

JACQUELYN FINNEY
Encinitas, CA

FILED
NORTH COUNTY DIVISION

2002 DEC 18 AM 10: 21

(5)
CLERK SUPERIOR COURT
SAN DIEGO COUNTY, CA

In Pro Per

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

JACQUELYN FINNEY

Petitioner and Plaintiff

v.

CALIFORNIA DEPARTMENT OF
MANAGED HEALTH CARE;
DANIEL ZINGALE, DIRECTOR;
ANDREW GEORGE, SENIOR STAFF
COUNSEL, HMO HELP CENTER;
DOES 1 - 100

Respondent and Defendants

Case No: GIN024734

**NOTICE OF MOTION &
MOTION FOR WRIT OF
MANDATE & COMPLAINT
FOR DECLARATORY RELIEF
& MANDATORY INJUNCTION;
MEMORANDUM OF POINTS
& AUTHORITIES & APPENDIX**

Date: January 30, 2003

Time: 3:00 p.m.

Dept: 30

Judge: Hon. Thomas P. Nugent

[Telephonic Ruling (760) 806-6050]

PLEASE TAKE NOTICE that plaintiff, Jacquelyn Finney, moves the Court under Code Civ. Procedure §§ 1085 and 1086 for an order for declaratory and injunctive relief. The grounds for issuance of this order are the protection of the public health and safety, a clear, present and nondiscretionary ministerial duty upon the part of defendants and a clear, present and beneficial right in the petitioner and in the public interest to the performance of that duty at present and in the future frequency with which the issue will arise. Plaintiff has exhausted her available administrative remedies and has no other plain, speedy and adequate remedy.

The Superior Court of San Diego County, North County Division, is located at 325 South Melrose, Vista, California 92083-6627.

This motion is based on plaintiff's Petition, Memorandum of Points and Authorities, Appendix/Exhibits and on all papers filed and records in this action and on any evidence received at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This case arises from a routine Request for Assistance to the California Department of Managed Health Care (hereinafter "DMHC") to order a health plan and its physicians to comply with the First Amendment of the U.S. Constitution, the California Constitution, California Public Policy, Knox-Keene Act statutory mandates per the intent of the Legislature and in particular mandatory provisions (Health & Safety Code § 1340 et seq.), and the common law Doctrine of Informed Consent governing the physician's fiduciary duties to the patient.

Plaintiff submitted her RFA to Daniel Zingale, Director, DMHC on January 29, 2002, submitted three Addenda to her RFA on April 1, 2002, April 15, 2002, and May 9, 2002, and a memorandum to Andrew George, DMHC Senior Legal Counsel, on April 8, 2002, meticulously documenting numerous facts to support her RFA requests. (See Appendix: Exhibit Nos. 2, 3, 4, 5 & 6.)

Rather than properly investigate plaintiff's RFA and perform duties mandated by the U.S. and California Constitutions, California Public Policy, California statutory mandates and established common law doctrines, defendants Zingale and George conspired to violate plaintiff's Constitutional right to protection from retaliation for free speech (by a health care service plan and its physicians) and other legal rights. Defendants do not have immunity for these acts and omissions. They produced documents that were unsubstantiated by facts and conclusions as a pretext for denial of all plaintiff's requests and wrongful closure of her case. (See Appendix: Exhibit Nos. 7 and 8) Defendants conspired with the Kaiser Foundation Health Plan (hereinafter "KFHP") and other entities to frustrate and prevent plaintiff and all California managed care patients from receiving the benefit and protection of the laws that they and their contracting agents are paid by public funds to enforce, intentionally subjecting patients and the general public to unnecessary disease, disability and death.

Defendants refuse to acknowledge and declare that, if managed care patients are coerced into waiving their right to speak what they think about their legal rights and are retaliated against for enforcing their rights, managed care patients have no rights. Plaintiff has been denied honest, competent and medically necessary dermatology care for two years in retaliation for demanding the right to speak about the enforcement of her rights prior to the establishment of and during the course of her physician-patient relationships.

