E-FILED
Tuesday, 15 January, 2013 11:54:18 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and the STATE OF ILLINOIS ex rel. VANESSA ABSHER and LYNDA MITCHELL,	)	04-2289
Plaintiffs,	)	
v.	)	
MOMENCE MEADOWS NURSING CENTER, INC. and JACOB GRAFF,	)	
Defendants.	)	

ORDER ON SUMMARY JUDGMENT

The relators, Vanessa Absher (Absher) and Lynda Mitchell (Mitchell) have brought this *qui tam* action against the defendants, Momence Meadows Nursing Center, Inc. (MMNC) and Jacob Graff (Graff), to recover treble damages and penalties pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq*. (the FCA) and the Illinois Whistleblower Reward and Protection Act, 740 ILCS 175/1 *et seq*. (the Illinois Act).

The defendants have filed a motion for summary judgment [313-314] and a supplemental motion for summary judgment [344]. Absher and Mitchell have filed a response in opposition [321, 324, 326] and a supplemental response in opposition [347]. The defendants filed a reply [348] and the United States filed a statement of interest in response to the motion [350]. The relators filed a response stating that they did not oppose the statement of interest [351] and the defendants filed a reply in opposition to the statement of interest [352].

BACKGROUND

At all relevant times, MMNC operated a 140-bed long term care facility located in Momence, Kankakee County, Illinois. Graff was an owner of MMNC. Mitchell was a licensed registered nurse who worked at MMNC from 2001 until February 2003. Absher was a licensed practical nurse and worked at MMNC for a year from 1998 to 1999, and then from January 2000 to February 2003. Absher and Mitchell allege that residents of MMNC routinely went without medical care and food, were left to lay in urine and feces-soaked beds, went without prescribed medications needed for their mental and physical well-being and pain relief, suffered from ongoing outbreaks of skin disorders and infection including scabies and painful bedsores, and otherwise suffered from substantial neglect. They allege that these conditions were ongoing until Graff sold the facility in approximately June 2006.

Absher and Mitchell further allege that during their employment at MMNC, employees forged or

destroyed medical documents and staffing records to make it appear that MMNC residents received proper care. They also allege that the nursing staff was sometimes told not to log negative information about residents' care, and if negative care was charted, MMNC administrators would rip the pages from the chart and create more favorable information, sometimes forging the nurses' signatures on the newly created documents.

MMNC billed Medicare and Medicaid for care provided to many of its residents. The relators allege that through their falsification of medical and staffing records, MMNC concealed the fact that residents received substandard care or did not receive meals or prescribed medications. By failing to provide adequate care and by failing to staff the facility adequately, it filed false claims for services to Medicare and Medicaid that did not meet minimum standards required for payment under those programs. The relators speak of rampant scabies outbreaks; nursing assistants leaving their assignments and going outside to smoke marijuana, jeopardizing patients' health and safety; the choking death of a resident who was ignored for an entire night; a patient who was scalded by hot bath water; and patients who did not receive medication ordered by their physicians, among other things.

The relators claim that during their employment at MMNC they complained to MMNC management about inadequate patient care and low staffing levels. In October 2002, Absher tendered her resignation because of MMNC's non-compliance with state and federal resignations. She was asked to remain on staff, and was told that changes were coming after January 1, 2003. She remained on staff but resigned (or took an emergency leave of absence) in February 2003, citing stress from the recent death of her mother. Mitchell alleges that as a result of her complaints to MMNC management, she was terminated within days of Absher's departure from MMNC. Mitchell claims that her termination was a pretext and cover-up for MMNC's inadequate care of a resident resulting in his death, and the defendants' attempt to make her a scapegoat for that death.

ANALYSIS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

The relators' sixth amended complaint asserts claims under the FCA, 31 U.S.C. § 3729 *et seq*., and the Illinois Act, 740 ILCS 175 *et seq*. The relators argue that MMNC fraudulently billed Medicare and Medicaid for worthless services and certified falsely that MMNC was in

compliance with all regulations in order to receive payment. The FCA and Illinois Act also prohibit retaliation in employment against any individuals who report violations of those statutes to the relevant authorities.

