

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION at ASHLAND
CASE NO. 09-CV-55-DLB

LISA ALLEN,)
)
Plaintiff)
)
vs.)
)
BON SECOURS HEALTH SYSTEM,)
INC., a Kentucky Corporation;)
OUR LADY OF BELLEFONTE)
HOSPITAL, INC., a Kentucky)
Corporation,)
)
Defendants)

**Plaintiff’s Memorandum In
Opposition to Defendants’
Motion To Dismiss**

Defendants’ motion to dismiss is without merit. First, defendants misstate the content of the False Claims Act and, as a result of this flaw, advance an analysis that misses the mark. This error by defendants is compounded by misstatements regarding the detailed allegations in plaintiff’s amended complaint. Second, defendants misconstrue Kentucky wrongful discharge law and omit mention or discussion of controlling Sixth Circuit precedent on the interaction of Kentucky wrongful discharge law and a federal statutory cause of action. Accordingly, for these and for the reasons set forth more fully in the following, defendants’ motion should be **DENIED** in its entirety.

Counterstatement of the Case

The Allegations of Allen’s Amended Complaint

Plaintiff Lisa Allen presents a detailed and well-pleaded amended complaint. Defendants, despite asserting that Allen's allegations are insufficient to state a claim, fail to discuss some of Allen's actual allegations and misrepresent others. The facts giving rise to the lawsuit, as pleaded in section IV of Allen's amended complaint (DE 3), are as follows:

6. Lisa Allen, at all times pertinent hereto, was employed as a Registered Nurse by defendants. Allen began employment with defendants on or about October 1, 1984; she was terminated from employment by defendants on November 19, 2008.

7. At all times pertinent hereto, Allen was (and remains) a Registered Nurse licensed by and subject to the regulation of the Kentucky Board of Nursing.

8. Beginning in about February 1993, Allen's job duties for defendants consisted principally and materially of the following: assessment and implementation of home care patients per physicians' orders and plan of care and administrative duties related to such care including completion of forms necessary to secure funding under Medicaid and/or Medicare and/or private insurance.

9. At all times pertinent hereto, Allen performed her job duties for defendants consistent with their reasonable expectations.

10. Part of Allen's job duties for defendants included providing care for patients whose health care costs were covered by Medicaid and/or Medicare and/or private insurance.

11. On August 18, 2008, Allen recertified two home care patients for continued care consistent with Medicare guidelines and her clinical data assessment of the patients' conditions and status.

12. On August 26, 2008, Allen was instructed by Gaylene Karl, the auditing nurse for defendants, to change and alter the

documentation for the two aforementioned patients recertified on August 18, 2008, with no change in status (meaning no new medication or change in condition but held for continued care) to start of care certifications.

13. A start of care certification is generally applicable to new patients.

14. Under certain circumstances, a start of care certification can be appropriate for continuing patient who is changing their payment source.

15. In response to Karl's instruction described in paragraph 12, Allen informed Karl that she needed a medical basis to make the requested changes.

16. Karl, in response to Allen's statement described in paragraph 15, informed Allen that Kathy Cook, defendants' office manager, had asked her to pass along the directive described in paragraph 12 to Allen.

17. Cook, as an office manager, was unqualified to give Allen directives on issues dependent on a clinical data assessment.

18. The recertifications and/or certifications described in paragraphs 11 and 12 are dependent on a clinical data assessment by Allen using her skills, experience and training as a Registered Nurse.

19. Following Allen's conversation with Karl described in paragraphs 12, 15 and 16, Allen contacted Kathy Cook, the office manager, who informed Allen that the basis for the requested change was "just because."

20. Cook further informed Allen that she had been directed to have the changes made by Verona Kennedy, the Director of Home Health Care for defendants.

21. Allen advised Cook that she needed a better reason than "just because" to make the requested change. Cook informed Allen that she would get back in touch with Allen with further details.

22. In the following days, Allen received a number of inquiries from Michelle Morales and/or Gaylene Karl about whether she had made the requested changes referenced and described in paragraph 12.

23. Allen advised both Morales and Karl repeatedly that she had no basis to make the requested changes and would not do so in absence of written documentation or OASIS guideline information showing the requested changes to be appropriate.

24. Shortly thereafter Kennedy and Allen met for a regularly-scheduled staff review meeting.

25. During the course of the aforescribed review meeting between Kennedy and Allen, Allen raised the issue of the requested changes, said it was wrong to make the requested changes without proper basis and informed Kennedy that she had been set up to fail.

26. Following this discussion and meeting with Kennedy, Allen was subjected to higher degree of scrutiny and differential treatment including but not limited to incorrect allegations of missing care notes, incorrect allegations of inadequate documentation, incorrect allegations of deviations from plan or standards of care and accused of being “too aggressive” in discharging patients.

27. On or about September 9, 2008, Kennedy and Morales, in response to Allen’s continuing refusal to make the requested changes without adequate or appropriate basis, faxed the documents to Allen attached hereto and marked Ex. A.

28. Allen reviewed Ex. A. on September 10, 2008, phoned Morales and spoke with both Morales and Kennedy. Allen informed Morales and Kennedy that Ex. A did not set forth a basis to allow or justify the requested changes.

29. In response to Allen’s continuing refusal to make the requested changes, Kennedy ominously stated and warned Allen as follows: “You’ve been told.”

30. Neither Morales nor Kennedy, in this telephone discussion with Allen, offered a substantive answer or rebuttal to Allen's assertion that Ex. A did not set forth a basis to allow or justify the requested changes.

31. Ex. A does not set forth an adequate basis to justify the requested changes.

32. The directive issued to Allen to change the patients' certifications without proper or adequate basis was an instruction to Allen to falsify a record material to a claim by defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in question.

33. Had Allen falsified either or both of the patient's certifications she would have violated provisions of Title 31, Chapter 37, Subchapter III of the United States Code.

34. Allen's refusal to change and falsify the certifications was a refusal to violate a law in the course of employment.

35. Allen's refusal to change and falsify the certifications was a refusal to falsify an essential record within the meaning of KRS 314.091(1)(h).

36. Allen's refusal to falsify the certifications was a lawful act done in furtherance of an effort to stop or prevent a violation by defendants of provisions of Title 31, Chapter 37, Subchapter III of the United States Code.

37. On November 19, 2008, Allen's employment was terminated.

38. The reason proffered by defendants for Allen's termination was that Allen had practiced outside her scope and had tendered a fraudulent insurance claim.

39. Defendants' proffered reason for Allen's termination regarded events on August 25, 2008, when Allen took blood samples consistent with doctor's orders from her husband, transported them in appropriate container to a lab operated by

defendants and asked a clerk to register her husband as an outpatient, a process that would produce a lab slip.

40. The aforescribed process and procedure was one that Allen had followed on numerous prior occasions without complaint and correction from defendants.

41. The aforescribed process and procedure was substantially similar and/or materially indistinguishable from those used by other of defendants' employees who have not been fired.

42. None of Allen's actions described in paragraph 39 were practicing beyond her scope.¹

43. Defendants' proffered reason for terminating Allen's employment was and is pretextual.

44. A substantial and motivating factor but for which Allen's employment would not have been terminated by defendant was Allen's lawful acts done in furtherance of her efforts to stop or prevent a violation by defendants of Title 31, Chapter 37, Subchapter III of the United States Code, her refusal to violate provisions of Title 31, Chapter 37, Subchapter III in the course of her employment and her refusal to violate KRS 314.091(1)(h) in the course of her employment.

45. As a direct and proximate result of the unlawful termination of her employment, Allen has suffered loss of wages, past and future, other injuries including embarrassment and humiliation, emotional distress, and mental anguish.

46. The termination of Allen's employment was done in reckless disregard and/or with gross negligence toward and regarding her rights.

¹ One of defendants' errors regarding the allegations in Allen's amended complaint is their assertion that "Allen admits that she was terminated for practicing outside the scope of her license[.]" *Defendants' Memorandum In Support of Their Motion To Dismiss* (hereinafter referred to as "Defendants' memo")(DE 4-2) at p. 8. Allen, in fact, specifically alleges to the contrary.

Allen pleads three causes of action: Count I – discharge in violation of the False Claims Act, 31 U.S.C. § 3730(h); Count II – wrongful discharge – refusal to violate Title 31, Chapter 37, Subchapter III of the United States Code; and, Count III – wrongful discharge – refusal to violate KRS 314.091(1)(h).

Argument

1. Allen Has Pleaded Adequately a Claim Under the False Claims Act

The genesis of the flaws in defendants’ discussion and analysis of the False Claims Act is their misstatement of the content of 31 U.S.C. § 3730(h), which reads in pertinent part as follows:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

Defendants’ error stems from the amendments to the False Claims Act found in Pub.L. 111-21, § 4, May 20, 2009, 123 Stat. 1624. Congress titled § 4 of Public Law 111-21 as follows: “Clarifications to the False Claims Act to Reflect the Original Intent of the Law.” The Sixth Circuit recognizes that clarifications of an existing statute are applicable to pending and later-filed lawsuits, *Boddie v. American Broadcasting Co.*, 881 F.2d 267, 269 (6th Cir. 1989), as do other circuits. *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d

1272, 1283 (11th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000)(clarifying amendments are applicable to pending lawsuits); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (“Clarification, *ab initio*, is a well recognized principle.”); *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 951 (9th Cir.1998)(later reversed on other grounds) (J. Reinhardt, concurring)(a clarification is a statement “of what [Congress] believed the law already was, and thus to be applicable to all cases, past, present and future.”). In any event, Public Law 111-21 does no more restate existing law regarding the protective shelter of the False Claims Act, as courts have held that “[t]he False Claims Act makes it unlawful for an employer to discharge an employee because the employee refuses to participate in submitting false claims under the Federal Medicare Program and makes an intracorporate complaint.” *Goodwin v. Visiting Nurses Ass’n Home Health Services*, 831 F.Supp. 449, 454 (E.D. Pa. 1993).

Defendants’ motion appears to assume that the Supreme Court’s recent decisions in *Ashcroft v Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), abolished notice pleading, despite Federal Rule of Civil Procedure 8(a). But the Court has done no such thing and it advised merely in *Iqbal* as follows:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require “detailed factual

allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.*, at 557, 127 S.Ct. 1955.

More recently, the Sixth Circuit has advised in *Courie v. Alcoa Wheel & Forged Products*, --- F.3d ---, 2009 WL 2497928 (6th Cir., August 18, 2009), on the import of *Twombly* and *Iqbal* as follows:

The Court has now explained, however, that a civil complaint only survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949. Indeed, while this new *Iqbal/Twombly* standard screens out the "little green men" cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are "implausible."

Allen has pleaded both the elements of a False Claims Act retaliation claim and the “further factual enhancement” that *Iqbal* and *Twombly* require. First, Allen has pleaded that she engaged in protected activity; more specifically, that her “refusal to falsify the certifications was a lawful act done in furtherance of an effort to stop or prevent a violation by defendants of provisions of Title 31, Chapter 37, Subchapter III of the United States Code.” *Amended Complaint* ¶ 36. This is precisely what 31 U.S.C. § 3730 defines as protected activity. Allen pleads factual details – the whats, whens and whos – that constitute this protected activity and surely thereby provides the

“further factual enhancement” to which *Iqbal* refers. Second, Allen pleads an adverse employment action, specifically, that her employment was terminated. *Amended Complaint* ¶ 37. Third, Allen alleges a connection between her protected activity and her termination: “[a] substantial and motivating factor but for which Allen’s employment would not have been terminated by defendant was Allen’s lawful acts done in furtherance of her efforts to stop or prevent a violation by defendants of Title 31, Chapter 37, Subchapter III of the United States Code[.]” *Amended Complaint* ¶ 44. Furthermore, Allen pleads facts, including references to the ominous warnings of her supervisor and grounds on which defendants’ proffered reason for her termination can be found pretextual, that surely constitute the “further factual enhancement” required. Accordingly, defendants’ motion is without merit.

The Sixth Circuit’s decision in *McKenzie v. BellSouth Telecommunications, Inc*, 219 F.3d 508 (6th Cir. 2000), does not, contrary to defendants’ urgings, erect a bar to Allen’s claim. First, *McKenzie* takes pains to twice reiterate that “protected activity” under the False Claims Act is to be construed broadly. *Id.* at 514-515. Second, the court states that “protected activity” under the Act “must relate to ‘exposing fraud’ or ‘involvement with a false claims disclosure.’” *Id.* at 516. It is not necessary, the court is at pains to caution, that the employee know of the ability to file a *qui tam* action or have already filed such an action. *Id.* The fraud internally complained of by the

employee must reasonably lead to a viable False Claims Act action. *Id.* at 517.

Allen has pleaded facts to meet the standard of *McKenzie*. She pleads that her internal reporting regarded an order to falsify “a record material to a claim by defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in question.” *Amended Complaint* ¶ 32. Defendants do not discuss these allegations; neither do they dispute them. These facts regard involvement with a false claims disclosure and could reasonably lead to a viable False Claims Act. *McKenzie* does not support dismissal of count 1 of Allen’s amended complaint.

Defendants’ assertion that “Allen has not pled any facts demonstrating that Defendants knew that she was engaged in a protected activity”² is not well-taken. Allen has alleged that she directly informed her supervisor, Verona Kennedy, on two occasions that the directive to change the patients’ certifications was unjustified and that she would not do so. *Amended Complaint* ¶¶ 25, 28-29. Kennedy warned Allen of retribution for her refusal to engage in the fraud. *Id.* at ¶ 29. Accordingly, defendants’ assertion is simply unfounded; Allen has pleaded the “further factual enhancement” required by *Iqbal* and *Twombly*.

Defendants’ assertion that Allen has not pleaded any facts demonstrating that Defendants’ terminated her employment because of her alleged

² Defendants’ memo at p. 5.

participation in a protected activity”³ also is not well-taken, as it simply ignores the allegations in Allen’s amended complaint, to wit:

44. A substantial and motivating factor but for which Allen’s employment would not have been terminated by defendant was Allen’s lawful acts done in furtherance of her efforts to stop or prevent a violation by defendants of Title 31, Chapter 37, Subchapter III of the United States Code, her refusal to violate provisions of Title 31, Chapter 37, Subchapter III in the course of her employment and her refusal to violate KRS 314.091(1)(h) in the course of her employment.

...

48. Allen’s refusal to alter the patients’ recertifications was a refusal to falsify a record material to a false or fraudulent claim within the meaning of Title 31, Chapter 37, Subchapter III and most specifically 31 U.S.C. § 3729.

49. Allen’s refusal to falsify the patients’ recertifications was a lawful act in furtherance of her efforts to stop or prevent a violation by defendants of the provisions of Title 31, Chapter 37, Subchapter III.

50. A substantial and motivating factor but for which Allen’s employment would not have been terminated by defendants was her refusal to falsify the patients’ recertifications was a lawful act in furtherance of her efforts to stop or prevent a violation by defendants of the provisions of Title 31, Chapter 37, Subchapter III.

51. Allen’s termination was in violation of 31 U.S.C. § 3730(h).

Contrary to defendants’ assertion, it is respectfully submitted that the foregoing does allege the “further factual enhancement” demonstrating

³ Defendants’ memo at p. 6.

plausibly that defendants terminated Allen's employment because of her protected activity.

Defendants' assertion that "Allen concedes that she was terminated for practicing the art of nursing outside the scope of her license and for tendering an unrelated and false insurance claim on her own initiative and without OLBH's knowledge" is a gross misrepresentation of Allen's amended complaint. First, Allen does not and has not conceded that she practiced the art of nursing outside the scope of her license and has pleaded specifically to the contrary:

38. The reason proffered by defendants for Allen's termination was that Allen had practiced outside her scope and had tendered a fraudulent insurance claim.

39. Defendants' proffered reason for Allen's termination regarded events on August 25, 2008, when Allen took blood samples consistent with doctor's orders from her husband, transported them in appropriate container to a lab operated by defendants and asked a clerk to register her husband as an outpatient, a process that would produce a lab slip.

40. The aforescribed process and procedure was one that Allen had followed on numerous prior occasions without complaint and correction from defendants.

41. The aforescribed process and procedure was substantially similar and/or materially indistinguishable from those used by other of defendants' employees who have not been fired.

42. None of Allen's actions described in paragraph 39 were practicing beyond her scope.

43. Defendants' proffered reason for terminating Allen's employment was and is pretextual.

Once again and contrary to defendants' assertion, it is respectfully submitted that the foregoing does not concede that Allen practiced outside the scope of her license and does allege plausible facts with all necessary enhancement that the reason offered by defendants for her termination was pretextual.

2. Defendants' Motion Regarding Whether Bon Secours Health System Was Allen's Employer Is Premature and Unsupported by any Evidence

Defendants' argument that Bon Secours Health System, Inc. was not Allen's employer and should be dismissed as to count 1 of her amended complaint is at least premature. Bon Secours offers merely an argument with no evidentiary support demanding without any discovery to be dismissed. Bon Secours required Allen to sign, during the course of her employment an acknowledgement of receipt of a Bon Secours Health System code of conduct booklet substantially similar to that tendered herewith as Ex. A. The code of conduct booklet details, *inter alia*, the rights and responsibilities of it as Allen's employer and of Allen as its employee. Accordingly and since Allen's allegations must now be taken as true, defendants' motion is now premature and should be denied.

3. Allen Has Adequately Pled Her Wrongful Discharge Claims

Defendants make three assertions under point II.b. of their memo that are not well-taken and are directly contrary to Allen's amended complaint. First, defendants assert that Allen "has neither pled that Defendants asked her to

violate the FCA nor explained how a request for an unspecified change to a patient's recertification amounts to a submission of a false claim to the federal government." Defendants' memo at p. 8.

Contrary to defendants' assertion, Allen has pleaded that defendants directed her to violate the False Claims Act and sets forth with "further factual enhancement" the events and circumstances surrounding that directive:

11. On August 18, 2008, Allen recertified two home care patients for continued care consistent with Medicare guidelines and her clinical data assessment of the patients' conditions and status.

12. On August 26, 2008, Allen was instructed by Gaylene Karl, the auditing nurse for defendants, to change and alter the documentation for the two aforementioned patients recertified on August 18, 2008, with no change in status (meaning no new medication or change in condition but held for continued care) to start of care certifications.

13. A start of care certification is generally applicable to new patients.

14. Under certain circumstances, a start of care certification can be appropriate for continuing patient who is changing their payment source.

15. In response to Karl's instruction described in paragraph 12, Allen informed Karl that she needed a medical basis to make the requested changes.

16. Karl, in response to Allen's statement described in paragraph 15, informed Allen that Kathy Cook, defendants' office manager, had asked her to pass along the directive described in paragraph 12 to Allen.

17. Cook, as an office manager, was unqualified to give Allen directives on issues dependent on a clinical data assessment.

18. The recertifications and/or certifications described in paragraphs 11 and 12 are dependent on a clinical data assessment by Allen using her skills, experience and training as a Registered Nurse.

19. Following Allen's conversation with Karl described in paragraphs 12, 15 and 16, Allen contacted Kathy Cook, the office manager, who informed Allen that the basis for the requested change was "just because."

20. Cook further informed Allen that she had been directed to have the changes made by Verona Kennedy, the Director of Home Health Care for defendants.

21. Allen advised Cook that she needed a better reason than "just because" to make the requested change. Cook informed Allen that she would get back in touch with Allen with further details.

22. In the following days, Allen received a number of inquiries from Michelle Morales and/or Gaylene Karl about whether she had made the requested changes referenced and described in paragraph 12.

23. Allen advised both Morales and Karl repeatedly that she had no basis to make the requested changes and would not do so in absence of written documentation or OASIS guideline information showing the requested changes to be appropriate.

24. Shortly thereafter Kennedy and Allen met for a regularly-scheduled staff review meeting.

25. During the course of the aforescribed review meeting between Kennedy and Allen, Allen raised the issue of the requested changes, said it was wrong to make the requested changes without proper basis and informed Kennedy that she had been set up to fail.

26. Following this discussion and meeting with Kennedy, Allen was subjected to higher degree of scrutiny and differential treatment including but not limited to incorrect allegations of missing care notes, incorrect allegations of inadequate documentation, incorrect allegations of deviations from plan or standards of care and accused of being “too aggressive” in discharging patients.

27. On or about September 9, 2008, Kennedy and Morales, in response to Allen’s continuing refusal to make the requested changes without adequate or appropriate basis, faxed the documents to Allen attached hereto and marked Ex. A.

28. Allen reviewed Ex. A. on September 10, 2008, phoned Morales and spoke with both Morales and Kennedy. Allen informed Morales and Kennedy that Ex. A did not set forth a basis to allow or justify the requested changes.

29. In response to Allen’s continuing refusal to make the requested changes, Kennedy ominously stated and warned Allen as follows: “You’ve been told.”

30. Neither Morales nor Kennedy, in this telephone discussion with Allen, offered a substantive answer or rebuttal to Allen’s assertion that Ex. A did not set forth a basis to allow or justify the requested changes.

31. Ex. A does not set forth an adequate basis to justify the requested changes.

32. The directive issued to Allen to change the patients’ certifications without proper or adequate basis was an instruction to Allen to falsify a record material to a claim by defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in question.

It is respectfully submitted that the foregoing does in fact adequately and plausibly plead with all necessary and further factual enhancement that defendants directed Allen to violate the False Claims Act. Defendants’ assertion is simply without foundation.

Allen has not pleaded, contrary to defendants' assertion, an "unspecified change" to a patient's recertification. She has specifically pleaded the changes that she was ordered and refused to make. *Amended Complaint* ¶¶ 11-14, 18. Furthermore, Allen has pleaded that the ordered changes were "an instruction to Allen to falsify a record material to a claim by defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in questions. *Amended Complaint* ¶ 32. Allen is only required to plead and prove that the records "were material to a false or fraudulent claim," since that would be a violation of Title 31, Chapter 37, Subchapter III and, more specifically, of 31 U.S.C. § 3729. She is not required to plead or to prove that the changes themselves "amounted to submission of a false claim to the federal government," whatever that amorphous and vague demand by defendants means.

Defendants assert incorrectly that "Allen fails to plead that her refusal to correct a certification was a 'substantial and motivating factor' in her termination. (*See id.* ¶ 19-26)." Defendants' memo at p. 8. Defendants' assertion ignores the following in Allen's amended complaint:

44. A substantial and motivating factor but for which Allen's employment would not have been terminated by defendant was Allen's lawful acts done in furtherance of her efforts to stop or prevent a violation by defendants of Title 31, Chapter 37, Subchapter III of the United States Code, her refusal to violate provisions of Title 31, Chapter 37, Subchapter III in the course of her employment and her refusal to violate KRS 314.091(1)(h) in the course of her employment.

...

48. Allen's refusal to alter the patients' recertifications was a refusal to falsify a record material to a false or fraudulent claim within the meaning of Title 31, Chapter 37, Subchapter III and most specifically 31 U.S.C. § 3729.

49. Allen's refusal to falsify the patients' recertifications was a lawful act in furtherance of her efforts to stop or prevent a violation by defendants of the provisions of Title 31, Chapter 37, Subchapter III.

50. A substantial and motivating factor but for which Allen's employment would not have been terminated by defendants was her refusal to falsify the patients' recertifications was a lawful act in furtherance of her efforts to stop or prevent a violation by defendants of the provisions of Title 31, Chapter 37, Subchapter III.

It is respectfully submitted that, in view of the foregoing, defendants' assertion is not well-taken and that Allen has pleaded with all necessary further factual enhancement that her refusal to make the directed changes in the records was a substantial and motivating factor for her termination.

Defendants also repeat under point II.b of their memo the falsehood that "Allen admits that she was terminated for practicing the art of nursing outside the scope of her license and for rendering an unrelated and false insurance claim on her own initiative and without OLBH's knowledge. (Am. Compl. ¶ 38)." Defendants' memo at p. 8. Again and as set forth above, *supra* at pp. 12-13, First, Allen does not and has not conceded that she practiced the art of nursing outside the scope of her license and has pleaded specifically to the contrary of defendants' unfounded assertion:

38. The reason proffered by defendants for Allen's termination was that Allen had practiced outside her scope and had tendered a fraudulent insurance claim.

39. Defendants' proffered reason for Allen's termination regarded events on August 25, 2008, when Allen took blood samples consistent with doctor's orders from her husband, transported them in appropriate container to a lab operated by defendants and asked a clerk to register her husband as an outpatient, a process that would produce a lab slip.

40. The aforescribed process and procedure was one that Allen had followed on numerous prior occasions without complaint and correction from defendants.

41. The aforescribed process and procedure was substantially similar and/or materially indistinguishable from those used by other of defendants' employees who have not been fired.

42. None of Allen's actions described in paragraph 39 were practicing beyond her scope.

43. Defendants' proffered reason for terminating Allen's employment was and is pretextual.

Once again and contrary to defendants' assertion, it is respectfully submitted that the foregoing does not concede that Allen practiced outside the scope of her license and does allege plausible facts with all necessary enhancement that the reason offered by defendants for her termination was pretextual.

The Kentucky Supreme Court, contrary to defendants' assertion, has not held "that wrongful discharge claims are precluded if a federal statute also declares the act unlawful and specifies the civil remedy." Defendants' memo

at p. 8.⁴ *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985), does not rule or hold that a Kentucky state law wrongful discharge claim is precluded if a federal statute also declares the act unlawful and specifies the civil remedy. In *Grzyb*, the plaintiff pleaded a tort claim for wrongful discharge premised on the notion that the Kentucky Civil Rights Act expressed the applicable and the violated public policy underpinning the claim. The court did not rule that a state law wrongful discharge claim is precluded if a federal statute also declares the act unlawful and specifies the remedy; in reality, the court did not consider or discuss the issue. Defendants cite no Kentucky case supporting or discussing the proposition that they urge.

Defendants' contention is directly contrary to the Sixth Circuit's holding in *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007). In *Murphy*, the plaintiff claimed that she had been discharged based on her free speech activity protected by the First and Fourteenth Amendments. 505 F.3d at 448. She pleaded causes of action for this violation both pursuant to 42 U.S.C. § 1983 and a wrongful discharge claim. *Id.* at 449. The Sixth Circuit, in remanding the case following its reversal of the summary judgment granted by the district court, specifically observed as follows:

In Kentucky, “[a]n at-will employee has a cause of action for wrongful discharge when the discharge is contrary to fundamental and well-defined public policy as evidenced by constitutional or statutory provision.” Because *Murphy* has

⁴ This argument by defendants also undercuts their contentions regarding the False Claims Act, as defendants' argument is reliant upon the availability of a remedy for Allen under the False Claims Act.

shown a fundamental policy under the United States Constitution against the discharge of public employees for voicing their political beliefs-as distinguished from merely becoming a candidate-she may maintain a claim for wrongful discharge. (citations omitted)

505 F.3d at 455.

Murphy involved a federal statute – 42 U.S.C. § 1983 -- that specified a remedy for the violation of the plaintiff's First Amendment rights.

