UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAWN MARIE DELEBREAU,

Plaintiff,

v.

CHRISTINA DANFORTH, LARRY BARTON, MELINDA DANFORTH, JAY FUSS, and GERALDINE DANFORTH,

Defendants.

Case No. 17-CV-1221-WCG

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

On January 31, 2018, plaintiff Dawn Marie Delebreau ("plaintiff" or "Delebreau") filed a "Motion to Quash" the Motion to Dismiss of defendants Cristina Danforth (improperly sued as "Christina" Danforth), Larry Barton, Melinda Danforth, and Geraldine Danforth (collectively, "defendants"). (Doc.#45). On February 12, 2018, plaintiff also filed a "Brief Opposing Defendant's Motion to Dismiss." (Doc.#48). Plaintiff contends that she has stated claims against defendants for prohibited reprisals by a government contractor under 41 U.S.C. § 4712 and under RICO, 18 U.S.C. §§ 1961-1968. (Doc.#45: 1-2, 3; Doc.#48: 1-22, 3-4.) However, plaintiff fails to state a claim upon which relief may be granted against defendants under either of these theories.

The Complaint must be dismissed because it does not allege that any individual defendant engaged in any conduct towards plaintiff that is actionable under federal law.

ARGUMENT

I. The Complaint Must be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1).

The Complaint must be dismissed because there is no subject matter jurisdiction on the basis of a federal question and there is no Article III standing against defendants.

There is no subject matter jurisdiction in federal court because there are no cognizable federal claims asserted. To the extent plaintiff attempts to allege a federal claim arising from adverse employment actions such as her transfers in positions and/or the termination of her employment, Oneida Nation was her employer – not any of the individual defendants. There are no claims alleged in the Complaint against the individual defendants arising under federal law. *See* part III, below. Other than general allegations that the defendants collectively retaliated against plaintiff, plaintiff points to no allegations of the Complaint setting forth claims against any of the defendants on an individual level:

- There is no actionable conduct alleged as to defendant Melinda Danforth. She is not alleged to have engaged in any conduct whatsoever as to plaintiff.
- Defendants Cristina Danforth, Larry Barton, and Geraldine Danforth are not alleged to have been plaintiff's supervisor or employer. Nor did any of these defendants allegedly terminate plaintiff's employment. Accordingly, there are no claims arising under the United States Constitution or the federal laws alleged against any of these defendants.[1]

There is no Article III standing against the defendants. For the same reasons, there is no Article III standing to assert a claim against any of the individual defendants. There is no "causal connection" alleged "between the injury and the conduct complained of" – the job transfers and terminations with Oneida Nation, and any conduct of any one of the individual

[1] Nor is defendant Jay Fuss alleged to have terminated plaintiff's employment or otherwise engaged in conduct toward plaintiff that gives rise to a claim under the federal statutes or U.S. Constitution.

defendants. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (the injury has to be "fairly traceable" to the challenged action of the defendant, and not the result of independent action of some third party not before the court.). As shown in the initial brief, the Complaint alleges no injury-in-fact traceable to conduct of Melinda Danforth, Cristina Danforth, Larry Barton, or Geraldine Danforth. Plaintiff's response does not point to any specific conduct by any individual defendant that caused her injury for which that defendant may be held liable. Plaintiff complains about her job transfers and terminations. (Doc.#48: 5). However, the alleged injury from those events is not traceable to conduct of any of the individual defendants and no defendant can be held liable for the employment transfers or terminations. Therefore, plaintiff lacks standing under Article III to assert claims against defendants upon the alleged retaliation.

II. To The Extent The Claims Seek a Remedy Against Oneida Nation, They Fall Within Tribal Sovereign Immunity.

To the extent plaintiff's claims against defendants arise from actions of Oneida Nation, including the termination of her employment or employment transfers within the Nation, and claim damage from such actions, the claims fall within tribal sovereign immunity. Plaintiff cannot have it both ways. She claims to have suffered injury from the employment actions of Oneida Nation, her employer. However, she sues the individual defendants for those employment actions. To the extent the Complaint is complaining about plaintiff's job transfers and ultimate termination of employment with Oneida Nation, those are claims against Oneida Nation, not the individual defendants. The defendants are not alleged to have undertaken the employment actions.

In response to the motion to dismiss, plaintiff argues that the individual defendants "knowingly participated in federal prohibited retaliatory action such that Defendant individuals, not the tribe are the real parties of interest . . . . For example, the Plaintiff was discharged,

demoted, and discriminated against . . . ." (Doc.#45: 2). However, not one of the individual defendants was plaintiff's supervisor and none of them are alleged to have terminated her employment. Thus, the employment-related allegations are claims against Oneida Nation, not the individual defendants. As such, those claims fall within the Oneida Nation's sovereign immunity and they must be dismissed. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017); *see also Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Brown v. Garcia*, 17 Cal. App. 5th 1198, 225 Cal. Rptr. 3d 910 (Ct. App. 2017).

Plaintiff claims to have suffered "emotional hardship," "financial debt," "lack of employment," "mental anguish," and harm to her "personal integrity." (Compl. at p.4). This harm allegedly was caused by the transfers of employment within Oneida Nation and the termination of plaintiff's employment with Oneida Nation. The Complaint does not allege conduct by the individual defendants establishing a claim against defendants under any federal statute. As shown in part III, below, the Complaint fails to state a claim under any federal statute upon which relief may be granted against defendants.

III. The Complaint Must be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6).

In their initial motion to dismiss brief (Doc.#39), defendants showed that the Complaint fails to state a claim upon which relief may be granted under: (a) Title VII (Doc.#39: 17-21); (b) the False Claims Act (Doc.#39: 21-22); (c) the "No FEAR Act" (Doc.#39: 23-24); (d) the Whistleblower Protection Act (Doc.#39: 24-25); or (e) the state law of defamation (Doc.#39: 25-26). These arguments apparently are conceded, because plaintiff does not argue that she asserts claims under any of these theories and she does not challenge defendants' arguments on these theories.

Instead, plaintiff's response only asserts claims under 41 U.S.C. § 4712 and under RICO, 18 U.S.C. §§ 1961-1968. (Doc.#48: 2). For the reasons shown below, the Complaint fails to

state a claim upon which relief may be granted against defendants under these theories and therefore this action must be dismissed.

A. **The Complaint Fails to State a Claim Under 41 U.S.C. § 4712.**

The Complaint does not set forth the basis of the retaliation claim against the individual defendants and it generally alleged a hostile work environment after plaintiff's alleged whistle blowing. (Doc.#1: 3.) As shown in defendants' initial brief, the Complaint fails to state a claim under the False Claims Act ("FCA") because such claims may be made only against an employer, not an employee. (Doc.#39: 21-22).

In response to the Motion to Dismiss, plaintiff argues that the Complaint makes a claim under 41 U.S.C. § 4712. However, the Complaint does not cite that statute. Further, any claim under 41 U.S.C. § 4712 fails for the same reasons as the claim fails under the FCA. A claim under section 4712 may be filed under certain circumstances by an employee or former employee against her employer or former employer who has a contract or grant with the federal government (a "contractor" or "grantee"). The statute does not provide for a claim under § 4712 against employees of the plaintiff's employer. Accordingly, the Complaint must be dismissed under Fed. R. Civ. P. 12(b)(6).

The claim under 41 U.S.C. § 4712 also fails because plaintiff did not exhaust administrative remedies before filing this action and it is too late to do so now. In addition, based upon the allegations of the Complaint it appears section 4712 does not apply to the alleged federal contract because it was prior to January 2013.

1. **A Claim for Prohibited Reprisals Under § 4712 Cannot be Asserted Against Employees.**

The Complaint fails to state a claim upon which relief may be granted against the individual defendants under 41 U.S.C. § 4712 because there is no liability for individual

employees under the statute. The statute only applies to certain employers who are government contractors who allegedly engage in prohibited reprisals such as termination of employment or demotion.

