

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN DONAVON ATKINSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN DONAVON ATKINSON
IN PRO SE
3213 WHEELING LANE
BONITA, CALIFORNIA. 91902
619-267-0279
atkinson40@yahoo.com

QUESTIONS PRESENTED FOR REVIEW

- 1) Does the Health Insurance Portability and Accountability Act (HIPAA) establish a duty to a health care facility to maintain and amend a patient's medical record as has been determined by multiple State Appellant Courts?
- 2) Should a mentally disabled Pro Se Plaintiff be allowed to introduce additional California Law at the Appellant Court Level that establishes a Duty owed him that he did not introduce at the District Court Level?

This additional California Law would have prevented the District Court from granting the Defendant's Motion To Dismiss For Failure To State a Claim for Which Relief Can Be Granted.

- 3) Is it OUTRAGEOUS as defined by an Intentional Infliction Of Emotional Distress Cause Of Action for a Defendant to abuse a mentally ill and mentally disabled Plaintiff while they are trying to cover up multiple traumas they inflicted on the Plaintiff and a possible crime?

List Of Parties

- 1) KEVIN DONAVON ATKINSON
Plaintiff & Respondent
- 2) UNITED STATES OF AMERICA
Defendant

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
APPENDIX LSISTING	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Negligent Infliction Of Emotional Distress	2
B. Intentional Infliction Of Emotional Distress	12
REASONS CERTIORARI SHOULD BE GRANTED..	14
I. Review Is Warranted Because The Decisions Of The District Court And The Ninth Circuit Are In Conflict With Other Court's Decisions that HIPAA may be used to establish a duty owed a Plaintiff.	

II. Review Is Warranted Because The Decisions Of
The District Court And The Ninth Circuit Are In
Conflict With:

1. The Seventh Circuit Court

2. Court Of Appeals California, Second
District, Division Seven

That A Plaintiff's Mental Illnesses And Mental
Disabilities Raise The Actions Of A Defendant To
OUTRAGEOUS In An Intentional Infliction Of
Emotional Distress Cause Of Action.

III. Review Is Warranted Because The Ninth Circuit Is
Inconsistent With Its Own Decisions Whether A
Pro Se Plaintiff Should Be Given An Opportunity
To Amend A Complaint Unless There Is No Way
To Correct The Complaint.

IV. Review Is Warranted Because The Ninth Circuit:

"Has so far departed from the accepted and
usual course of judicial proceedings, or
sanctioned such a departure by a lower
court, as to call for an exercise of this
Court's supervisory power."

APPENDIX

**A1. UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**ORDER DENYING PLAINTIFF'S REQUEST FOR
REHEARING EN BANC**

**A2. UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM AFFIRMING DISTRICT COURT'
SOUTHER DISTRICT OF CALIFORNIA'S ORDER**

**A4. UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**ORDER: (1) GRANTING DEFENDANT S MOTION TO
DISMISS PLAINTIFF'S THIRD AMENDED
COMPLAINT, AND DISMISSING WITH PREJUDICE
PLAINTIFF'S THIRD AMENDED COMPLAINT**

TABLE OF AUTHORITIES

CASES

Page

Negligent Infliction Of Emotional Distress

A. Duty By California Civil. Code § 1714, subd. (a)

Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.
(1989) 48 Cal.3d 583 , 257 Cal.Rptr. 98; 770
P.2d 278). 9

Rowland v. Christian
(1968) 69 Cal.2d 108, 112-113 [70 Cal.Rptr. 97, 443
P.2d 561, 32 A.L.R.3d 496]..... 10

B. Duty By HIPAA

Walgreen Co. v. Abigail E. Hinchy
No. 49A02-1311-CT-950
(Ind, Ct. App. Nov. 14, 2014)..... 14

Acosta v. Byrum
638 S.E.2d 246, N. C. Appellant Court, 2006..... 14

RK v. St. Mary's Medical Center Inc
735 SE 2d 715, (W. Va Supreme Court, 2012)..... 14

Byrne v. Avery Center for Obstetrics & Gynecology, P.C
SC 18904, (Connecticut Supreme Court, 2014)..... 15

