore, Hudes waived any right to appeal the judgment as to Aetna. *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210-11 (D.C. Cir. 1986) (affirming summary judgment for defendants because appellant waived all appeal issues by failing to advance any argument for reversing the judgment in opening brief). For this reason alone, the district court's judgment dismissing the claims against Aetna should be affirmed.

Moreover, Hudes cannot challenge the dismissal of her claims against Aetna in any reply. *See McBride*, 800 F.2d at 1210-11; *see also Steel Joist Inst. v. OSHA*, 287 F.3d 1165, 1166 (D.C. Cir. 2002) (refusing to consider argument raised for first time in reply). Indeed, it would be "patently inequitable" to require Aetna to "defend an appeal by guessing the arguments that the appellant might make in [her] reply brief." *McBride*, 800 F.2d at 1211.

II. HIPAA Provides No Private Right Of Action.

Even if Hudes had not waived her appeal as to Aetna, the district court's judgment as to Aetna should be affirmed. The only ruling the district court made with respect to Aetna was the conclusion that HIPAA, 42 U.S.C. §§ 1320d to 1320d-9, provides no private right of action. App. 58-60. The district court dismissed the only claim through which Hudes sought to invoke the court's original jurisdiction (*i.e.*, HIPAA) and declined to exercise pendent jurisdiction over the remaining state law claims. App. 60.

As a threshold matter, Hudes failed to preserve this issue for review. In response to Aetna's motion to dismiss, Hudes did not dispute that HIPAA provided no private right of action. (*See* Dkt. # 62-1 at 27.) As noted by the district court, Hudes acknowledged the Secretary of Health and Human Services is responsible for enforcing HIPAA. App. 59. Having failed to challenge the dismissal of her HIPAA claim before the district court, Hudes waived the issue for purposes of appeal. *See NRA v. FEC*, 854 F.2d 1330, 1337 (D.C. Cir. 1988) (holding appellant's failure to raise argument in response to motion to dismiss waived argument on appeal).

Even if the issue were preserved, the district court properly dismissed the HIPAA claim for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted. The dismissal of a cause of action

for lack of subject matter jurisdiction or for failure to state a claim is reviewed *de novo*. *See Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 786 (D.C. Cir. 2010) (lack of subject matter jurisdiction); *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012) (failure to state a claim).

Every court to consider the issue has held HIPAA provides no private right of action. *See, e.g.*, *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010) ("HIPAA does not create a private right of action."); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010) ("HIPAA does not create a private right of action for alleged disclosures of confidential medical information."); *Acara v. Banks*, 470 F.3d 569, 571-72 (5th Cir. 2006) ("Every district court that has considered this issue is in agreement that the statute does not support a private right of action.") (collecting cases); *Runkle v. Gonzales*, 391 F. Supp. 2d 210, 237-38 (D.D.C. 2005) (dismissing HIPAA claim involving disclosure of federal employee's medical diagnoses by employer because HIPAA provides no private right of action); *Johnson v. Quander*, 370 F. Supp. 2d 79, 100 (D.D.C. 2005) (dismissing HIPAA claim involving disclosure of DNA information because no private right of action exists under HIPAA), *aff'd*, 440 F.3d 489, 503 (D.C. Cir. 2006); *Logan v. Dep't of Veterans Affairs*, 357 F. Supp. 2d 149, 155 (D.D.C. 2004) (dismissing HIPAA claim involving testimony regarding federal employee's mental health because

HIPAA provides no private right of action). Accordingly, the district court properly dismissed Hudes' HIPAA claim with prejudice because HIPAA provides no private right of action. App. 58-60. For all these reasons, the judgment of the district court should be affirmed.

CONCLUSION

The Court should affirm the judgment of the district court dismissing all claims against Aetna.

Respectfully submitted,

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Dated: September 5, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

1. This brief complies with the page limitation of the Court's Order of June 6, 2012, because this brief contains 2,481 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of September, 2012, the foregoing Brief of Appellee Aetna Life Insurance Company was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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