By its terms, 41 U.S.C. § 4712 provides that an "employee of a contractor [or] grantee . . . may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing" information the employee believes is evidence of "gross mismanagement of a Federal contract or grant . . . ." 41 U.S.C. § 4712(a)(1) (emphasis added). A private claim for a prohibited reprisal can be filed against a "contractor" with or "grantee" of the federal government.

After exhaustion of required administrative remedies under § 4712, the employee claiming a prohibited reprisal may bring an action "against the contractor or grantee" to seek damages under the statute. 41 U.S.C. § 4712(c)(2) (emphasis added). Specifically, the statute provides:

> **(2) Exhaustion of remedies.--**If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity **against the contractor or grantee** to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(*Id.*) (emphasis added). *See also* 48 C.F.R. § 3.908-6 (b) (if the complainant exhausts all administrative remedies with respect to the complaint alleging prohibited reprisals by her employer, a government contractor, the complainant may sue in court "against the contractor" to seek damages and other relief under 41 U.S.C. § 4712).

Section 4712 provides only for filing of claims for prohibited reprisals "against the contractor or grantee." Courts look to other statutes in Chapter 47 of Title 41 to define terms within 41 U.S.C. § 4712. For the definition of "contractor" and "contract," courts apply the definitions found in 41 U.S.C. § 4705.[2] The term "contract" "means a contract awarded by the head of an executive agency" and "contractor" "means a person awarded a contract with an executive agency." 41 U.S.C. § 4705(a)(1), (2); *Armstrong*, 2017 W.L. 4236315, *8. The term "grantee" means the recipient of funds under a federal grant program.[3] *See, e.g.*, 24 C.F.R. § 1003.5 (Pursuant to CFR Title 24, the Housing and Urban Development regulations, "[t]ribal organizations which are eligible under Title I of the Indian Self–Determination and Education Assistance Act may apply on behalf of any Indian tribe, band, group, nation, or Alaska native village eligible under that act for funds under this part," the "Community Development Block Grant" program for Indian Tribes.)

The remedies available under § 4712 include reinstatement of employment and payment of back pay and benefits. 41 U.S.C. § 4712(c)(1). Those are remedies that only may be provided by the employer, not an employee. *Cf. Aryai v. Forfeiture Support Assocs.*, 25 F. Supp. 3d 376, 387 (S.D.N.Y. 2012) (holding that FCA does not provide for liability of individual employees; reasoning that FCA provides for "remedies such as reinstatement," remedies "[that] a mere supervisor could not possibly grant in his individual capacity."), quoting *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001).

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[2] *Armstrong v. Arcanum Group Inc.*, 2017 W.L. 4236315, *8 (D. Colo.) (noting that the protections of §§ 4712 and 4705 apply to conduct involving disclosure of rule violations relating to contracts between the federal government and private contractors).

[3] *See, e.g.*, *Dixson v. United States*, 465 U.S. 482, 487 (1984) (HUD "grantees" are recipients of federal grant funds from HUD); *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 166 (D. Mass. 2004) ("Nearly thirty federal agencies, in their regulations concerning cooperative agreements, include a standard definition that '[t]he grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.' ").

A claim for prohibited reprisal only may be filed against the "contractor." The statute does not provide for claims against employees of the contractor. Accordingly, a claim under 41 U.S.C. § 4712 cannot be asserted against defendants Larry Barton, Cristina Danforth, Geraldine Danforth, or Melinda Danforth because they are individual employees of Oneida Nation.[4] They are not a "contractor" with the federal government subject to potential liability under section 4712. Rather, they are employees of the contractor, Oneida Nation. For this reason, the Complaint must be dismissed.

Moreover, the Complaint also fails because it does not allege that any of the defendants personally engaged in reprisals prohibited by § 4712. The alleged claim under § 4712 is premised upon the termination of plaintiff's employment with Oneida Nation, from positions in the Risk Management department and the Oneida Museum. The Complaint does not allege that any of the individual defendants terminated that employment. None of the individual defendants was Dawn Delebreau's supervisor in those positions, or in her original position with the Housing Authority. The allegations do not suggest that any of the defendants terminated plaintiff's employment. (Nor could they.)

2. **Plaintiff Did Not Exhaust Administrative Remedies.**

Before a claim can be filed in federal court against a contractor for prohibited reprisals under 41 U.S.C. § 4712, a plaintiff must fully exhaust the administrative remedies set forth in the statute. *Moore v. University of Kansas*, 118 F. Supp. 3d 1241, 1253 (D. Kan. 2015) (section 4712 "require[s] the complainant to exhaust administrative remedies in the described ways prior to filing an action.").

[4] This argument also applies to defendant Jay Fuss, a former employee of Oneida Nation who has not yet appeared in this case.

The first required step is the filing of a complaint with the Inspector General of the federal agency with whom the employer has a government contract or from which it received a federal grant. 41 U.S.C. § 4712(b)(1). A person who believes she was subject to a prohibited reprisal must first file a complaint raising the alleged reprisal with the Inspector General of the executive agency administering the federal contract or federal grant. 41 U.S.C. § 4712(b)(1). The Inspector General must investigate and issue findings (*id.*) and then the head of the agency concerned must determine whether the contractor or grantee subjected the complainant to a prohibited reprisal and must either (a) deny relief, or (b) take action including ordering the contractor or grantee to abate the reprisal and/or to reinstate the employee and provide back pay and benefits. 41 U.S.C. § 4712(c)(1).

The remedies are deemed exhausted if the head of the executive agency issues an order denying relief under § 4712(c)(1) or has not issued an order within 210 days after the submission of the complaint to the Inspector General by the complainant. 41 U.S.C. § 4712(c)(2). If the remedies are exhausted then an action can be filed in federal court against the contractor or grantee to seek damages or other relief. (*Id.*)

To exhaust administrative remedies in this case, plaintiff was required to file a complaint raising the alleged reprisal with the Inspector General of HUD, as the Complaint alleges that materials were stolen from HUD housing sites administered by Oneida Nation's Housing Authority. (Doc.#1: 3). Plaintiff does not allege that any complaint was filed with the Inspector General of HUD. The Complaint instead alleges that a "whistle blower form" was filed online with "OSHA" and that plaintiff contacted a U.S. Senator's office. (Doc.#1: 4). The response also asserts that plaintiff originally disclosed the alleged fraud and waste to the HUD Inspector

General. (Doc.#48: 3). However, plaintiff does not allege that she filed a complaint alleging prohibited reprisals with the HUD Inspector General.

Further, it is now too late to file such a complaint with the Inspector General of HUD. Filing a complaint with the Inspector General of HUD was required within "three years after the date on which the alleged reprisal took place." 41 U.S.C. § 4712(b)(4). This step cannot occur because the alleged reprisals (transfers or terminations) occurred more than three years ago:

> (a) transfer from the Housing Authority, March 21, 2013, to Risk Management department;
>
> (b) termination from the Risk Management position on November 2, 2013;
>
> (c) assignment to Oneida Museum as Cultural Interpreter on January 21, 2014; and
>
> (d) termination from museum position on September 18, 2014.

See (Doc.#1: 3).

Plaintiff did not exhaust the required administrative remedies and cannot do so now, as apparently she did not file a complaint with the Inspector General of HUD within three years of the alleged reprisals listed above. Accordingly, the claim under 41 U.S.C. § 4712 cannot be asserted as a matter of law.

3. **Section 4712 Does Not Apply to the Alleged HUD Contract or HUD Grant.**

The Complaint alleges that there were housing sites being administered by Oneida Nation's Housing Authority, for "HUD housing." (Doc.#1: 3). Plaintiff alleges that in January 2013, she came across information suggesting that materials intended for use at the HUD housing sites were being stolen from the housing sites. (*Id.*)

Assuming on the motion to dismiss that plaintiff alleges that Oneida Nation had a contract with or grant from HUD, a federal executive agency, the contract or grant presumably

was awarded prior to January 2013. If the contract or grant was awarded by HUD to Oneida Nation prior to January 2, 2013, 41 U.S.C. § 4712 does not apply to the contract or grant unless it was modified to include a clause providing for the applicability of the amendment. The Complaint does not allege that the purported contract or grant with HUD relating to the HUD housing sites was entered into or issued on or after January 2, 2013.

The statute, 41 U.S.C. § 4712, was enacted by the National Defense Authorization Act of 2013, Pub. L. No. 112-239, § 828(b)(1). Claims can be asserted under section 4712 only as to government contracts that were awarded on or after January 2, 2013. "The effects of Section 4712 extend only to 'contracts and grants awarded on or after [January 2, 2013]; … and …all contracts awarded before [January 2, 2013] that are modified to include a contract clause providing the applicability of such amendments.'" *Dimartino v. Seniorcare*, 2016 W.L. 3541217, *4 (D. Md. 2016) (complaint did not allege that contract was awarded to employer on or after 1/2/2013).

Accordingly, drawing the reasonable inference from the allegations that the alleged HUD contract or grant was awarded to Oneida Nation prior to January 2, 2013, 41 U.S.C. § 4712 does not apply to the claims in this case as alleged in the Complaint.

B. **There is No RICO Claim Stated by the Complaint.**

Plaintiff asserts that the Complaint makes claims under RICO against the individual defendants, citing 18 U.S.C. §§ 1961-1968. (Doc.#48: 2). She describes her action as "a suit brought against individual racketeers who knowingly participated in patterns of federally prohibited retaliation." (Doc.#45: 2).

A person may recover in a private right of action for damages under RICO if she is injured in her business or property by reason of a violation of 18 U.S.C. § 1962. To state a RICO claim, a complaint must allege the elements of a violation of section 1962 and allege that

plaintiff was injured by reason of the violation. 18 U.S.C. § 1964. This requires allegations of criminal conduct violating section 1962 and that it caused injury to plaintiff's business or property.

In this case, the Complaint does not allege any activities by the individual defendants that give rise to a RICO claim. To allege a RICO violation, 18 U.S.C. § 1962, the complaint must allege "racketeering" activities, which include state or federal predicate crimes. 18 U.S.C. § 1961(1). There also must be a pattern of racketeering activity, meaning long-term organized conduct. 18 U.S.C. § 1962.

The RICO claims must be dismissed because the Complaint contains no mention of any RICO violations whatsoever and there are no allegations that establish a RICO violation or injury to plaintiff caused by such violation. (Doc.#1). The Complaint does not allege facts under which a RICO violation is established against any of the individual defendants. *Gamboa v. Velez*, 457 F.3d 703, 705 (7th Cir. 2006) ("RICO . . . does not cover all instances of wrongdoing. Rather, it is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity."). The elements of a RICO claim under 18 U.S.C. § 1962(c) claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Gamboa*, 457 F.2d at 705.

The Complaint fails to assert allegations as to each individual defendant that establish the elements of a claim for a RICO violation. The Complaint does not mention RICO, let alone state a claim upon which relief may be granted under RICO. There is no allegation that any defendant engaged in any specific actions at all, and certainly not any actions that would give rise to a RICO claim. The Complaint fails to state a claim upon which relief may be granted against any of the defendants for violation of RICO.

IV. **Plaintiff's Other Arguments Fail to Establish a Claim Upon Which Relief May be Granted.**

Nor do any of the other arguments in plaintiff's response briefs set forth a claim upon which relief may be granted against defendants.

Plaintiff argues that defendants told plaintiff that "all would be well" and that plaintiff would receive "full" "indemnification" after the investigation into the HUD fraud was completed. (Doc.#45: 3). She argues that she was misled into cooperating to provide information to assist in the investigation of the fraud, and lead to believe she would receive indemnification.

But plaintiff was not sued by Oneida Nation in this case. Plaintiff has sued the individual defendants in this case. From the allegations of the Complaint, plaintiff was not accused of engaging in fraud, but she rather provided information bringing it to light and other persons were criminally charged as a result of the fraud. "Indemnification" simply does not apply to plaintiff's position here. Plaintiff does not claim she was held liable for damages or she incurred legal costs that should be indemnified by any of the individual defendants.

Plaintiff also argues that she should receive "tolling" for her claims for relief. It appears she argues that the statute of limitations applicable to her claims should be tolled because she did not discover the alleged wrongdoing against her. (Doc.#48: 5-6; Doc.#45: 3). It is difficult to understand this argument. The Complaint fails to state a claim upon which relief may be granted against any of the individual defendants. As shown in the initial brief and as shown above, to the extent plaintiff sues for the employment actions arising from her termination or employment transfers, those claims are barred by the applicable statutes of limitations. Plaintiff was aware when those events occurred. She also was aware when she made alleged disclosures to blow the whistle as alleged. There was no aspect of plaintiff's alleged claims for relief that was unknown

to her. Put simply, if plaintiff wished to raise a discrimination or other statutory claim arising from the employment actions, she was required to do so by the statutory deadlines and she was required to exhaust her administrative remedies. There is no tolling applicable to the limitations periods under the facts of the Complaint.

Finally, plaintiff argues that the Fifth and Fourteenth Amendments to the United States Constitution have been violated by defendants' defense of this action. (Doc.#48: 6-7, 8). Plaintiff argues that "Oneida Nation is party to this action" and it is "using unlimited resources to silence Plaintiff." (Doc.#48: 6). Plaintiff contends that she is "indigent" and the "playing field" is not "level[]." (*Id.* at 7).[5] These arguments have no basis. Plaintiff has not been sued in this case. She filed this action against defendants. This action has no legal merit against defendants and defendants did not do anything for which they can properly be sued by plaintiff. Defendants are entitled to defend this action and they properly have moved to dismiss it.

CONCLUSION

The Complaint should be dismissed against defendants Cristina Danforth, Larry Barton, Melinda Danforth, and Geraldine Danforth pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

[5] Plaintiff raises the fact that defendants filed a motion for a protective order asking the Court to quash the subpoena to Dennis Nelson. (*Id.*) Defendants filed a motion for a protective order not on behalf of Mr. Nelson, but on the ground that discovery is stayed in this case until the Motion to Dismiss is decided.

Further, the subpoena to Dennis Nelson was overly broad, asking for "[a]ll" API Reports for Oneida Nation for 15 years, from 2003 to 2018. However, the events raised by plaintiff in the Complaint occurred in the years 2013 and 2014. The subpoena was overly broad because it sought documents from years that have nothing to do with this case. It was also overly broad because it sought "[a]ll" API reports on any subject, which was far broader than investigations relating to the Housing Authority issues identified in the Complaint.

Dated this 14th day of February, 2018.

HUSCH BLACKWELL LLP

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Certificate of Service

I hereby certify that on February 14, 2018, I electronically filed this document on behalf of the above-referenced defendants with the Clerk of Court by using the ECF system.

I further certify that I am serving this document on plaintiff on February 14, 2018 by U.S. Mail, first class postage prepaid:

Dawn M. Delebreau
W480 Fish Creek Rd
De Pere, WI 54115

Jay L. Fuss
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s/Lisa M. Lawless
Lisa M. Lawless

2016 WL 3541217
Only the Westlaw citation is currently available.
United States District Court,
D. Maryland.

Rachel Dimartino, Plaintiff,
v.
Remedi Seniorcare, Defendant.

Civil Action No. RDB-15-3788
|
Signed 06/29/2016

Opinion

MEMORANDUM OPINION

Richard D. Bennett, United States District Judge

***1** Plaintiff Rachel DiMartino ("Plaintiff" or "DiMartino"), previously employed as a pharmacist by Defendant Remedi SeniorCare of Virginia, LLC [1] ("Defendant" or "Remedi"), brings this action alleging violations of Virginia common law and 10 U.S.C. § 2409. [2] Specifically, Plaintiff claims that she suffered wrongful discharge and retaliation by Defendant after she complained about certain Remedi pharmacy practices.

Presently pending is Defendant's Motion to Dismiss the Amended Complaint (ECF No. 23). The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2014). For the reasons that follow, Defendant's Motion to Dismiss the Amended Complaint (ECF No. 23) is GRANTED WITH PREJUDICE.

BACKGROUND

At the motion to dismiss stage, this Court accepts as true the facts alleged in the plaintiff's complaint. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011). This action arises from Plaintiff Rachel DiMartino's employment as an overnight shift pharmacist at the Richmond, Virginia branch of Defendant Remedi SeniorCare of Virginia, LLC. Amended Compl. ¶¶ 6, 7, 9, ECF No. 14. Defendant Remedi, a Maryland corporation, headquartered in Towson, Maryland, "operat[es] an institutional pharmacy business" that has a contract with the Centers for Medicare & Medicaid Services ("CMS"). *Id.* ¶¶ 7-8. Plaintiff alleges that, "[a]lmost immediately" after her hiring in January 2014, she "recognized that Remedi's pharmacy operations were in a state of disarray." *Id.* ¶¶ 9-10.

DiMartino offers several instances when she allegedly communicated her "serious safety concerns." *Id.* ¶ 10. On May 5, 2014, she alleges that a pharmacy technician erroneously failed to provide a patient with the prescribed end-of-life sedative. *Id.* ¶ 11. She expressed her concern over this incident in an email to a colleague later that evening. *Id.* After discovering the email, Remedi General Manager Dale St. Clair ("St. Clair") allegedly admonished her for "put[ting] these things in writing" and gave her a "disciplinary document." *Id.* ¶ 12.

Throughout that summer, Plaintiff allegedly expressed concerns to St. Clair over Remedi's alleged use of Daptomycin, an antibiotic, *id.* ¶¶ 13-14; its alleged handling of intravenous (IV) components, *id.* ¶ 15; its alleged failure to follow the "dispensing limitations and specific safeguards" of the "Combat Methamphetamine Epidemic Act of 2005," *id.* ¶ 16; and a technician's mistaken preparation of IVs containing potassium, *id.* ¶ 18. With respect to the last alleged issue, DiMartino claims that, after St. Clair said that he had "taken care of" the erroneous preparation of IVs, she "continued to observe sterile compounding without the proper documentation to ensure such a serious error would not be repeated." *Id.* ¶ 18. Moreover, she alleges that one manager, Heath McMillion, "made derogatory statements regarding [her] concerns in management meetings." *Id.* ¶ 17.

***2** On August 31, 2014, Plaintiff allegedly instructed a pharmacy technician, Danielle Crawley ("Crawley") to fill a prescription for morphine. *Id.* ¶ 20. Another technician allegedly told Crawley that Plaintiff's instruction was "illegal." *Id.* Plaintiff claims that she was "alarmed by the accusation...and by Remedi's ongoing unsafe practices." *Id.* ¶ 21. Accordingly, she submitted a letter of resignation, effective September 29, 2014, to St. Clair. *Id.* She notified several colleagues at Remedi, stating that she would not continue working with the technician who accused her of ordering an illegal prescription. *Id.* ¶ 23. When DiMartino returned to work on September 8, 2014, St. Clair and the Vice President of Human Resources explained that her

resignation would be effective as of that date. *Id.* ¶ 25. She refused the offered severance package. *Id.*

Plaintiff subsequently filed the present action in the Circuit Court for Baltimore County, Maryland. Notice of Removal, 1, ECF No. 1. Defendant timely removed to this Court pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446. *Id.* at 1-2. Defendant now moves to dismiss the Amended Complaint (ECF No. 14) under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Mot. to Dismiss, ECF No. 23.

STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

The Supreme Court's opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "require that complaints in civil actions be alleged with greater specificity than previously was required." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted). In *Twombly*, the Supreme Court articulated "[t]wo working principles" that courts must employ when ruling on Rule 12(b)(6) motions to dismiss. *Iqbal*, 556 U.S. at 678. First, while a court must accept as true the factual allegations contained in the complaint, the court is not so constrained when the factual allegations are conclusory or devoid of any reference to actual events. *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). Moreover, a court need not accept any asserted legal conclusions drawn from the proffered facts. *Iqbal*, 556 U.S. at 678. (stating that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim); *see also Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) ("Although we are constrained to take the facts in the light most favorable to the plaintiff, we need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." (internal quotation marks omitted)). Second, a complaint must be dismissed if it does not allege "a plausible claim for relief." *Iqbal*, 556 U.S. at 679. Although a "plaintiff need not plead the evidentiary standard for proving" her claim, she may no longer rely on the mere possibility that she could later establish her claim. *McCleary-Evans v. Maryland Department of Transportation, State Highway Administration*, 780 F.3d 582, 584 (4th Cir. 2015) (emphasis omitted) (discussing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) in light of *Twombly* and *Iqbal*).

ANALYSIS

In moving to dismiss the subject two-count Amended Complaint, Defendant contends that Plaintiff fails to state a claim for which relief may be granted under either count. With respect to Count I, Remedi argues that, as DiMartino resigned, she cannot state a claim for wrongful discharge under Virginia law. Even if she had not resigned, none of the Virginia statutes cited by the Plaintiff permits a wrongful discharge claim in this case. Turning to Count II, Remedi contends that it is not a covered entity under 10 U.S.C. § 2409. As such, she cannot state any possible claim for relief under that statute. Each count will be addressed in turn.

A. Count I—Wrongful Discharge

***3** In Count I, Plaintiff claims that she was wrongfully discharged from Remedi after expressing concern over certain pharmacy practices. As a preliminary matter, Maryland adheres to the doctrine of *lex loci delicti*, which applies the law of the state in which the alleged injury occurred. *Laboratory Corp. of America v. Hood*, 911 A.2d 841, 845 (Md. 2006). Since Plaintiff's alleged injury—wrongful discharge—occurred in Virginia, this Court will apply Virginia law to her claim. [3]

Virginia applies the common law doctrine of "employment-at-will," *Lockhart v. Commonwealth Educ. Sys. Corp.*, 439 S.E.2d 328, 330 (Va. 1994), which dictates that, "when the intended contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will... [.]" *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 916-17 (Va. 1987).

Although Virginia "strongly adheres" to this doctrine, it is not without exceptions. *Lockhart*; 439 S.E.2d at 330; *VanBuren v. Grubb*, 733 S.E.2d 919, 922 (Va. 2012). Any such exceptions, however, are narrowly construed. *VanBuren*, 733 S.E.2d at 922 (citing *Bowman, et al. v. State Bank of Keysville, et al.*, 331 S.E.2d 797, 801 (Va. 1985)).

In *Bowman*, 331 S.E.2d at 801, the Supreme Court of Virginia recognized one such exception—an employee states a "cause of action in tort against" his employer for "wrongful discharge" when the termination violates a "established public policy." This exception is not "automatically" triggered whenever an employee is terminated "in violation of the policy underlying any one [statute] [.]" *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002) (quoting *City of Virginia Beach v. Harris*, 523 S.E.2d 239, 245 (Va. 2000)) (alteration in original). As "virtually every statute expresses a public policy of some sort," an automatic trigger would negate Virginia's strict adherence to the employment-at-will doctrine. *Rowan*, 559 S.E.2d at 711. Virginia thus recognizes only three situations in which a public policy wrongful discharge claim may arise: (1) when "an employer violated a policy enabling the exercise of an employee's statutorily created right," *id.* (citing *Bowman*, 331 S.E.2d at 797); (2) when "the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy," *Rowan*, 559 S.E.2d at 711 (citing *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502 (Va. 1997); *Lockhart*, 439 S.E.2d at 328); or (3) "where the discharge was based on the employee's refusal to engage in a criminal act[,]" *Rowan*, 559 S.E.2d at 711; *see also Mitchem v. Counts*, 523 S.E.2d 246, 252 (Va. 2000) (recognizing refusal to engage in a criminal act as sufficient to establish a wrongful discharge claim under the public policy exception).

In this case, Plaintiff fails to state a claim for wrongful discharge under the public policy exception. This Court need not consider whether the circumstances of this case trigger the exception, as a necessary prerequisite to stating a wrongful discharge claim is that the employer did, in fact, terminate the employee. As the United States District Court for the Eastern District of Virginia has explained, "*Bowman's* breadth is '*limited to discharges* which violate...the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general.' " *Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597, 606 (E.D. Va. 2015) (quoting *Miller*, 362 S.E.2d at 918) (emphasis in original). The employment-at-will doctrine "concerns [only] the ability of an employer ... to *terminate* the employment relationship[.]" *Willis*, 90 F. Supp. 2d at 606. Anything short of termination by the employer, such as suspension or even constructive discharge, cannot give rise to a wrongful discharge cause of action. *Id.*; *see also Miller*, 362 S.E.2d at 918; *Michael v. Sentara Health Sys.*, 939 F. Supp. 1220, 1232 (E.D. Va. 1996).

***4** DiMartino specifically alleges that she submitted a letter of resignation on August 31, 2014. She intended to continue working until September 29, 2014, yet Remedi chose to have her leave prior to that date and offered her a severance package. Voluntary resignation is simply not termination by the employer. Plaintiff attempts to rebut the clear allegations of her Amended Complaint by arguing that her classification by the Virginia Employment Commission as "involuntarily terminated," Amended Compl. ¶ 26, is conclusive proof that she was indeed terminated. As Defendant correctly notes, however, the Virginia Employment Commission's determination concerned only her eligibility for unemployment benefits under Va. Code Ann. § 60.2-612(8). This statutory classification is entirely separate from the common law doctrine of employment-at-will. DiMartino explicitly states that she resigned from Remedi, thus she fails to state a claim for wrongful discharge under Virginia law. Count I is accordingly dismissed with prejudice.

B. Count II—10 U.S.C. § 2409

In Count II, Plaintiff alleges that Defendant retaliated against her for engaging in protected activity in violation of 10 U.S.C. § 2409.[4] Section 2409 provides that a covered "contractor, subcontractor, grantee, or subgrantee may not...discharge[ ], demote[ ], or otherwise discriminate [ ] against [its employees] as a reprisal for disclosing...[g]ross mismanagement," "gross waste of funds," "abuse of authority," or "violation[s] of law" related to Department of Defense or National Aeronautics and Space Administration contracts or grants; or a "substantial and specific danger to public health or safety." 10 U.S.C. § 2409(a)(1). This prohibition, however, applies only to contractors awarded a contract with the Department of Defense; the Department of the

Army; the Department of the Navy; the Department of the Air Force; the Coast Guard; and the National Aeronautics and Space Administration. 10 U.S.C. §§ 2303, 2409(g)(1).

Here, DiMartino does not allege that Remedi has a contract with any of the specified agencies. She states only that Remedi, as an institutional pharmacy company, is a contractor for the Centers for Medicare & Medicaid Services ("CMS"). CMS is not a subgroup of an agency covered by Section 2409. Rather, CMS is a federal agency within the Department of Human Health and Services. Section 2409 and its prohibition against retaliation thus do not apply to Remedi or the Plaintiff.

Plaintiff's argument in favor of applying Section 2409 is unpersuasive. She appears to contend that 41 U.S.C. § 4712, a "Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information," extended the protections of Section 2409 to non-defense contractors. Pl.'s Resp. in Opp'n, 5-6, ECF No. 28. She essentially contends that, although she may not state a claim under 10 U.S.C. § 2409, she *can* state a claim under 41 U.S.C. § 4712. The Amended Complaint, however, is devoid of any reference to Section 4712. Plaintiff's argument thus concedes that Count II, which asserts a violation only of Section 2409, must be dismissed.

Even if DiMartino had asserted her claim under Section 4712, and not Section 2409, that claim must also be dismissed. She alleges neither that Remedi has a federal contract within the ambit of Section 4712, nor that she engaged in any activity protected by that section. The effects of Section 4712 extend only to "contracts and grants awarded on or after [January 2, 2013]; ... and...all contracts awarded before [January 2, 2013] that are modified to include a contract clause providing for the applicability of such amendments." National Defense Authorization Act of 2013, Pub. L. No. 112-239, § 828(b)(1). Although Plaintiff alleges that Remedi has a contract with CMS, she does not allege that the contract was awarded on or after the date on which Section 4712 came into effect.

***5** Were this Court to assume that Plaintiff did allege a federal contract subject to Section 4712, her claim still merits dismissal because she did not participate in any activity protected by this statute. Plaintiff alleges that she disclosed Remedi's repeated violations of 42 C.F.R. § 482.25[5] and the Combat Methamphetamine Epidemic Act of 2005 ("CMEA"), Pub. L. No. 109-177, 120 Stat. 192. As a preliminary matter, neither provision applies to Defendant. 42 C.F.R. § 482.25 governs basic hospital functions, including the provision of pharmaceutical services. Remedi, however, is not a hospital. The CMEA, on the other hand, applies only to retail institutions and transactions in an effort to regulate over-the-counter sales of methamphetamines. Pub. L. No. 109-177, 120 Stat. 192. Remedi, an institutional pharmacy provider, is not a retail pharmacy, nor does it engage in retail transactions of any kind.

Moreover, the prohibitions of Section 4712 apply only to an employee's disclosure of "evidence of gross mismanagement of a Federal contract or grant...a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract...or grant." 41 U.S.C. § 4712(a)(1). Plaintiff's alleged activity—her complaints to colleagues and St. Clair, and her allegations that Remedi violated certain laws and regulations—are not covered by Section 4712. She certainly alleges concerns as to the pharmacy procedures in place at Remedi, but these concerns do not meet the high bar of "a substantial and specific danger to public health and safety." Even further, while she also alleges violations of CMEA and 42 C.F.R. § 482.25, neither provision concerns a federal contract or grant.

In sum, Plaintiff's claim must be dismissed whether it is asserted under 10 U.S.C. § 2409 *or* 41 U.S.C. § 4712. Count II is accordingly dismissed with prejudice.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss the Amended Complaint (ECF No. 23) is GRANTED WITH PREJUDICE.

A separate Order follows.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3541217

Footnotes

1 Plaintiff incorrectly names "Remedi SeniorCare" as Defendant in her Amended Complaint (ECF No. 14). As reflected *supra*, Remedi SeniorCare of Virginia, LLC, a Maryland corporation, headquartered in Towson, Maryland, is the correct name of Plaintiff's employer. *See* Mem. in Support of Mot. to Dismiss, 1 n.1, ECF No. 23-1. The Clerk of the Court is directed to re-caption this case accordingly.

2 10 U.S.C. § 2409 is an anti-retaliation statute that applies to defense contractors. 10 U.S.C. §§ 2409(a), (g)(1). As discussed *infra,* it is undisputed that Defendant Remedi holds no contract with an agency covered by this statute.

3 The parties agree that Virginia law applies to Count I.

4 This Court notes that Plaintiff incorrectly labels 10 U.S.C. § 2409 as a section of the National Defense Authorization Act of 2013 ("NDAA"). Section 2409, however, predates the NDAA as a component of the Armed Forces Title of the United States Code—Title 10. The NDAA *amended* Section 2409, but did not establish the section or its retaliation provisions.

5 42 C.F.R. § 482.25 governs

2017 WL 4236315
United States District Court,
D. Colorado.

Mindy ARMSTRONG, Plaintiff,
v.
The ARCANUM GROUP INC., Defendant.

Civil Action No. 16-CV-1015-MSK-CBS
|
Signed 09/25/2017

Attorneys and Law Firms

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Opinion

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Marcia S. Krieger, United States District Court Judge

***1 THIS MATTER** comes before the Court on the Defendants' Motion for Summary Judgment (**# 27**), the Plaintiff's Response (**# 30**), and the Defendants' Reply (**# 32**). For the following reasons, the motion is granted in part.

I. JURISDICTION

The Court exercises jurisdiction under 28 U.S.C. § 1331.

II. BACKGROUND [1]

Defendant Arcanum Group Inc., called TAG by the parties, is a contractor that provides professional staffing to federal agencies. In this matter, TAG had a contract with the Bureau of Land Management (BLM), a component of the Department of the Interior (DOI). The contract provided, among other things, that the "Government may withdraw a previously issued approval or assignment of Contractor personnel to this contract and direct that the individual be removed from the contract based upon the individual not meeting Government expectations or requirements for personal, professional, or performance standards." # 27-2 at 15. This contract is subject to a global clause that allows either TAG or the BLM to demand an "interpretation of contract terms." # 30-5 at 1.

Plaintiff Mindy Armstrong was employed by TAG. Pursuant to the contract described above, she was placed by TAG as a Lease Administrator at the BLM. Ms. Armstrong prepared reports of the BLM's portfolio of leases for its Real Estate Leasing Services team. Her BLM supervisor was Terry Baker and her TAG supervisor was Steve Cota. [2]

The BLM leases land from both private entities and the General Services Administration (GSA). Some leases are based upon usable square feet, others upon rentable square feet. The difference is unimportant except that, at one time, the GSA provided in a *Pricing Desk Guide* that leases measured by usable square feet should be converted using a "global conversion factor" to measurements basted on rentable square feet.

Ms. Armstrong determined that the GSA failed to include the conversion factor in a subsequent *Pricing Desk Guide,* which made it inconsistent with a 2007 Department of Interior policy. Ms. Armstrong therefore reasoned that the updated *Pricing Desk Guide* superseded the 2007 DOI policy, leading her to the conclusion that the BLM was incorrectly calculating its leased footprint in two ways—(1) by using the conversion factor when it should not (thus inflating the total square feet in its portfolio); and (2) by excluding space that it received at no cost from its lessors, a practice the *Guide* did not authorize.

The BLM asked Ms. Armstrong to prepare two specific reports that included information regarding BLM leases, both of which would be used in requests to the DOI for funding of additional personnel. One report was designed to show the value of expiring leases (Lease Expiration Report) and the other was designed to show the costs that the BLM was willing to reduce over the upcoming 20 years to justify additional positions (Cost Avoidance Report).

***2** Because these reports did not comport with her understanding of how the square footage of the leases should be calculated, Ms. Armstrong believed the reports to be based on false information.[3] Ms. Armstrong told Ms. Burns-Fink that the leasing services team was "falsifying data" and Ms. Baker responded that there was nothing fraudulent about the team's calculation of the lease data. After additional back-and-forth, Ms. Baker decided that Ms. Armstrong should be removed from the project. She emailed the BLM contracting officer, Tina Hamalak, stating that Ms. Armstrong should be removed from her contract assignment for "extremely poor performance" which was outlined in an attached justification which included the incident at issue as well as other performance issues. Ms. Hamalak, in turn, notified Mr. Cota at TAG that the BLM wanted Ms. Armstrong "terminated" from the BLM assignment because she was "not working out". He pressed for an explanation, but Ms. Hamalak was not willing to answer questions. Mr. Cota removed Ms. Armstrong from the BLM assignment. Because TAG had no other assignments for Ms. Armstrong, TAG terminated her employment.

Five days later, Ms. Armstrong filed a complaint with the Department of Interior Inspector General in accordance with 41 U.S.C. § 4712. The Department of Interior Inspector General failed to act on the complaint within 210 days, and pursuant to statute, Ms. Armstrong then filed her Complaint with this Court.

Her Complaint (# **1**) is brought solely against TAG. In it, she alleges three claims: (1) retaliation in violation of the False Claims Act (FCA): (2) retaliation in violation of the enhanced whistleblower provisions in the National Defense Authorization Act (NDAA); and (3) common-law wrongful discharge (both violation of public policy and retaliation) under Colorado law. TAG has moved for summary judgment on all claims.

III. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(c)(1)(A). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

***3** If the moving party does not have the burden of proof at trial, it must point to an absence of sufficient evidence to establish the claim or defense that the non-movant is obligated to prove. If the respondent comes forward with sufficient competent evidence to establish a *prima facie* claim or defense, a trial is required. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, then the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

IV. DISCUSSION

A. Retaliation Under the False Claims Act

31 U.S.C. § 3730(h)(1) provides that any employee who is discharged "because of lawful acts done by the employee in furtherance of an action under this section or other

efforts to stop one or more violations of" the False Claims Act may bring suit. To make a *prima facie* showing of retaliation under the FCA, a plaintiff must come forward with evidence that (1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew about such protected activity and took an adverse action against the employee; and (3) the plaintiff's protected activity was the but-for cause of the adverse action. *See Schell v. Bluebird Media LLC*, 787 F.3d 1179, 1187 (8th Cir. 2015).

The Eighth Circuit stated in *Schell* that the causation element is satisfied if the protected activity is a motivating factor in the adverse action decision. In 2013, however, the Supreme Court held that the proper standard of causation for Title VII is but-for causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013); *accord Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1296 n.9 (10th Cir. 2013). Though the Tenth Circuit has yet to apply this holding to the FCA retaliation analysis, the Fifth Circuit has recently done so. *See U.S. ex rel. King v. Solvay Pharm. Inc.*, ——F.3d ——, 2017 WL 4003473 at *8 (Sept. 12, 2017). The Court agrees, particularly given that the statutory phrase "because of" connotes a more stringent causal connection than "motivating factor" does.

Courts have applied the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973), to retaliation claims under the FCA.[4] *See, e.g.*, *Diaz v. Kaplan Higher Educ. LLC*, 820 F.3d 172, 175 n.3 (5th Cir. 2016); *Harrington v. Aggregate Indus. Ne. Region Inc.*, 668 F.3d 25, 31 (1st Cir. 2012). Under this framework, a plaintiff must establish a *prima facie* case of retaliation and, if successful, the defendant must then articulate a legitimate, nondiscriminatory reason for taking an adverse action against the plaintiff. The plaintiff must then produce evidence such that a reasonable fact finder could find the explanation to be pretext for discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56 (1981).

TAG argues that Ms. Armstrong cannot establish a *prima facie* case because her opposition to the BLM's practices did not constitute protected activity within the meaning of the FCA and because her conduct was not a motivating factor in the decision to terminate her.

1. Adverse Action

It is helpful to begin with isolating the adverse employment action at issue. As to this, the parties disagree. Ms. Armstrong argues that the adverse action in this case was her removal from her assignment at the BLM; TAG contends that the subject adverse employment action was its termination of Ms. Armstrong's employment. The Court agrees with TAG.

***4** Assuming, without deciding, that the BLM's decision to remove Ms. Armstrong from working on its projects is an adverse action, it would be actionable only if Ms. Armstrong sued the BLM. But here Ms. Armstrong sues only TAG and offers no basis upon which TAG is liable for the BLM's decision.[5] Thus the only adverse action subject to this suit is TAG's termination of Ms. Armstrong's employment.