C. Duty By California Civil. Code §1798

Lucas v. Dep't of Corr.
66 F.3d 245, 248 (9th Cir. 1995)..... 18

Flowers v. First Hawaiian Bank
295 F.3d 966, 976 (9th Cir. 2002)..... 18

Intentional Infliction Of Emotional Distress

Christensen v. Superior Court
(1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79, 820 P.2d
181..... 15

Christensen, supra,
54 Cal.3d at pp. 905-906..... 16

Cole v. Fair Oaks Fire Protection Dist.,
supra, 43 Cal.3d at p. 155, fn. 7..... 16

Holbrook v. Lobdell-Emery Mfg. Co
219 F.3d 598, 602 (7th Cir. Ind. 2000)..... 17

Martinez v. Rite Aid Corp
No. B263665 Court Of Appeals Ca., 2nd District,
Division 7..... 17

**UNITED STATES CODE OF FEDERAL
REGULATIONS**

Health Insurance Portability And Accountability Act (HIPAA) § 164.526.....	4
28 U.S.C. § 1346(b).....	7
U.S.C. § 1001(a)	13

CALIFORNIA CIVIL CODES

California. Civil. Code, §1714 subd. (a).....	9 10, 11, 19
California Civil Code §1798	7, 8, 18, 19, 20, 22

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, filed January 3, 2018, denying rehearing En Banc, is reported at Atkinson v. United States Government on the Court's Electronic Case Files System. Case Number 16-55146

The Memorandum of the United States Court of Appeals for the Ninth Circuit, filed June 26, 2017, Affirming the District Court's Order, is reported at Kevin Atkinson v. United States Government on the Court's Electronic Case Files System. Case Number 16-55146

The Order Of the United States District Court For Southern California, San Diego filed on January 4, 2016, dismissing my complaint is reported at Atkinson v. United States Government on the PACER Electronic Case Filing system case number 3:14-cv-00016-JLS-JMA

JURIDICTION

The Ninth Circuit denied my Request For Rehearing En Banc on January 3 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

A. Negligent Infliction Of Emotional Distress

This Cause Of Action stems from a Primary Care Doctor at the Veteran's Affairs San Diego Health Care System (VASDHS) making a false, slanderous and defamatory entry in my electronic medical record that was subsequently cut and pasted by other doctors throughout my electronic medical record.

I was suffering four separate symptoms of prostate cancer. One symptom was a blood test. **The above VASDHS doctor was aware of these symptoms and that both my parents had died from cancer but was not addressing my symptoms.**

At my annual physical, I asked about the appropriateness of a prostate exam. All of my previous and subsequent Primary Care Doctors have recommended a prostate exam at my annual physical.

The VASDHS doctor became irritated that I had inquired about the exam and then physically hurt me as she performed the exam.

Four days later and only after I'd inquired about a transfer to another doctor, the VASDHS doctor entered a false, slanderous and defamatory entry in my electronic medical record.

This entry indicated that I was seeking a prostate exam for other than clinical reasons and that I behaved inappropriately following the exam.

I was confused and disorientated after the VASDHS doctor hurt me. It flashed through my mind I had just been intentionally hurt. I felt betrayed and violated but I was not disrespectful. I left as soon as I could.

My nightmares regarding this moment have become less frequent, but my waking memories of the incident are intrusive and frequent. VASDHS trauma therapy has eased my suicidal thoughts as a result of the event.

In addition her entry contained multiple lies regarding the note I wrote her asking about the appropriateness of a transfer to another doctor. She was not the only VASDHS staff I delivered this note to. It is an easy exercise to prove that she lied.

She had forgotten my family history of cancer and my symptoms of prostate cancer. I have proven beyond any doubt that her entry was false, slanderous, and defamatory.

Subsequently she acknowledged her mistake in writing and agreed to have her entry removed, but it has not been removed where other doctors cut and pasted it throughout my electronic medical record.

I have been diagnosed with Post Traumatic Stress Disorder (PTSD), depression and anxiety as a result of the above trauma.

It required 36 sessions with a trauma therapist at the VASDHS Military Sexual – Interpersonal trauma clinic to address the above physical and subsequent interpersonal traumas by other VASDHS doctors and staff as a result of them reading the false, slanderous and defamatory entry in my electronic medical record.

This cause of action Negligent Infliction Of Emotional Distress hinges on my pleading multiple authorities that establish a health care facility has a duty to maintain and amend a patient's health care record in accordance with both the Health Insurance Portability and Accountability Act (HIPAA) and California Law.

**Duty By Code of Federal Regulations §164.526
Amendment Of Protected Health Information (HIPAA)**

(b) (2) Timely action by the covered entity.

(i) The covered entity must act on the individual's request for an amendment no later than **60 days** after receipt of such a request, as follows.....

(d) (4) Record keeping. **The covered entity must, as appropriate, identify the record or protected health information in the designated record set that is the subject of the disputed amendment and append or otherwise link the individual's request for an amendment, the covered entity's denial of the request, the individual's statement of disagreement, if any, and the covered entity's rebuttal, if any, to the designated record set.**

Assumption Of Duty By The VASDHS

The VASDHS responded to a Congressional Inquiry from my then Congressman Bob Filner after I asked him for help in removing the false, slanderous and defamatory entries in my medical record as follows:

"Dear Congressman Filner:

Thank you for your inquiry on behalf of Mr. Kevin Atkinson.

Mr. Atkinson's request is being processed as a medical record amendment under HIPAA (45 CFR parts 160-164), 38 U.S.C. and the VHA Handbook 16051."

It took the Veteran's Administration 2 months to respond as shown above to a Congressional Inquiry and over 5 months more to falsely claim they had completed my request.

All this time my care for cancer symptoms was on hold. I was suffering from diagnosed PTSD, anxiety and depression as a **direct result of my care at the VASDHS.**

I could not take any more abuse by VASDHS providers who read the false, slanderous and defamatory entries so I went without much needed care and traveled into Mexico for what care I could afford.

The VASDHS staff involved in processing my Medical Record Amendment knew this. It was in the Congressional Inquiry from Congressman Filner.

Office For Civil Rights Findings

An Office For Civil Rights investigation, in spite of being **grossly incompetent and incomplete**, concluded that the VASDHS violated the aforementioned section.

"(b) (2) Timely action by the covered entity." of HIPAA.

The Office Of Civil Rights then required a VASDHS employee to be sanctioned as a result of its findings.

Current State Of My Electronic Medical Record

The VASDHS is still in violation of the above section:

“(d) (4) Record keeping. The covered entity must, as appropriate, identify the record or protected health information in the designated record set that is the subject of the disputed amendment.”

For six years past the deadline for amending my electronic medical I have been subjected to abuse by VASDHS providers as a result of the VASDHS not identifying the entries in my electronic medical record as required by HIPAA. This causes me distress in the form of extreme anxiety attacks.

All attempts by me to have the VASDHS identify the remaining false, slanderous and defamatory entries in my medical record that were cut and pasted from the original entry have gone ignored by the VASDHS.

District And Appellant Court Findings

I pleaded the above response by the VASDHS to a Congressional Inquiry assuming a duty to perform to HIPAA in four separate Complaints at the District Court level and twice at the Appellant Court level.

These pleadings establish a duty imposed on the VASDHS by HIPAA and assumed by the VASDHS in response to a Congressional Inquiry.

The District Court ignored these pleadings and found no duty to the Defendant and granted the Defendants Motion To Dismiss For Failing To State A Claim For Which Relief Could Be Granted.

The Ninth Circuit ignored these pleadings and affirmed the District Court's Order.

California Civil Codes Establish Duty

The FTCA provides that the law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 1346(b)

Duty By California Civil Code §1798

I did not discover California Civil Code §1798 until I requested a Rehearing En Banc at the Ninth Appellant Court level. I pleaded it at this level.

I am mentally disabled, not an attorney and have not had any help in any of my pleadings.

This California Law definitively establishes a duty to a health care facility to maintain and amend a patient's health care record. It does not leave any discretion to Courts regarding duty. It spells duty out clearly and identifies my rights to relief as a result of a breach of this duty.

1798.35. Each agency shall permit an individual to request in writing an amendment of a record and, shall within 30 days of the date of receipt of such request:

(a) Make each correction in accordance with the individual's request of any portion of a record which the individual believes is not accurate, relevant, timely, or complete and inform the individual of the corrections made in accordance with their request.....

1798.45. An individual may bring a civil action against an agency whenever such agency does any of the following:

(b) Fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual.

(c) Fails to comply with any other provision of this chapter, or any rule promulgated there under, in such a way as to have an adverse effect on an individual.

1798.48. In any suit brought under the provisions of subdivision (b) or (c) of Section 1798.45, the agency shall be liable to the individual in an amount equal to the sum of:

(a) Actual damages sustained by the individual, including damages for mental suffering.

Appellant Court Findings

The Appellant Court ignored my pleading duty by California Civil Code §1798. At the very least it should have been consistent with its own case history and referred the matter back to the District Court allowing me to file another Amended Complaint to plead this additional California Law

Duty By California Civil. Code § 1714, subd. (a)

Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.
(1989) 48 Cal.3d 583, 257 Cal.Rptr. 98; 770 P.2d 278

"The principle is well established that "[everyone] is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care" (Civ. Code, § 1714, subd. (a).) "[In] the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, **no such exception should be made unless clearly supported by public policy.** [Citations.] [¶]

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the **foreseeability of harm to the plaintiff**, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of

the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (Rowland v. Christian (1968) 69 Cal.2d 108, 112-113 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496].)"

Establishing duty by California Civil Code, §1714, subd.(a) depends on me establishing **"the foreseeability of harm to the plaintiff"**.

1. I gave prior written notice to the VASDHS detailing the harm their failures would have on me. I told them my care for symptoms of cancer was on hold because VASDHS providers and staff were abusing me.
2. I gave multiple written notices to the VASDHS detailing the harm their failures were having on me as they were in the process of failing.
3. The Defendant's employees acknowledged in writing the harm their failures were having on me as it was happening.

District And Appellant Court Findings

The District Court dismissed the above evidence I submitted demonstrating foreseeability and asserted it's own false claims that it would be too much of a burden to force health care facilities to conform to HIPAA timelines for maintaining a patient's medical record.

The District Court went on to falsely assert: 1. It would require a health care facility to see fewer patients if it was required to conform to HIPAA timelines. 2. The VASDHS kept me informed of their progress.

Both these claims are incorrect because: 1. An hour of time would bring the VASDHS into compliance where it has been in violation for over 6 years. 2. The VASDHS only informed me of progress when I prompted them.

The District Court found no duty to the Defendant by California Civil Code, § 1714, subd. (a) and granted the Defendants Motion To Dismiss For Failure To State A Claim For Which Relief Could Be Granted.

The Ninth Circuit ignored the evidence regarding foreseeability and affirmed the District Court's Order.

Breach Of Duty And Injury

One of the many violations of the above laws is that the false, slanderous and defamatory entries in my medical record should be flagged as being disputed by me. They are not.

For over 7 years past the date of the original entry I have been subjected to abuse by providers at the VASDHS as a result of these false, slanderous and defamatory entries.

In addition, my health care was on hold for symptoms of cancer for over 5 months as the VASDHS repeatedly failed to perform to HIPAA as they stated they would. I let them know in advance my care for cancer was on hold.

I was a mentally ill patient suffering from diagnosed depression, anxiety and PTSD as a result of my care at the VASDHS. I could not tolerate the repeated abuse by providers that were reading the false, slanderous and defamatory entries in my electronic medical record.

B. Intentional Infliction Of Emotional Distress

Subsequent to the infliction of the above traumas I suffered a bicycle vs. truck accident that left me with a brain injury requiring intensive care for four days.

The resulting damage to my brain led a Social Security Disability Insurance Adjudication Judge to grant me lifelong disability.

The damage to my brain is severe. I suffered a subdural hematoma (brain bleed), where oxygen was cut off from parts of my brain.

The VASDHS employees that inflicted me with Intentional Infliction Of Emotional Distress were aware of my mental illnesses and mental disability.

In one case the VASDHS employee that was sanctioned for his failures to properly maintain and amend my medical records subjected me to Intentional Infliction Of Emotional Distress out of anger and revenge.

Other instances occurred as I was uncovering multiple VASDHS employees had submitted false statements in response to two Congressional Inquiries, an investigation by the Office For Civil Rights and an investigation by the Veteran's Affairs Office Of The Inspector General.

These employees knowingly submitting false statements to government agencies and knew the implications of 18 U.S.C. § 1001(a). They said so in writing.