I. Subject Matter Jurisdiction

As they have done throughout the case, the defendants argue that the court lacks subject matter jurisdiction because the relators are not original sources. Subject matter jurisdiction in any case is a threshold inquiry, subject to review at any time. In 2007, the defendants moved for judgment on the pleadings and/or dismissal [95, 96] based on the Seventh Circuit's newly released opinion in *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730 (7th Cir. 2007). In September 2008, the court granted the defendants' motions and dismissed this case with leave to reinstate. Leave was granted in March 2009, and the plaintiffs filed their sixth amended complaint [145]. Several months later, the Seventh Circuit released its opinion in *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009), which overruled *Caremark*.

> *Qui tam* actions are subject to a jurisdictional bar when the relator's action is based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Glaser, 570 F.3d at 912-13 (citing 31 U.S.C. § 3730(e)(4)(A)). The court's inquiry is based on three factors: (1) whether the relators' allegations were "publicly disclosed;" (2) if so, whether the lawsuit is "based upon" the publicly disclosed information; (3) and if so, whether the relator is the "original source" of the information. *Glaser*, 570 F.3d at 913.

A. "Publicly disclosed"

"A public disclosure occurs when the critical elements exposing the transaction *as fraudulent* are placed in the public domain." *Glaser*, 570 F.3d at 913 (emphasis added). Public disclosure "bring[s] to the attention of the relevant authority that there has been a *false claim* against the government." *Glaser*, 570 F.3d at 913 (emphasis added). Public disclosure does not require that the allegation of wrongdoing be "widely disseminated" or publicized. *Glaser*, 570 F.3d at 913. The defendants argue that the plaintiffs' claims are founded upon their allegations that Momence was providing care that failed to meet regulatory standards, and that the government was aware of and investigated each of the alleged regulatory violations. However, the issue in this case is not simply whether regulatory standards were met, which is not an issue of fraud (MMNC's patient care might have been negligent, or reckless, or its conduct toward a particular patient could even be intentional, but the care itself would not be fraudulent). The question is whether MMNC billed the federal and/or state governments for false claims. The

critical elements of the *fraud* – the billing for MMNC's services – were not publicly disclosed by way of the reports and investigations of MMNC's noncompliant patient care.

Alternatively, if the court were to determine that the documents *were* publicly disclosed, it would not be a jurisdictional bar, as discussed below.

B. "Based upon"

Under prior Seventh Circuit case law, "based on" was interpreted to mean "derived from." If a relator whose claim derives not from publicly disclosed allegations but from the relator's own investigation of wrongdoing, disclosure in the public domain does not bar the relator from pursuing claims that were "the same or similar to allegations in the public domain." *Glaser*, 570 F.3d at 915 (citing *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999)). Since *Glaser*, "a relator's FCA complaint is 'based upon' publicly disclosed allegations or transactions when the allegations in the relator's complaint are substantially similar to publicly disclosed allegations." *Glaser*, 570 F.3d at 920. In this case, the relators' claims are substantially similar to reports that MMNC failed to meet regulatory standards. The violation of regulatory standards is the first step in the relators' allegations that MMNC fraudulently billed Medicare and Medicaid. Thus, the allegations could be "based on" publicly disclosed information.

C. "Original source"

The *Glaser* opinion restored the purpose and importance of the "original source" exception that had essentially been eliminated by *Bank of Farmington*. *Glaser*, 570 F.3d at 910.

> "[O]riginal source" means an individual who either (i) prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action[.]

31 U.S.C. § 3730(e)(4)(B). The original source exception to the public-disclosure bar is meant to prevent plaintiffs from capitalizing on public information while encouraging plaintiffs to come forward with firsthand knowledge of fraud.

The relators, Absher and Mitchell, worked at MMNC, saw patients' care that they claim to be worthless, and/or were directed to falsify (or saw other staff falsifying) patient records to show that patients were given care that they did not receive. The relators are original sources of this information, which culminated in requests for payment under Medicare and Medicaid. Moreover, they made telephone calls to agencies and hotlines to report their concerns.

To qualify as an "original source" the disclosure must be voluntary. The defendants argue that Absher and Mitchell had a professional obligation to report suspected cases of abuse

or neglect to the government. However, the obligation was not a primary job responsibility; it was incident to their primary responsibility as nurses to provide patient care. *See, e.g., United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (ruling government auditor's disclosure not voluntary; his "paramount responsibility" was to disclose fraud).

The above inquiry is limited to whether the relators have met the jurisdictional bar.[1] The court rules that they have done so. Therefore, the court has subject matter jurisdiction over this case.

II. False claims

The United States has filed a statement of interest [350] in response to the motion for summary judgment. The government notes that it has declined to intervene in this case but retains a significant interest in FCA case law.[2] For that reason, "[t]he United State takes no position on th merits of these particular relators' claims or on whether they have demonstrated a genuine issue of material fact sufficient to survive summary judgment. However, we urge the Court not to adopt Defendants' erroneous interpretations of the law if it does grant their summary judgment motion." Statement of Interest, d/e 350, p.1. The statement of interest deals primarily with the relevant law and the relators' allegations rather than facts, disputed or otherwise. The court has conducted its own research as to the relevant law and concludes that the United States has presented a complete and accurate statement of the law governing this case.

> The FCA penalizes "[a]ny person who ... knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). It also punishes any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C.§ 3729(a)(2).

Chesbrough v. VPA, P.C., 655 F.3d 461, 466 (6th Cir. 2011).

The relevant test is (1) "whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim')." *United States ex rel. Rostholder v. Omnicare, Inc.*, ____ F. Supp. 2d ____, 2012 WL 3399789, at *12 (D. Md. Aug. 14, 2012) (internal citations omitted).

---

[1] It is not, for example, a factual finding or ruling as to the relevant time periods of their claims, or any other factual dispute.

[2] The defendants state, and the court agrees, that the FCA and the Illinois Act require proof of essentially the same elements.

A. Worthless services

The relators claim that MMNC provided worthless services to its residents. "A worthless services claim is a distinct claim under the [FCA]. It is effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided." *Chesbrough*, 655 F.3d at 468-69 (quoting *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001). "In a worthless services claim, the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." *Mikes*, 274 F.3d at 703.

The defendants argue that the relators's claim of substandard services cannot be equated to no services at all. This misapplies the case law. In *Chesbrough*, radiology images were of such poor quality that they had limited to no diagnostic value. *Chesbrough*, 655 F.3d at 465. "A test known to be of 'no medical value,' that is billed to the government would constitute a claim for 'worthless services.'" *Chesbrough*, 655 F.3d at 468 (quoting *Mikes*, 274 F.3d at 702-03). The relators do not claim that no services were provided; they claim that the services were so deficient that they were worthless.

The presentation of a worthless services claim must be knowing, or reckless with deliberate ignorance; negligence or innocent mistake is insufficient. *Mikes*, 274 F.3d at 703.

One difficulty in proving a worthless services claim lies in the per diem billing system utilized by Medicare and Medicaid. *See United States v. NHC Health Care Corp.*, 163 F. Supp. 2d 1051, 1055 (W.D. Mo. 2001). Under the system, nursing homes bill Medicare and Medicaid for overall care per diem, rather than for each individual service. Therefore, occasional services not provided[3] do not give rise to an FCA claim because the billing is the same whether or not the service is provided. When Mitchell, Absher, and other witnesses testify of various meals not given, medications not administered, or patients not bathed, there is no fraud involved because those services were not billed separately to Medicare/Medicaid. However, when the government pays the per diem rate for services that fall short of "the minimum necessary care activities required to promote the patient's quality of life," the facility may have crossed the "very blurry point" into worthless services. *NHC*, 163 F. Supp. 2d at 1055-56. *NHC* is factually similar to this case. The quality of care led to two residents who died, and the Missouri Division of Aging's hotline received complaints from a number of family members as well as staff members.