Nonetheless, the Sixth Circuit ruled that she could also pursue a wrongful discharge claim likewise premised on the violation of her First Amendment rights. Accordingly, the Sixth Circuit's holding in *Murphy* is contrary to defendants' argument that Allen's state law wrongful discharge claim is preempted by federal law.

The only other case that defendants cite to on this point that involves Kentucky law is *Franklin County v. Nationwide Mut. Ins. Co.*,⁵ which is not a wrongful discharge but is an insurance tax case. It cites *Grzyb* for the proposition that a party suing for a violation of a state insurance statute is limited to the remedies provided for in that state statute. The case in no way discusses or holds that a Kentucky state law wrongful discharge claim is precluded if a federal statute also declares the act unlawful and specifies the civil remedy.

⁵ This case originated in this Court's Frankfort division; Civil Action No. 3:08-46-DCR, 2008 WL 5330521 (E.D. Ky. Dec. 17, 2008).

Defendants' arguments are not supported by any Kentucky court decision and are contrary to the Sixth Circuit's decision in *Murphy*. Accordingly, they are without merit.

4. Allen Has Adequately Pleaded the Wrongful Discharge Claim In Count III of the Amended Complaint

Allen, contrary to defendants' assertions, has adequately pleaded a wrongful discharge claim premised on her refusal to violate KRS 314.091(1)(h) in the course of her employment.⁶ First, defendants' assertion that Allen "has not pled that Defendants asked her to falsify an essential entry in an essential record under KRS 314.091(1)(h) is not well-taken. Allen, in fact, pleads as follows:

11. On August 18, 2008, Allen recertified two home care patients for continued care consistent with Medicare guidelines and her clinical data assessment of the patients' conditions and status.

12. On August 26, 2008, Allen was instructed by Gaylene Karl, the auditing nurse for defendants, to change and alter the documentation for the two aforementioned patients recertified on August 18, 2008, with no change in status (meaning no new medication or change in condition but held for continued care) to start of care certifications.

13. A start of care certification is generally applicable to new patients.

14. Under certain circumstances, a start of care certification can be appropriate for continuing patient who is changing their payment source.

⁶ Count III, as defendants recognize, does have a typographical error, as it cites to KRS 314.091(1)(f) instead of KRS 314.091(1)(h), which is pleaded in section IV of the complaint and incorporated by reference into Count III as noted in paragraph 54 of the amended complaint.

15. In response to Karl's instruction described in paragraph 12, Allen informed Karl that she needed a medical basis to make the requested changes.

16. Karl, in response to Allen's statement described in paragraph 15, informed Allen that Kathy Cook, defendants' office manager, had asked her to pass along the directive described in paragraph 12 to Allen.

17. Cook, as an office manager, was unqualified to give Allen directives on issues dependent on a clinical data assessment.

18. The recertifications and/or certifications described in paragraphs 11 and 12 are dependent on a clinical data assessment by Allen using her skills, experience and training as a Registered Nurse.

19. Following Allen's conversation with Karl described in paragraphs 12, 15 and 16, Allen contacted Kathy Cook, the office manager, who informed Allen that the basis for the requested change was "just because."

20. Cook further informed Allen that she had been directed to have the changes made by Verona Kennedy, the Director of Home Health Care for defendants.

21. Allen advised Cook that she needed a better reason than "just because" to make the requested change. Cook informed Allen that she would get back in touch with Allen with further details.

22. In the following days, Allen received a number of inquiries from Michelle Morales and/or Gaylene Karl about whether she had made the requested changes referenced and described in paragraph 12.

23. Allen advised both Morales and Karl repeatedly that she had no basis to make the requested changes and would not do so in absence of written documentation or OASIS guideline information showing the requested changes to be appropriate.

24. Shortly thereafter Kennedy and Allen met for a regularly-scheduled staff review meeting.

25. During the course of the aforescribed review meeting between Kennedy and Allen, Allen raised the issue of the requested changes, said it was wrong to make the requested changes without proper basis and informed Kennedy that she had been set up to fail.

26. Following this discussion and meeting with Kennedy, Allen was subjected to higher degree of scrutiny and differential treatment including but not limited to incorrect allegations of missing care notes, incorrect allegations of inadequate documentation, incorrect allegations of deviations from plan or standards of care and accused of being “too aggressive” in discharging patients.

27. On or about September 9, 2008, Kennedy and Morales, in response to Allen’s continuing refusal to make the requested changes without adequate or appropriate basis, faxed the documents to Allen attached hereto and marked Ex. A.

28. Allen reviewed Ex. A. on September 10, 2008, phoned Morales and spoke with both Morales and Kennedy. Allen informed Morales and Kennedy that Ex. A did not set forth a basis to allow or justify the requested changes.

29. In response to Allen’s continuing refusal to make the requested changes, Kennedy ominously stated and warned Allen as follows: “You’ve been told.”

30. Neither Morales nor Kennedy, in this telephone discussion with Allen, offered a substantive answer or rebuttal to Allen’s assertion that Ex. A did not set forth a basis to allow or justify the requested changes.

31. Ex. A does not set forth an adequate basis to justify the requested changes.

32. The directive issued to Allen to change the patients’ certifications without proper or adequate basis was an instruction to Allen to falsify a record material to a claim by

defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in question.

33. Had Allen falsified either or both of the patient's certifications she would have violated provisions of Title 31, Chapter 37, Subchapter III of the United States Code.

34. Allen's refusal to change and falsify the certifications was a refusal to violate a law in the course of employment.

35. Allen's refusal to change and falsify the certifications was a refusal to falsify an essential record within the meaning of KRS 314.091(1)(h).

It is respectfully submitted that the foregoing adequately and plausibly pleads facts that Allen was directed to falsify an essential record within the meaning of KRS 314.0910(1)(h) and that she refused to do so.

Defendants' repeat in section II.c of their memo the unfounded assertion that Allen's amended complaint "fails to state how a request for an unspecified change to a patient's recertification amounts to a 'falsification' of an 'essential entry' on an essential record,' or how her refusal to correct a certification was a 'substantial and motivating factor' in her termination. (*See id.* ¶¶ 19-26)." Defendants' memo at p. 10. First and as noted above, *supra* at pp. 17-18, Allen has specified the changes she was ordered to make as shown by ¶¶ 11-14, 18 of the amended complaint. Furthermore, Allen has pleaded that the ordered changes were "an instruction to Allen to falsify a record material to a claim by defendants to obtain Medicare funding and/or reimbursement related to care of the two patients in questions. *Amended Complaint* ¶ 32.

Secondly and as Allen has already pointed out above at pp. 18-19, she has pleaded adequately and plausibly that her refusal to violate KRS 314.091(1)(h) was a substantial and motivating factor for her termination:

44. A substantial and motivating factor but for which Allen's employment would not have been terminated by defendant was Allen's lawful acts done in furtherance of her efforts to stop or prevent a violation by defendants of Title 31, Chapter 37, Subchapter III of the United States Code, her refusal to violate provisions of Title 31, Chapter 37, Subchapter III in the course of her employment and her refusal to violate KRS 314.091(1)(h) in the course of her employment.

...

54. Allen incorporates Paragraphs 1-53 hereof as if fully incorporated herein.

55. A substantial and motivating factor for the termination of Allen's employment was her refusal to violate KRS 314.091(1)(f)⁷ in the course of her employment. Therefore, Allen was wrongfully discharged under Kentucky law.

Finally, defendants again repeat without foundation and contrary to the actual allegations in Allen's amended complaint that she "admits she was terminated for other reasons. (Am. Compl. ¶ 38)." Again, defendants' assertion is not well-taken. Allen, in fact, has pleaded directly to the contrary:

38. The reason proffered by defendants for Allen's termination was that Allen had practiced outside her scope and had tendered a fraudulent insurance claim.

⁷ Defendants' correctly recognize the cite to KRS 314.091(1)(f) as a typographical error. See *Defendants' memo at p. 10 n.3*. The cite should be to KRS 314.091(1)(h) as correctly recited in ¶¶ 35 and 44 of Allen's amended complaint.

39. Defendants' proffered reason for Allen's termination regarded events on August 25, 2008, when Allen took blood samples consistent with doctor's orders from her husband, transported them in appropriate container to a lab operated by defendants and asked a clerk to register her husband as an outpatient, a process that would produce a lab slip.

40. The aforescribed process and procedure was one that Allen had followed on numerous prior occasions without complaint and correction from defendants.

41. The aforescribed process and procedure was substantially similar and/or materially indistinguishable from those used by other of defendants' employees who have not been fired.

42. None of Allen's actions described in paragraph 39 were practicing beyond her scope.

43. Defendants' proffered reason for terminating Allen's employment was and is pretextual.

Once again and contrary to defendants' assertion, it is respectfully submitted that the foregoing does not concede that Allen practiced outside the scope of her license and does allege plausible facts that the reason offered by defendants for her termination was pretextual.

Conclusion

For all the foregoing reasons, defendants' motion to dismiss should be **denied** in its entirety.⁸

⁸ A proposed order is tendered herewith.

Respectfully submitted,

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Certificate of Service

I certify that on August 28, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: s/Robert L. Abell
Robert L. Abell
COUNSEL FOR PLAINTIFF