Ultimately the employment of the employees who submitted the above false statements was terminated, but during the last month of their employment they were allowed to inflict me with Intentional Infliction Of Emotional Distress as I was uncovering their lies. The abuse was repeated multiple times.

I detailed the abuse, why the individual was doing it and the distress it was causing me in letters to the VASDHS Patient's Advocate and the VASDHS Director.

I described my anxiety attacks as severe and lasting for many hours as a result of the abuse by the above individual. I asked for relief and to not be contacted by the perpetrator of the abuse again.

The Director of the VASDHS knew of my mental illnesses and mental disability. He responded to my request by feigning ignorance and allowed the abuse by his subordinate to continue. In reality, as a measure of the corruption at the VASDHS the person abusing me wrote the response and the Director only signed it.

District And Appellant Court Findings

The District Court ignored my susceptibility to the above abuse through my mental illnesses and mental disability and found the actions of Defendant employees were not OUTRAGEOUS. This is in conflict with multiple other courts finding.

The Ninth Circuit also ignored my susceptibility to the above abuse through my mental illnesses and mental disability and affirmed the District Court's Order.

REASONS CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because The Decisions Of The District Court And The Ninth Circuit Are In Conflict Other Court's Decisions that HIPAA may be used to establish a duty owed to a Plaintiff.

Negligent Infliction Of Emotional Distress HIPAA Establishes Duty

Although HIPAA does not provide for a private cause of action the following Courts found that HIPAA does not preempt common-law claims for negligence and negligent infliction of emotional distress against a health care provider and **may be used to establish a duty to the health care provider.**

Walgreen Co. v. Abigail E. Hinchy

No. 49A02-1311-CT-950 (Ind, Ct. App. Nov. 14, 2014)

Acosta v. Byrum

638 S.E.2d 246, (N. C. Appellant Court, 2006)

RK v. St. Mary's Medical Center Inc

735 SE 2d 715, (W. Va Supreme Court, 2012)

Byrne v. Avery Center for Obstetrics & Gynecology, P.C
SC 18904, (Connecticut Supreme Court, 2014)

Both the District and Appellant Court decisions are in conflict with the above Court decisions.

II.

V. Review Is Warranted Because The Decisions Of The District Court And The Ninth Circuit Are In Conflict With:

1. The Seventh Circuit Court

2. Court Of Appeals California, Second District, Division Seven

That A Plaintiff's Mental Illnesses And Mental Disabilities Raise The Actions Of A Defendant To OUTRAGEOUS In An Intentional Infliction Of Emotional Distress Cause Of Action.

California Law Defining Outrageous Conduct in An Intentional Infliction Of Emotional Distress Claim

From California Civil Jury Instructions:

"The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional

distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)

" 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware, but acts with reckless disregard of, the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905-906, internal citations omitted.)

""... Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress"" (Cole v. Fair Oaks Fire Protection Dist., *supra*, 43 Cal.3d at p. 155, fn. 7.)

The following Courts determined a Plaintiff suffering from a mental illness or mental disability, is sufficient to establish a defendant's conduct was OUTRAGEOUS in an Intentional Infliction Of Emotional Distress cause of action.

Holbrook v. Lobdell-Emery Mfg. Co.
219 F.3d 598 (7th Cir. 2000)

"Had Holbrook sued the individuals who actually committed these acts, rather than his employer, the result may have been different. It is not difficult to imagine that a jury would exclaim "Outrageous!" upon hearing that Holbrook's co-workers taunted him and set him on fire knowing that he had recently been released from a hospital where he was being treated for severe depression and psychosis. We join the district court's assessment that verbally and physically assaulting a mentally disabled man is cruel and inexcusable.

The difference in my Complaint is that I did sue the correct Defendant, which is the United States Of America.

Martinez v. Rite Aid Corp.
No. B263665 Court Of Appeals California, Second District, Division Seven

Regarding whether a defendant's actions are OUTRAGEOUS in an Intentional Infliction Of Emotional Distress cause of action.

“There was also evidence that Chan engaged in a series of discriminatory and harassing acts toward Martinez based on her **mental disability**. After Martinez disclosed to Chan that she was being treated by a mental health care provider, Chan made multiple derogatory comments about Martinez’s mental health, telling Martinez that she was “mentally a problem” and should “go see [her] psychiatrist.....

Granillo and Acosta also made derogatory comments about **Martinez’s mental health**, calling her “unbalanced” and “mentally off” during the disciplinary process.....

Martinez presented substantial evidence that the conduct of her supervisors extended beyond unfair discipline and criticism about her performance to include repeated derogatory remarks about **her mental disability** and age.”

The Defendant’s employees knew of my mental illnesses and mental disability. They knew of the multiple traumas I had suffered by the Defendant’s employees. One of multiple acts of Intentional Infliction Of Emotional Distress was stating the following to me:

“Nobody thinks anything egregious happened to you. It’s only an issue in your own sick mind.”

The District and Appellant Court ignored my susceptibility to their actions.

The lower courts decided the Defendant's employee's actions were not OUTRAGEOUS which is in conflict with the above Seventh Circuit Court and Court Of Appeals California, Second District, Division Seven Decisions

III.

Review Is Warranted Because The Ninth Circuit Is Inconsistent With its Own Decisions Whether A Pro Se Plaintiff Should Be Given an Opportunity To Amend A Complaint Unless There Is No Way To Correct The Complaint.

“Dismissal of a pro se complaint without leave to amend is proper only if it is clear that the deficiencies of the complaint could not be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995);

see also *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002) (noting that court is cautious in approving a district court’s decision to deny pro se litigant leave to amend).”

To be consistent the Ninth Circuit should have referred the case back to the District Court and allowed me to amend my Complaint to plead California Civil Code §1798 to establish duty.

California Civil Code §1798 establishes a duty to health care providers to maintain and amend a patient’s medical records that is not subject to the discretion of any court.

If I had discovered and pleaded this California Code at the District Court level it would have not been able to use its discretion and dismiss my complaint for Failure To State A Claim For Which Relief Can Be Granted.

Prior to pleading California Civil Code §1798 to establish duty I pleaded both HIPAA and California Civil Code §1714 to establish duty.

I submitted documents that supported establishment of duty by HIPAA and California Civil Code §1714 and both the District Court and the Ninth Circuit ignored them.

These Courts would not have been able to ignore California Civil Code §1798. It clearly states a duty to health care providers to maintain and amend a patient's medical record.

IV.

Review Is Warranted Because The Lower Courts:

"Has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Have we become a society that would condone the perpetrators of the traumas to the "Me Too" victims to do the following to their victims as was done to me?

1. Trivialize the trauma they perpetrated on their victims by stating the following to them:

“Nobody thinks anything egregious happened to you. It’s only an issue in your own sick mind.”

2. Lie and place the blame on their victims for the multiple traumas they subjected them to.
3. Be allowed to verbally abuse their victims with the intent of doing them harm out of anger and revenge because they had been caught covering up the traumas and possible commission of a crime.

What if their victims were mentally ill and mentally disabled? Is this not OUTRAGEOUS behavior?

It has been determined and laws enacted that provide special protection for mentally ill and mentally disabled individuals from deliberate abuse.

The Defendant’s employee’s actions may not rise to criminal intentional infliction of emotional distress but they certainly rise to the level of OUTRAGEOUS as has been determined by multiple Courts.

The District Court and The Ninth Circuit have determined that the Defendant’s employees, particularly Veterans Administration Healthcare System employees are not bound by the normal values and morals of our society.

Conclusion

Based on the foregoing, Petitioner Kevin Donavon Atkinson respectfully submits that this Petition for Writ of Certiorari should be granted.

The Court may wish to consider the following:

1. A summary reversal of the decision of the Ninth Circuit Court of Appeals.
2. A remand to the District Court allowing me to amend my complaint to include California Civil Code §1798, which establishes duty not subject to a Court's discretion.
3. A remand to the District Court with a determination that HIPAA can be used to establish a duty owed to the Plaintiff.
4. A remand to the District Court with a determination that mental illnesses and mental disabilities of the Plaintiff raises the actions of the defendant's employees to OUTRAGEOUS

Dated March 1, 2018

Respectfully submitted

KEVIN DONAVON ATKINSON
IN PRO SE
3213 WHEELING LANE
BONITA, CALIFORNIA. 91902
619-267-0279
atkinson40@yahoo.com