Defendants' obstruction of a DMHC law enforcement order caused plaintiff to file this petition. Defendants have never denied plaintiff's statements affirming the existence of this order. (See Appendix: Exhibit No.1.) The requirements now placed on defendants by this Court will compel them to perform their nondiscretionary ministerial duties or to provide truthful reasons for their refusal to perform their duties.

Individual defendants have acted fraudulently within the scope of their employment in conspiracy with other parties to decrease the value of and render plaintiff's health benefits illusory, unjustly enriching the parties to the conspiracy and subjecting plaintiff to physical harm and emotional distress. As a result, plaintiff's health care benefits are worth substantially less than what was advertised and sold to her by KFHP.

Defendants have no discretion whatsoever in enforcing statutory mandates that defendant DMHC was created by the Legislature to enforce, i.e., to prevent health care service plans from harming patients by wrongfully interfering in the traditional relationship of trust and communication between the professional and the patient.

II. ARGUMENT

A. Standards Governing Petitions for Writ of Mandate

"A writ of mandate will lie to 'compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station' (Code Civ.Proc. § 1085) 'upon the verified petition of the party beneficially interested,' in case 'where there is not a plain, speedy, and adequate remedy, in the ordinary courts of the law' (Code Civ.Proc. § 1086)." *Venice Town Counsel v. City of Los Angeles*, (1996) 47 Cal.App.4th 1547, 1556. "The writ will issue against a county, city or other public body or against a public officer." *Id.* (citations omitted). "Two basic requirements are essential to the issuance of a writ:

(1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty.” *Id.* (citations omitted).

A writ of mandate is proper when the action taken by an administrative agency is so palpably unreasonable that it has abused its discretion as a matter of law. [*Sanders v. City of Los Angeles* (1961) 55 Cal. 2d 626, 639, 12 Cal. Rptr. 671, 361 P.2d 247]

Importantly, petitions for redress of grievances are used to protect citizens from retaliation for speech about the preparedness of a vital public safety institution under the First Amendment to the U.S. Constitution. See *Ulrich v. City & County of San Francisco*, (No. 01-15717 9th Circuit 10/11/2002) and *Conant v. Walters* (No. 00-17222 9th Circuit 10/29/2002).

B. The Binding Effect of the 9th Circuit’s Opinions

The Ninth Circuit’s legal conclusions in *Ulrich v. City and County of San Francisco* (No. 01-15717 9th Cir. 10/11/2002) and *Conant v. Walters* (No. 00-17222 9th Cir. 10/29/2002) are binding on this motion. “The [previously] published decisions... are the controlling law of the circuit.” *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 772 (9th Cir. 1996).

III. PLAINTIFF IS ENTITLED TO A WRIT OF MANDATE DECLARING HER LEGAL RIGHTS AND OTHER RELIEF WITHOUT FURTHER DELAY

A. Plaintiff Has Suffered Loss of Benefit or Privilege in Retaliation for First Amendment Speech Re: Public Concern

The U.S. Court of Appeals for the Ninth Circuit stated in *Ulrich v. City and County of San Francisco* (No. 01-15717 9th Cir. 10/11/2002):

“Dr. Ulrich’s U.S.C. § 1983 claims are based on the constitutional admonishment that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected interests...’ *Perry v. Sindermann* 408 U.S. 593, 597 (1972). To meet this element of a First Amendment retaliation claim, Dr. Ulrich had to demonstrate only that he suffered a loss of any ‘governmental benefit or privilege in retaliation for protected speech activity’ [*Hyland v. Wonder*, 972 F.2d 1129, 113-35 (9th Cir. 1992)]... ‘An opinion about the preparedness of a vital public safety institution... goes to the core of

what constitutes speech on matters of public concern.” *Gilbrook v. City of Westminster* 177 F. 3d at 866.

Defendant DMHC exists to protect plaintiff’s right to health care benefits as mandated by California law. Plaintiff has been denied medically necessary health care benefits for two years in retaliation for her refusal to consent to KFHP’s coercive demands that she expressly waive her right to discuss the impact of her legal rights upon her physician-patient relationships prior to the establishment of and during the course of the relationships.

Plaintiff’s benefits under her health care service plan contract have been rendered illusory in violation of CCR § 1300.67.4(a)(3)(A). Without question defendants have a clear, present and ministerial duty to enforce plaintiff’s rights to receive health care benefits as mandated by state law. Plaintiff and the public have a clear, present and beneficial right to have defendants perform their duty. The public interest suffers from their failure to perform such duty.

B. Plaintiff has Suffered Harm From Retaliation and Coercion to Waive Free Speech Rights in the Physician-Patient Relationship

The U.S. Court of Appeals for the Ninth Circuit stated in *Conant v. Walters* (No. 00-17222, 9th Cir.10/29/02):

“In the marketplace of ideas, few questions are more deserving of free speech protection than whether regulations affecting health and welfare are sound public policy... Without open communication with their physicians, patients would fall silent and appear uninformed. The ability of patients to participate meaningfully in the public discourse would be compromised...” (Conant Opinion, p.11)

The government’s policy does, however, strike at core First Amendment interests of doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient. That need has been recognized by the courts through the application of the common law doctor-patient privilege. *See Fed. R. of Evid. 501...* (Conant Opinion, p.14)

The doctor-patient privilege reflects ‘the imperative need for confidence and trust’ inherent in the doctor-patient relationship. *Trammel v. United States*, 445 U.S. 40, 51 (1980)... The Supreme Court has recognized that physician speech is entitled to First

Amendment protection because of the significance of the doctor-patient relationship. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)... This Court has also recognized core First Amendment values of the doctor-patient relationship. See *Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd of Psychology*, 228 F.3d 1043 (9th Cir. 2002).”

In his concurring opinion (pp. 26-27), Judge Kozinski stated: “Indeed, the right to hear and the right to speak are flip sides of the same coin. As Justice Brennan put it pithily, ‘It would be a barren marketplace of ideas that had only sellers and no buyers.’ *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965)...

In this case, for instance, it is perfectly clear that the harm to patients from being denied the right to receive candid medical advice is far greater than the harm to doctors from being unable to deliver such advice. [emphasis supplied] While denial of the right to speak is never trivial, the simple fact is that if the injunction were denied, the doctors would be able to continue practicing medicine and go on with their lives more or less as before. It is far different for patients who suffer from horrible disabilities...”

Defendants have condoned patient “gagging” and denial of other privileges and benefits in retaliation for plaintiff engaging in protected First Amendment speech on a matter of public concern, causing harm to her health and well-being. Without question defendants have a clear, present and ministerial duty to protect plaintiff from harm by health plans/physicians who violate her right to health care benefits as mandated by state law. Plaintiff and the public have a clear, present and beneficial right to have defendants perform their duty. The public health and safety suffers from their failure to perform such duty.

C. It Is in the Public Interest to Prevent Repetition of Constitutional Violations that Evade Review

The public importance of the matter to be litigated can be a significant factor affecting a Court’s determination concerning the adequacy of alternative legal remedies. Courts may consider whether a case raises an issue of widespread interest [See *Brandt v. Superior Court* (1985) 37 Cal. 3d 813, 816, 210 Cal. Rptr. 211, 693 P.2d 796] or presents a significant and novel constitutional issue. [See *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 851, 143 Cal Rptr. 695, 574 P.2d 766]

The Court may consider whether delay in adjudicating an issue would have an adverse impact on the public welfare. [*See Brown v. Superior Court* (1971) 5 Cal. 3d 509, 515, 96 Cal Rptr. 584, 487 P. 2d 1224] Related to these factors a Court may also consider whether the questions presented are ones of first impression and general importance to the bench and bar, so that general guidelines can be laid down for future cases. [*Simon v. Superior Court* (1992) 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428]

The California Constitution's free speech clause (Art. I, § 2, subd.(a)) is broader and more protective than the First Amendment free speech clause. "A law may not restrain or abridge liberty of speech or press." *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352,366-367)

Ordering relief does not render issues of public importance raised in plaintiff's Petition moot. It is reasonable that all patients' right to freely speak of and enforce their rights will be violated in future cases without plain, speedy and adequate remedy at great personal and financial cost to the general public and harm to public health and safety.