In this case, whether MMNC's services crossed into the "admittedly grey area" of worthless services is a factual determination. In *United States v. Houser*, Case No. 4:10-cr-00012 (N.D. Ga. Apr. 2, 2012), d/e 290, pp. 430-31, the court found a "long-term pattern and

[3] The relators seem to believe that proper charting is imperative for proper billing, and they base at least some of their claims on the fact that their charting was removed or revised after they had charted the patients' care. No doubt, accurate charting is important for medical purposes. But improper charting does not necessarily prove whether MMNC engaged in fraudulent billing.

practice of conditions at Defendant's nursing homes that were so poor, including food shortages bordering on starvation, leaking roofs, virtually no nursing or housekeeping supplies, poor sanitary conditions, major staff shortages, and safety concerns, that, in essence, any services that Defendant actually provided were of no value to the residents. Given the severe nature of the multiple deficiencies at Defendant's nursing homes, the Court finds that a reasonable person would understand that Defendant provided worthless services."

Mitchell, Absher, and others will testify to specific events – failure to administer medications, feed patients, diagnose ailments and injuries, or tend to critically ill patients, which was, at a minimum, a contributing factor in at least one patient's death. They state that their supervisors knew of insufficient staffing levels, turned a blind eye to patients' ailments, and refused to do anything when confronted with evidence that patients were not receiving their medication. The defendants cite a number of witnesses who worked at MMNC who will testify that the residents received good, quality care.[4] This factual dispute must be resolved at trial. Whether the evidence reflects a long-term pattern of appalling conditions or a series of occasional lapses in the care given to more than 100 seriously ill patients in residence on any given day is for the jury to decide.

B. False certification

False certification may be express or implied. "When a claim expressly states that it complies with a particular statute, regulation, or contractual term that is a prerequisite for payment, failure to actually comply would render the claim fraudulent." *Chesbrough*, 655 F.3d at 467. "Liability can [also] attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned." *Chesbrough*, 655 F.3d at 468.

The defendants argue that the relators cannot show the requisite scienter. The relevant sections of the FCA require the defendants' knowing submission of a fraudulent claim. In this context, "knowing" conduct includes "'acts in deliberate ignorance' or 'reckless disregard' of the truth or falsity of the information." *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) (citing 31 U.S.C. § 3729(b)).

If the plaintiffs come forth with competent proof that the services provided by MMNC were worthless, it would strain credulity that MMNC did not have the requisite scienter to falsify its certifications.[5] The appalling conditions to which Mitchell, Absher, and others expect to testify could lead to the conclusion that any certifications made by someone without knowledge

[4] The defendants cite annual certification, licensure, and complaint surveys to show whether MMNC was in substantial compliance with the relevant regulations. This is compelling, but not dispositive, evidence, because the relators have evidence to suggest that conditions were hidden and investigations thwarted during site visits.

[5] Proving that the services were worthless is one way, but it is not the only way.

of those conditions (for example, an offsite accountant who routinely prepared and signed claims) would have done so in deliberate ignorance. If certifications were made by someone who was aware of those conditions (for example, a MMNC nursing supervisor), any certification would have been made in reckless disregard. The court need not decide which form of scienter applies. The court need only determine whether the relators may attempt to convince a jury that the certifications were false and made with the requisite scienter.

III. Retaliatory discharge

The relators assert claims of retaliatory discharge under the FCA and the Illinois Act. *See* 31 U.S.C. § 3730(h); 740 ILCS § 175/4. To prevail on their claim under the FCA, the relators must show that (1) they engaged in "efforts to stop" potential FCA violations; and (2) their protected conduct was connected to MMNC's decision to terminate their employment. *Halasa v. ITT Educ. Servs., Inc.*, 690 F.3d 844, 847-48 (7th Cir. 2012). The Illinois Act is similar; the relators must prove that (1) they took action in furtherance of the Illinois Act; (b) the employer knew that the relators engaged in that action; and (3) MMNC's adverse action was motivated, at least in part, by the protected conduct. *McDonough v. City of Chicago*, 743 F. Supp. 2d 961, 987-88 (N.D. Ill. 2010). The *prima facie* case under federal and Illinois law is essentially the same.