2. Causation

Although causation is usually addressed as the third element for which a plaintiff must offer evidence, its analysis flows readily from the determination of the adverse action. Because the adverse action is TAG's termination of Ms. Armstrong's employment, to make a *prima facie* showing, she must come forward with evidence that her protected activity was the but-for cause of her termination by TAG. *See Nassar*, 133 S. Ct. at 2528.

Ms. Armstrong contends that her criticism of the calculation of the BLM's leases for purposes of the reports was protected conduct. Again, assuming, without deciding, that such conduct was protected, Ms. Armstrong has failed to come forward with evidence to show that her statements caused her termination by TAG. There is no direct evidence that Mr. Cota knew of the statements that she made at the BLM when he terminated her employment with TAG. Indeed, Mr. Cota speaks to what he knew prior to making his decision to terminate Ms. Armstrong's employment with TAG: "So apart from the client instructing you to remove her and apart from there being no other positions to place her in, did you have any other reasons on October 3, 2014, for terminating Ms. Armstrong? No." Cota Dep. 18:8–13.

The only information Ms. Armstrong offers as to Mr. Cota's knowledge is speculative. She insinuates that Ms. Burns-Fink may have apprised Mr. Cota of her conduct at the BLM because Ms. Burns-Fink and Mr. Cota communicated about personal and routine events. In the

same vein, she asserts that Ms. Hamalak could have told Mr. Cota because it is unlikely she would refuse to answer questions about Ms. Armstrong. Ms. Armstrong also argues that Mr. Cota was a "cat's paw," who uncritically relied on statements made by Ms. Burns-Fink, "a biased subordinate". The problem with these theories is that there is no evidence, only speculation, that anyone told Mr. Cota what Ms. Armstrong had said about the lease calculations.[6] This is not sufficient. *See Dusenberry v. Peter Kiewit Sons Inc.*, 2007 WL 1346598 at *9 (D. Colo. May 8, 2007).

***5** In the absence of evidence that Ms. Armstrong's activity at the BLM was the reason that Mr. Cota terminated her employment at TAG, she has failed to establish a *prima facie* case of retaliation.

3. Protected Activity

The Court also has substantial doubt that, as a matter of law, Ms. Armstrong's statements about the calculation of square footage for BLM leases constitutes protected activity under the False Claims Act. The FCA concerns itself with actions that constitute fraud on the United States. There are two types of protected conduct: (1) an action by an employee in furtherance of a *qui tam* action or assistance in an FCA action; and (2) other efforts to stop an FCA violation. 31 U.S.C. § 3730(h)(1).

The first category requires that an employee put her employer on notice that she is "either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought by the government." *McBride v. Peak Wellness Ctr.*, 688 F.3d 698, 704 (10th Cir. 2012). Such notice may take a variety of forms, from "informing the employer of illegal activities that would constitute fraud on the United States," to "warning the employer of regulatory noncompliance and false reporting of information to a government agency," to "explicitly informing the employer of an FCA violation." *Id.* However, "merely informing the employer of regulatory violations, without more, does not provide sufficient notice." *Id.*

As to FCA suits, the Tenth Circuit has not announced a standard defining "action in furtherance of." The consensus among the courts of appeal is that such action minimally requires that a plaintiff be investigating matters that reasonably could lead to a viable FCA case. *See Glynn v. EDO Corp.*, 710 F.3d 209, 214 (4th Cir. 2013); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 236 (1st Cir. 2004), *abrogated on other grounds by Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662 (2008); *U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). This standard evolved from one where the touchstone is whether FCA litigation is a distinct possibility.[7] *See Childree v. UAP/GA AG CHEM Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996); *Neal v. Honeywell Inc.*, 33 F.3d 860, 864 (7th Cir. 1994).

***6** The second category of conduct extends protection to steps taken to remedy misconduct through methods such as internal reporting. *See Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 434 (4th Cir. 2015); *Halasa v. ITT Educ. Servs Inc.*, 690 F.3d 844, 847–48 (7th Cir. 2012). However, there still must be some nexus between the reporting and exposing of a fraud. *Mikhaeil v. Walgreens Inc.*, No. 13-14107, 2015 WL 778179 at *7 (E.D. Mich. Feb. 24, 2015). Given that there need not ultimately be an FCA violation for retaliation to occur, the Fourth and Sixth Circuits have incorporated an objectively-reasonable-belief standard to determine whether the employee's conduct is protected. *See Carlson v. DynCorp Int'l LLC*, 657 Fed.Appx. 168, 172 (4th Cir. 2016) (unpublished); *Jones-McNamara v. Holzer Health Sys.*, 630 Fed.Appx. 394, 399–400 (6th Cir. 2015) (unpublished). Under this standard, a plaintiff must have an objectively reasonable belief that the conduct she opposes violates the FCA. The Court will discuss each category of protected activity in turn.

As an initial matter, the only "false claim" identified by Ms. Armstrong would be the BLM's request for more personnel in connection with the expiring leases based on the Lease Expiration and Cost Avoidance Reports. Although the Court appreciates that Ms. Armstrong believed the methodology used was incorrect, the Court has doubt that the request constitutes a "claim" under the FCA.

A "claim" is defined as any request or demand for money or property to be spent or used on the government's behalf if the government "provides or has provided any portion of the money or property requested or demanded." 31 U.S.C. § 3729(b)(2)(A). Courts have generally construed "claim" to encompass a demand for payment from the government, falsely asserting an

entitlement to government money that it is not obligated to pay out. *See, e.g.*, *United States v. McNinch*, 356 U.S. 595, 599 (1958); *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys. Inc.*, 637 F.3d 1047, 1056 (9th Cir. 2011); *Costner v. URS Consultants Inc.*, 153 F.3d 667, 677 (8th Cir. 1998). Furthermore, the Court can also find no instance where a government agency has ever tendered a false claim unto itself.

The Court has some doubt that the reports prepared by Ms. Armstrong support a claim for payment of government money. It is not clear that a request for more staffing is a "demand for payment" from funds of the United States. Most claims addressed by the FCA are made by third parties seeking payment from the United States Government, not one department or agency seeking an allocation of appropriated funds for a particular purpose. Ms. Armstrong offers no case law for the proposition that a request for additional staffing constitutes a claim for purposes of the FCA, and the Court has found no authority for such proposition. Assuming that a request for staffing conceptually could be a claim, it is not clear that this request actually is a claim. The request could just as easily be a request for a change in allocation of already appropriated funds, or a recommendation/ projection connected with long-range planning pertinent to appropriation in the future. Ms. Armstrong concedes that she does not even know if the purported claim was ever submitted to the DOI.

Assuming that the request is a claim, there arises a different problem. For Ms. Armstrong's conduct to be protected, it must have had a specific connection to an FCA action, either brought by the government or a *qui tam* action. Clearly, she was not assisting in an FCA action. Indeed, she does not identify any FCA action that was being investigated or that could be brought. A potential relator like Ms. Armstrong is unable to bring an FCA claim against a government defendant because the United States, in essence, would be suing itself. *See Greene v. IRS*, No. 08-CV-280, 2008 WL 5378120 at *6 (N.D.N.Y. Dec. 23, 2008); *Prevenslik v. USPTO*, No. 05-CV-498, 2005 WL 6047270 at *1 (E.D. Va. June 16, 2005). It is well established that such suits are non-justiciable. *See, e.g.*, *Sweeney v. FDIC*, 116 F.3d 942 (D.C. Cir. 1997) (table); *Juliano v. Fed. Asset Disposition Assoc.*, 736 F. Supp. 348, 351–53 (D.D.C. 1990). FCA claims against the government are frivolous. *See Turner v. U.S. Dep't of Educ.*, No. 15-CV-424, 2015 WL 4757055 at *2 (S.D. Cal. Aug. 10, 2015); *Prevenslik*, 2005 WL 6047270 at *1.

***7** Similarly, the Court finds that she has not established that her conduct would be protected as "other efforts" to remedy misconduct under the FCA. The "objectively reasonable" test applies here. As noted earlier, although Ms. Armstrong may have been correct that the accounting method used for the BLM leases was in error, she had no "objectively reasonable" belief that such conduct violated the FCA. The record does not reveal any belief by Ms. Armstrong that the FCA was being violated, but even if one infers from her critique that she held such a belief, it was not reasonable because the government cannot sue itself.

Accordingly, under either category of § 3730(h)(1), Ms. Armstrong has not established that her conduct was protected under the False Claims Act. Consequently, this claim must be dismissed.

B. Reprisal Under the National Defense Authorization Act

Ms. Armstrong's second claim is based upon the National Defense Authorization Act. The NDAA prevents a government contractor from discharging an employee in reprisal for disclosing information that shows a violation of law, rule, or regulation related to a federal contract." 41 U.S.C. § 4712(a)(1)–(2). To establish retaliation under § 4712, a plaintiff must come forward with evidence showing that (1) she was an employee of a government contractor, (2) she disclosed information that she reasonably believed was evidence of a rule violation related to a federal contract to the required person, [8] and (3) her disclosure was a contributing factor in the action taken against her.

The NDAA does not follow *McDonnell Douglas*, but incorporates a similar framework into the statute itself by borrowing from an administrative-law statute. 41 U.S.C. § 4712(c)(6) provides that the legal burdens in 5 U.S.C. § 1221(e) shall be controlling for any judicial determination of whether retaliation occurred. § 1221(e), in turn, requires that an employee show her protected activity was a "contributing factor" in the employment action taken unless the agency (contractor for our purposes) "demonstrates by clear and convincing evidence that it would have taken the same personnel action" without disclosure. Thus, the questions asked are similar, but

the NDAA collapses the *McDonnell Douglas* stages into a single question that the employer can only surmount with clear and convincing evidence as opposed to a preponderance of the evidence.

TAG argues that Ms. Armstrong cannot establish any NDAA reprisal because her opposition to the BLM's practices did not constitute protected activity within the meaning of the NDAA. Ms. Armstrong responds that her conduct concerned rule violations related to BLM leases which are government contracts. The Court agrees with TAG.

Ms. Armstrong's reliance on the NDAA is misplaced. The NDAA and its anti-reprisal provisions pertain only to contracts between the federal government and private contractors, not contracts between the BLM and other governmental agencies. The operative section of the NDAA is § 4712 entitled "Enhancement of contractor protection from reprisal for disclosure of certain information." It is found in Chapter 47 of Title 41, which contains miscellaneous provisions governing the relationship between federal agencies and private contractors. *See* 41 U.S.C. §§ 4701–12.

***8** Although § 4712 is relatively new and the Court can find no case law applying or interpreting it, it is clear that § 4712 was enacted to enhance the protections of § 4705 of the Act, entitled "Protection of contractor employees from reprisal for disclosure of certain information." § 4712 does not define the term "federal contract", but § 4705 clearly does—it is the contract awarded by the head of an executive agency to a contractor. The contractor is the person to whom the contract is awarded. 41 U.S.C. § 4705(a)(1)–(2). Thus, the protections of § 4712 and § 4705 apply to conduct involving a disclosure of rule violations related to contracts between the federal government and private contractors. In this case, that would be the contract between TAG and the BLM. Because Ms. Armstrong's comments were not direct at that contract, but instead intra-government contracts, she has no claim under the NDAA.

Because the NDAA is not applicable in this context, the claim is dismissed.

C. Wrongful Discharge

Common-law wrongful discharge is a state-law cause of action. Having dismissed the federal claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over this claim pursuant to 28 U.S.C. § 1367(c)(3).

V. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Summary Judgment (**# 27**) is **GRANTED** as to the Plaintiff's retaliation claims under the FCA and NDAA. Both Claims are **DISMISSED, with prejudice.** [9] The Plaintiff's wrongful-discharge claim is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction under 28 U.S.C. § 1367.

All Citations

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Footnotes

1 The Court recounts the facts in the light most favorable to Ms. Armstrong, the nonmoving party. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002). In large part, the parties do not dispute the material facts.

2 Ms. Armstrong asserts that Barbara Burns-Fink, a TAG contractor working with her also was a supervisor. There is evidence that Ms. Burns-Fink had seniority relative to Ms. Armstrong, but not that Ms. Burns-Fink had supervisory authority or responsibility.

3 TAG argues that the Court should disregard an affidavit submitted by Ms. Armstrong with her response that describes these two reports as a "sham affidavit." The Court need not resolve this dispute because even with the information contained in the challenged affidavit, Ms. Armstrong has not presented evidence to sustain either of her retaliation claims.

4 The Tenth Circuit has yet to confront the applicability of *McDonnell Douglas* to either the FCA or NDAA, but it has implicitly approved of such burden shifting in an FCA retaliation case. *See U.S. ex rel. Erickson v. Uintah Spec. Servs. Dist.*, 268 Fed.Appx. 714, 717 (10th Cir. 2008) (unpublished).

5 Ms. Armstrong does not allege that TAG can be held liable for the removal as a joint employer. *See Bristol v. Bd. of Cty. Comm'rs*, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc) (allowing joint liability if the employers "co-determine the

essential terms and conditions of employment."). Nor could she, as TAG did not co-determine her contract assignment with the BLM; the BLM determined it in its sole discretion. Instead, she argues that the TAG-BLM contract contains a procedural mechanism for TAG to challenge her removal from the assignment, apparently surmising that, because TAG did not avail itself of the mechanism, it assumed the BLM's retaliatory motive in terminating her employment. But this contractual provision merely provides for TAG to seek an interpretation of contract terms; it does not contain any meaningful way for TAG to police or otherwise verify the BLM's justifications for directing removal. To investigate or verify the BLM's reasoning, TAG would need a mechanism for information gathering or fact finding, not a mechanism for a legal interpretation.

6 Ms. Armstrong contends that Mr. Cota must have learned about her conduct at the BLM prior to their termination meeting because he testified he was performing research about some "questions that Mindy had asked." But this, too, is speculative. It is not reasonable to infer from the fact that Ms. Armstrong had asked questions that Mr. Cota was aware of Ms. Armstrong's accusations against BLM personnel. Even with such an inference, the fact of Mr. Cota's research does not come close to establishing that he terminated Ms. Armstrong's employment *because of* her accusations.

7 At least the Eighth and Ninth Circuits have used Title VII's retaliation standard—asking whether the plaintiff had a good faith and objectively reasonable belief that the defendant was committing fraud against the government—to elucidate whether a plaintiff was investigating matters that reasonably could lead to a viable FCA action. *See Schell*, 787 F.3d at 1187; *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845–46 (9th Cir. 2002). The Seventh Circuit has also used this standard in addition to asking whether an FCA action was a distinct possibility at the time of investigation. *See Fanslow v. Chicago Mfg. Ctr.*, 384 F.3d 469, 479–80 (7th Cir. 2004). The Court does not see any need to import Title VII's standard because the viability standard is sufficient on its own.

8 The statute enumerates the persons to which a disclosure can be made. As relevant here, Ms. Armstrong must have disclosed information to either a federal employee "responsible for contract or grant oversight or management at the relevant agency" or a management official of the contractor "who has the responsibility to investigate" misconduct. 41 U.S.C. § 4712(a)(2)(D), (G).

9 Because neither claim can be pursued as a matter of law and there has been no proffer of allegations that can address the deficiencies in the showing, the Court is disinclined to allow amendment of the Complaint.

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