Plaintiff's Petition raises questions capable of repetition, yet evading review, which is in the public interest for the Court to decide. *Copley Press, Inc. v. Superior Court* (1991) 228 Cal. 3d 77, 278 CR 443. Plaintiff's issues are of such importance to public health and safety that due to the frequency with which they arise, this Court's order must provide for future relief. *Green v. Superior Court* (1974) 10 C3d 616, 622 n6, 111 CR 704.

The Doctrine of Informed Consent and health plan/medical group wrongful interference physician-patient communication were issues recently before the Orange County California Superior Court [*McCall v. Pacificare of California, Inc*, No. 788545] This complaint alleged that Pacificare and its contracting doctors violated their statutory duties owed to plaintiff per California Health and Safety Codes (Knox-Keene Act) and California Public Policy (Business and Professions Code § 2056) that resulted in unnecessary death. Plaintiff alleged fraudulent communication by the plan and the doctors that created a foreseeable risk of harm.

The family's attorney stated that he had requested an injunction to require Pacificare and other health plans to honestly communicate with patients in future cases, stating:

"The injunction would be a remarkable thing if we got it. It would take a fairly courageous judge." (*Los Angeles Times*, p. B-1, November 11, 2002)

On the eve of trial a confidential settlement was reached. (Los Angeles Times, page B-1, November 15, 2002) By not going to trial, the attorney's request for injunctive relief is moot. However, this Court is able to grant injunctive relief to deter and punish future violations that intentionally harm the public health and safety.

D. IF TWO OR MORE PERSONS CONSPIRE TO COMMIT ANY ACT INJURIOUS TO THE PUBLIC HEALTH, TO PUBLIC MORALS OR TO OBSTRUCT JUSTICE, OR THE DUE ADMINISTRATION OF THE LAWS, THEY ARE PUNISHABLE FOR A FELONY.

Defendants Zingale and George acted within the scope of their authority to investigate plaintiff's RFA and apply the facts to the laws that DMHC is mandated to enforce by statute, common law and the California and U. S. Constitutions. However, they conspired with a health plan and other parties to retaliate against plaintiff, obstructing a DMHC law enforcement order declaring plaintiff's First Amendment right to free speech on a matter of public concern. This right was clearly established at the time of the violation.

Plaintiff provided fair and clear notice and warning that their obstruction of this DMHC law enforcement order was unconstitutional and otherwise in violation of the law. [*See Hope v. Pelzer*, -U.S.-, 122 S. Ct. 2508, 2513, 2156, 153 L. Ed. 2d 666 (2002)]

Defendants' conduct lies so obviously at the very core of what the First Amendment prohibits that the lawlessness of the conduct was readily apparent to them, notwithstanding the lack of fact specific case law. [*See Lee v. Ferraro*, 284 F. 3d 1188, 1194 (11th Cir. 2002)]

Defendants have conspired to violate HSC §1386(b)(6) and California Penal Code §182(a)(5) to aid and abet KFHP, a participant in the PBGH Racketeering Enterprise (See Plaintiff's Petition, Exhibit No.1). Defendants have invited KFHP and PBGH to improperly influence and control the state's review of patient complaints, grievances and appeals against health care service plans. Defendants have subverted due process to be injurious to the health of all California managed health care patients.

Defendant DMHC has solicited KFHP's access and control, while intentionally denying patient access and due process by creating a "black box" to obfuscate review criteria, procedures and other information material to the disposition of individual complaints, grievances and appeals. (See Plaintiff's Petition, Exhibit No.2)

Defendants refusal to properly apply the facts of plaintiff's case to the controlling law was intended to and did obstruct justice. DMHC Nurse Consultant's e-mail and defendant Andrew George's letter to plaintiff (See Appendix: Exhibit Nos. 8 and 9) state findings that are unsupported by substantial evidence and constitute an abuse of discretion [*Pyles v. Merit Sys. Prot. Bd.*, 45 F. 3d 411, 414 (Fed Cir 1995)].

To succeed in establishing a retaliation claim for exercising First Amendment rights, plaintiff must establish by preponderance of the evidence that (1) she engaged in conduct protected by the First Amendment and (2) that this constitutionally protected conduct was a motivating factor in the retaliation against her. [*See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)].

In order to retaliate against a plaintiff for her speech, defendants must be aware of that speech. [*See Keyser v. Sacramento City Unified Schl Dist.*, 265 F. 3d 750-51 (9th Cir. 2001)]

Plaintiff has presented both direct evidence of retaliatory motive and three types of circumstantial evidence: (1) proximity in time between protected speech and the retaliation; (2) the health plan's expressed opposition to the speech, and (3) other evidence that the reasons proffered by the health plan for the denial of necessary medical benefits are false and pretextual. [*See Keyser*, 265 F.3d at 751-52].

IV. CONCLUSION

RESPONSIBILITY

- Defendants have failed to take responsibility to perform their duty to enforce the legal mandates as intended by the Legislature per California Health and Safety Code § 1342 et seq., i.e., "It is the intent and purpose of the Legislature to promote the delivery of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by a health care service plan by ensuring the traditional relationship of trust and confidence between patient and the professional."
- Defendants refuse to acknowledge and declare that, if managed care patients are coerced into waiving their right to speak what they think about their legal rights and

are retaliated against for enforcing their rights, managed care patients have no rights.

- Defendants refuse to acknowledge that it is illegal for a health plan to force a patient to leave that plan, in full or in part, to obtain covered medically necessary health care benefits in retaliation for refusing to waive her right to free speech.

CREDIBILITY

- Defendants' findings and conclusions have no credibility, because they are unsubstantiated by facts. Defendants have never disputed that they have obstructed a DMHC law enforcement order mandating that KFHP and its physicians discuss with plaintiff the impact of her legal rights and protections prior to the establishment of and during the course of her physician-patient relationships. (See Appendix: Exhibit No.1)
- This Court should give no weight to defendants' after-the-fact, contrived, and disingenuous answers to plaintiff's Petition. Had defendants' answers any credibility, defendants would have provided these answers to plaintiff without being compelled to do so by this Court.

ACCOUNTABILITY

- Defendants forced plaintiff to file her Petition as the only plain, speedy and adequate remedy to obtain her beneficial right in the performance of defendants' clear, present and non-discretionary ministerial duty.
- The requirements now placed on defendants by this Court will compel their accountability for violations of plaintiff's legal rights for the first time in the 12 month period between the submission of her RFA and the date of the Court's ruling.
- Delay in adjudicating the issues raised in plaintiff's Petition will have an adverse impact on the public welfare, as the questions presented are of general importance to the bench and bar so that general guidelines can be laid down for future cases.

MALIGNITY

- Defendants have demonstrated an invincible malignity in their conduct toward plaintiff and the public health and safety.

- Defendants have conspired to commit an act injurious to the public health and have obstructed justice and due administration of the laws.
- “Without open communication with their physicians, patients would fall silent and appear uninformed. The ability of patients to participate meaningfully in the public discourse would be compromised...”
- The government’s policy does, however, strike at the core First Amendment interests of doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient...”

(See *Conant v. Walters* No. 00-17222, 9th Circuit 10/29/2002)

For the foregoing reasons, plaintiff respectfully requests that a writ of mandate be issued without further delay.

Respectfully submitted,

DATED: November 23, 2002

Jacquelyn Finney
 1664 Buttercup Road
 Encinitas, CA 92024-2451
 In Pro Per

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 23, 2002 in Encinitas, California.

Jacquelyn Finney
 Declarant

Signature