The defendants argue that the relators must have engaged in protected activity during their employment and their activity "must contain at least some ingredient of uncovering fraudulent activity." *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1051 (N.D. Ill. 1998). In other words, complaining about inadequate care of MMNC's residents is not enough; the inadequate care must be tied to fraudulent conduct. The relators state that MMNC staff members were told that medical charting must reflect all services provided because Medicare/Medicaid claims were based on the care documented in the chart. When, for example, Mitchell complained to her superiors that patients were not given medications when their chart indicated that they had received the medication, she believed that the false charting led to fraudulent Medicare/Medicaid claims.[6]

[6] As discussed elsewhere in this order, the relators' belief that careful charting of each service affected Medicare/Medicaid billing was mistaken; patient care was billed on a per diem basis and not for individual services or medications. However, abject failure to provide adequate medical care *could* form the basis of a worthless services or false certification claim under the FCA or the Illinois Act. That the relators were mistaken about how Medicare/Medicaid billing worked is not fatal to their claim. The situation is distinct from that in *Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996), discussed in *Luckey*. In *Hopper*, an employee complained about how her employer's failure to comply with federal education regulations had a negative impact on special education students; she did not complain to stop fraudulent activity. *Luckey*, 2 F. Supp. 2d at 1052. In the instant case, the relators' complaints were related to exposing or deterring fraud because they believed that fraudulent charting led to fraudulent billing. "Specific awareness of the FCA is not required." *Hopper*, 91 F.3d at 1269.

The defendants knew of the relators' complaints because many of their complaints were communicated directly to various supervisors at MMNC. The relators at times refused to chart inaccurate information when told that they must, and refused to change other nurses' charting which they believed would lead to fraudulent billing.

Moreover, Mitchell claims she was terminated after having made numerous complaints to her supervisors and several calls to hotlines about conditions at the nursing home. That MMNC claims she was terminated for having falsely charted something herself is a factual dispute to be resolved by the jury. Absher claims that she was constructively discharged when Mitchell was terminated. Absher faxed MMNC on February 13, 2003,[7] to state that she was resigning her position at MMNC effectively immediately and/or was taking an emergency mental health leave of absence due to stress caused by her mother's recent death (and that she loved everyone at MMNC and would miss them all) and would "not be back – for now." Absher sent a far less friendly fax a month later, and mentioned the Illinois Whistleblower statute. She, too, had complained to supervisors and made numerous calls to hotlines over the years and was vocal about the substandard care provided to MMNC residents.[8] After the women left MMNC, they were reported to the Illinois Department of Professional Regulation. Whether the relators were terminated for cause or resigned by choice, or whether MMNC chose cut them loose because it was only a matter of time before they blew the whistle, is for a jury to decide.

IV. Individual liability as to defendant Graff

As a final matter, the defendants assert that Graff must be terminated as a defendant because he played no role in the day-to-day management of MMNC. This is hotly contested by the relators. Mitchell and other witnesses state that they overheard telephone conversations in which Graff directed the staff to find patients to fill the empty beds at MMNC, or otherwise would make decisions relating to the operation of MMNC and to patient care. Graff argues that MMNC's management was left to administrators, and patient care decisions were left to nursing staff. His only role, he states, was related entirely to MMNC's finances. Various witnesses state otherwise, but in any event, finances, management, and patient care are often intertwined. Once again, this dispute must be resolved by the trier of fact.

CONCLUSION

[7] The fax is dated February 11, but MMNC's fax transmission information indicates that it was received on February 13 at 7:23 a.m.

[8] Absher's mother was a resident at MMNC. In her March 2003 fax, she stated that her mother was well cared for. In her fax one month earlier, she said that her mother lived at MMNC for seven years and Absher encouraged her to be moved. The court will not speculate how the jury will view those seemingly inconsistent statements.

For the foregoing reasons, the defendants' motion for summary judgment is denied. This case will proceed to jury selection and trial beginning on January 28, 2013, at 9:00 a.m.

Entered this 15th day of January, 2013.

/s/Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE