

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES ex rel. NANCY C.
GILLIGAN-O'BRIEN,

Plaintiffs,

v.

MEMORANDUM AND ORDER
04-C-975-S

ROCK VALLEY COMMUNITY PROGRAMS, INC.
and IRWIN McHUGH

Defendants.

Relator Nancy C. Gilligan-O'Brien commenced this qui tam action on behalf of the United States alleging that the defendants Rock Valley Community Programs and Irwin McHugh knowingly made false claims for contract payments from the United States in violation of 31 U.S.C. § 3729(a)(1) and (2). Relator further claims that she was wrongfully discharged from her employment in retaliation for investigating and exposing the alleged false claims. The United States has declined to intervene in the action. Jurisdiction is based on 28 U.S.C. §§ 1345 and 1367. The matter is presently before the Court on defendants' motion for summary judgment. The following is a summary of facts which are undisputed or, if disputed, most favorable to the plaintiffs.

FACTS

Defendant Rock Valley is a non-profit corporation providing half way house services and alcohol and drug treatment. Defendant

McHugh has been Rock Valley's CEO since 1995. Defendant McHugh holds a license from the Wisconsin Department of Health and Family Services (WDHFS) to operate Rock Valley as a class A nonambulatory community based residential facility ("CBRF"). Relator was employed by Rock Valley as its outpatient and clinical services director beginning in January 1999.

Relators' job responsibility was to direct an alcohol and drug treatment program for state offenders known as the Treatment Alternative Program ("TAP"). TAP offers day and outpatient substance abuse treatment to state criminal offenders. During the relevant time period Rock Valley was certified by WDHFS as an approved facility for Alcohol and other drug abuse outpatient and day treatment.

In addition to TAP, Rock Valley operates the Alternate Program ("AP"). AP provides residential services for substance abuse and behavioral restructuring to federal and state criminal offenders. Relator did not work in AP. Rock Valley does not have a certification from WDHFS to provide residential treatment services. Its staffing levels at the relevant times would not have satisfied WDHFS requirements for residential treatment certification.

The Federal Bureau of Prisons operates a Transitional Drug Abuse Treatment program ("TDAT"). TDAT is a continuation of the substance abuse treatment federal inmates received in an institution during their transition back into the community. In

November 1999 the Bureau of Prisons issued Request for Proposal 200-0550-NC soliciting proposals to provide T DAT services in Janesville and Beloit Wisconsin, and the surrounding area. The Statement of Work ("SOW") appended to the request defined the contractors obligations under the contract to provide the services and included the following:

3. CONTRACTOR LICENSURE. The contractor shall have a single staff member who oversees the services. That person shall be licensed/certified and provide clinical supervision to all practitioners that provide direct services to offenders.

a. The contractor shall ensure that a licensed clinical professional (e.g. psychologist or social worker) with documented substance abuse training, or a Certified Addictions Counselor (CAC) oversees the drug treatment services. The individual must be licensed/certified in the state in which services are provided....

b. Facility Licensure. The agency/facility providing substance abuse treatment services must be licensed/certified with the state alcohol and drug abuse authority in the state where the treatment program is located.

Defendant Rock Valley responded to the request for proposal representing that it would comply with the SOW requirements. In response to requirement 3 of the RFP defendants included the following:

3. (Answer)

The "Treatment Services Coordinator" will provide clinical supervision of this contract.

The minimum requirement for this position shall be a licensed clinical professional (psychologist or social work) with documented substance abuse training, or a Certified Addictions Counselor. This individual must be licensed/certified in the state where services are provided. (Refer to copies of certification for "Treatment Services Coordinator" Enclosure 3-A.) A copy of the CBRF license is enclosed for your review. Enclosure 3-B.

The contract was awarded to Rock Valley on July 28, 2000 and it began performing services under it. At various times during the contractual relationship, defendants submitted the outpatient and day treatment certifications as proof of satisfaction of the SOW facility certification requirement.

Relator was hired by defendant Rock valley in 1990. Relator received consistently positive performance reviews during her employment with Rock Valley and received no discipline or written or verbal warnings during her 14 years of employment. Beginning in 2003, plaintiff expressed repeated concerns to McHugh that the TDAT program was not properly certified. She refused to sign documents certifying that she had supervised the TDAT employees because she in fact had not and because she believed it was improper to do so because of the lack of certification.

On March 12, 2004 relator initiated inquiries into Rock Valley's certifications with the WDHFS Bureau of Quality Assurance. On March 16, 2004, relator sent an e-mail to the WDHFS providing in part as follows:

On March 12, 2004 I contacted both you and Kevin Coughlin to discuss/report my concerns regarding the application of certifications for a certified substance abuse service (HFS 75.12 and HFS 75.13) to a certified community-based residential facility (HFS 83) within the corporation. Although this practice has been addressed numerous times within the corporation, as the standards and service requirements for the certifications are not the same, the rationale used is that both services are under the same corporate umbrella so the practice is legitimate. Contracts and billings reflect this practice.

On April 6, 2004 relator told defendant McHugh that she had contacted the Bureau of Quality Assurance to investigate the matter. On April 15, 2004 McHugh offered relator's position to Sue Sebastian. On May 6, 2006 McHugh discharged relator for, among other things, being publicly critical of defendants' programs.

MEMORANDUM

Defendants move for summary judgment arguing they are not liable for making false claims because they fully complied with the contract requirements. Alternatively, defendants assert that any breach was unintended and their submissions to the United States were not knowingly false. Defendants seek dismissal of the retaliation claim on the basis that plaintiff did not engage in protected activities or, if she did defendants were unaware of them. Plaintiff has voluntarily dismissed her conspiracy claim and her retaliation claim against defendant McHugh. She also makes no argument in opposition to defendant McHugh's contention that he

cannot be individually liable for wrongful discharge under Wisconsin law. She opposes the remainder of the motion for summary judgment.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

False Claim

Defendant Rock Valley may be liable for presenting a false claim if it knowingly failed to perform a material requirement of its contract, yet sought or received payment as if it had fully performed without disclosing the nonperformance. U.S. ex rel.

Fallon v. Accudyne Corp., 921 F.Supp. 611, 626 (W.D.Wis. 1995).

The starting point for determining whether defendant materially performed is the contract language. Specifically, the issue is whether the following SOW language required defendant Rock Valley to obtain state certification for its residential treatment program:

The agency/facility providing substance abuse treatment services must be licensed/certified with the state alcohol and drug abuse authority in the state where the treatment program is located.

Defendant notes that the literal language does not require certification for the particular program under contract, but requires only some form of license or certification. However, it seems most reasonable that the United States would be concerned with certification for the services it was purchasing (residential) rather than other services it was not (outpatient). Nevertheless, the language is sufficiently ambiguous that extrinsic evidence must be consulted thereby rendering the matter a factual question not subject to resolution on summary judgment. Management Computer Services, Inc. V. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

There is genuine dispute concerning the extrinsic evidence bearing on the meaning of the SOW requirement. Among the extrinsic evidence is a course of dealing where the United States failed to object to the absence of proof of certification and conflicting

testimony by government agents concerning their understanding of the provision. There is dispute concerning whether the reviewing agents believed that residential program certification was not required or whether they were misled to believe that the existing certification encompassed the residential services.

Assuming the question of the certification requirement is resolved in plaintiff's favor, there is evidence that the requirement was material. The evidence establishes that residential treatment certification was not merely a formality, but required staffing levels which defendant Rock Valley lacked and therefore imposed significant additional expense and may have materially affected the level of service provided by defendants.

Finally, assuming there was a failure of certification it cannot be determined on summary judgment whether defendant knowingly failed to disclose the fact that Rock Valley lacked it. Defendant McHugh has testified that he was acting in an honest belief that no program certification was required. His repeated submission of the certification for a program which was not providing services to the United States might have been motivated by a sincere belief that any certification would satisfy the contractual requirement. However, the inference is also available that such submissions were made to dupe government representatives into believing that the certification applied to the services they were receiving. Of course, defendant's actual knowledge and intent

is impossible to glean from summary judgment submissions.

Wrongful Discharge

Plaintiff's claim for retaliatory discharge is governed by 31 U.S.C. § 3703(h):

Any employee who is discharged ... by his or her employer because of lawful acts done by the employee ... in furtherance of an action under this section, including investigation for ... an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole....

Accordingly, to prevail plaintiff must demonstrate that she took action to investigate possible fraud, that defendants had knowledge of these actions, and that her discharge was motivated at least in part by the protected conduct. Fanslow v. Chicago Mfg. Center, Inc., 384 F.3d 469, 479 (7th Cir. 2004). Conduct is protected by the statute because it is action to investigate possible fraud. Conduct can be protected even though the relator has no knowledge of the False Claims Act. Id. Her actions were protected if she believed in good faith, and a reasonable employee in the same situation might believe, that the employer is committing fraud on the government. Id. at 480. "Congress intended to protect employees from retaliation while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together." Id. At 481.

The evidence viewed most favorably to relator supports a

finding that her conduct was protected. Relator was concerned that the AP was not properly certified and that defendant was improperly using the TAP certification to imply that the AP was certified. These concerns are set forth in relator's March 16 e-mail to WDHFS. The language of the e-mail refers directly to the alleged improper use of the certification in "contracts and billings." It appears from the facts that relator was acting not only from her suspicion that the AP required certification, but also her concern that the use of the TAP certification was improper and misleading. Given that the AP program served primarily federal TDAT offenders it is reasonable to infer that the reference contracts and billings were a reference to the federal government contract.

The circumstances addressed by the Court of Appeals in Fanslow confirm the conclusion that the claim must survive summary judgment. Fanslow believed that his employer was improperly transferring funds from a non-profit entity receiving government grants to related for-profit entities. He discussed the matter with his superiors, refused to purchase equipment for the for-profit entity using the non-profit's funds and asked questions about the corporate ownership structure. His employer maintained that the conduct was authorized in its contract with the government. The Court reversed summary judgment against Fanslow finding it premature: "[T]he record is simply too thin at this point to conclude that Fanslow was unreasonable to think CMC might

be committing fraud on the government.” Id. at 481. It seems at least as likely that relator might have reasonably believed that defendants were misrepresenting their licensing status to the government to conceal non-compliance with a contract requirement.

There is little question that the evidence is also sufficient to support the conclusion that defendants were aware of relator’s conduct and discharged her because of it. It is undisputed that relator spoke directly to defendant McHugh about her concerns and that she made him aware that she had contacted WDHFS. The timing of her discharge, combined with her positive and lengthy employment history readily supports the inference that her investigation and complaints were causally connected to her discharge.

In order to succeed on her wrongful discharge claim under Wisconsin law relator must demonstrate that she was discharged for refusing to act in a manner that violates or is contrary to a statutory, constitutional or administrative provision. Wilcox v. Niagra of Wisconsin Paper Corp., 965 F.2d 355, 360-63 (7th Cir. 1992). Relator contends that she was discharged at least in part because she refused to sign documents for billing purposes which falsely indicated that she had supervised employees in the AP. She contends that signing such statements would have been a violation of Wisconsin Administrative Code MPSW 20 which defines false billing practices, among other related conduct, as unprofessional conduct.

Defendants do not challenge the viability of this theory arguing only that the evidence is insufficient to sustain a causal connection between the refusal to sign and the discharge. Considering the close temporal relationship between the events and the relationship between the requests to sign forms and relator's concerns with defendant's licensing status, it cannot be determined as a matter of law that the inference is unreasonable. Accordingly, defendant Rock Valley's motion for summary judgment on this claim must be denied.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED as it concerns relator's conspiracy claim and her retaliation and wrongful discharge claims against defendant McHugh and is in all other respects DENIED.

Entered this 29th day of March, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge