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August 10, 2009

BY HAND

Hon. Raymond J. Dearie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***Catherina Lorena Cenzon-DeCarlo v. The Mount Sinai Hospital***
No. 09 Civ. 3120 (RJD-JO)

Dear Judge Dearie:

We represent Defendant The Mount Sinai Hospital (“Mount Sinai”) in the above-referenced matter. We submit this letter to request a pre-motion conference with respect to Defendant’s proposed motion to dismiss the Complaint for failure to state a claim. The Complaint, which is brought solely under 42 U.S.C. § 300a-7(c) (the “Church Amendment”), should be dismissed because the Church Amendment does not grant individual litigants a private right of action.

Plaintiff is an operating room nurse at Mount Sinai whose allegations arise from an incident on May 24, 2009 involving an emergency abortion procedure during Plaintiff’s voluntary “on-call” weekend shift. Plaintiff volunteered to be the only “on-call” nurse on that Sunday on the operating team that handles “complex and specialized surgeries” including, *inter alia*, gynecology. Plaintiff alleges that Mount Sinai violated the Church Amendment by “forcing” her to participate in the abortion procedure. She also alleges that Mount Sinai committed allegedly retaliatory action thereafter by allegedly assigning her to only one “on call” shift in August, 2009.

The Church Amendment was enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45 (“HPEA”). HPEA’s stated purpose was “to extend through fiscal year 1974 expiring appropriations authorizations in the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act, and for other purposes”. The relevant part of the Church Amendment prohibits entities that receive funding through certain federal sources from discriminating in the employment,

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promotion or termination of employment of health care personnel who refuse to participate in sterilization or abortion procedures on the basis of their religious beliefs or moral convictions. 42 U.S.C. § 300a-7(c).

In order to state a viable statutory claim, a plaintiff must demonstrate that her claim is permitted by either an express or implied private right of action. *See Olmsted v. Pruco Life Ins. Co.*, 283 F.3d 429, 434-436 (2d Cir. 2002) (affirming dismissal of claim under §§ 26(f) and 27(i) of the Investment Company Act of 1940 because the Act does not confer an express or implied private right of action); *Salahuddin v. Alaji*, 232 F.3d 305, 308-312 (2d Cir. 2000) (affirming dismissal of claim under the Child Support Recovery Act of 1992 because the Act does not confer a private right of action). There can be no dispute that there is no express right of action because there is nothing in the Church Amendment's language or statutory structure that expressly confers a private right of action.

There is likewise no basis for implying a right of action under the Church Amendment. First, courts have come to view the implication of private remedies in statutes with no express right of action with "increasing disfavor." *Hallwood Realty Partners L.P. v. Gotham Partners L.P.* 286 F.3d 613, 619 (2d Cir. 2002). *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978) ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best"); *Salahuddin*, 232 F.3d at 308 (2d Cir. 2000) *quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("[T]he mere fact that a statute was designed to protect a certain group does not require the implication of a private cause of action for damages on their behalf. Nor, absent indicia of Congressional intent to create a private right of action, need the court consider the practical likelihood that a private federal enforcement action would be useful in advancing the Congressional purpose") (internal citations omitted).

Second, there is nothing in the legislative history of the Church Amendment that even remotely suggests that Congress intended to create a private right of action. The only courts to address whether individual litigants can sue under the Church Amendment have ruled that no private right of action exists under the statute. *See Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 U.S. Dist. LEXIS 36897 at *15 (C.D. Ill. June 6, 2006) (granting motion to dismiss Church Amendment claim because the statute does not confer a private right of action); *Moncivaiz v. Dekalb*, No. 03-50226, 2004 U.S. Dist. LEXIS 3997 at *7 (N.D. Ill. Mar. 12, 2004) (same).

In addition, the regulations promulgated in December 2008 by the Department of Health and Human Services (the "Department") for the "implementation and enforcement of the Church Amendment, 42 U.S.C. 300a-7" do not mention any right for individual litigants to sue under the Church Amendment, demonstrating that a private right of action was never intended. Rather, the regulations specifically designate the Office of Civil Rights ("OCR") of the Department to "receive complaints of discrimination and coercion based on the health care conscience

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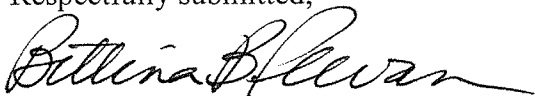
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protection statutes and this regulation” and provide that the OCR will “coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to which a complaint has been filed, receives funding.” 45 C.F.R. §88.6 (2009). The annotations to the regulations in the *Federal Register* designate the staff of the Department funding the health care entity to enforce the statute’s requirements “through the usual and ordinary program mechanisms” and provide that “the Department will work with such government or entity to comply or come into compliance with such requirements or prohibitions.” *Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, 73 Fed. Reg. 78072, 78074 (Dec. 19, 2008) (codified at 45 C.F.R. pt. 88). While the OCR is designated to “receive and coordinate” complaints, the annotations state that “[t]he Department-funding components will bear the actual responsibility for enforcement of the health care conscience protection laws” and vest authority with the Department to “consider all legal options”, including “the termination of funding” or requiring a “return of funds paid out.” *Id.* at 78074, 78086.

Courts routinely disallow private enforcement of statutory claims in circumstances like this where governmental entities are vested with the authority to police statutory law. *See Barnes v. Glennon*, No. 9:05-0153, 2006 WL 2811821 at *6 (N.D.N.Y. Sept. 28, 2006) (dismissing plaintiff’s HIPPA claim “since there is no private right of action stemming from HIPPA” because only New York State can bring a cause of action on behalf of plaintiffs); *Hayden v. Pataki*, No. 00-8586, 2004 WL 1335921 at *5 (S.D.N.Y. June 14, 2004) (holding that the Civil Rights Acts of 1957 and 1960 “does not provide for a private right of action and is only enforceable by the United States in an action brought by the Attorney General”); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004) (the provisions of 42 U.S.C. § 1971 “are only enforceable by the United States of America in an action brought by the Attorney General and may not be enforced by private citizens”) (citations omitted).

In light of the lack of any legislative intent, as well as the recently-enacted regulations, there is simply no basis to infer a private right of action under the Church Amendment. We therefore request a pre-motion conference on Defendant’s proposed motion to dismiss the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,



Bettina B. Plevan

cc: Joseph A. Ruta, Esq. (*by hand delivery*)
Steven H. Aden, Esq. (*via facsimile*)
Piero A. Tozzi, Esq. (*via facsimile*)