IP 03-0733-C B/S Chomer v Logansport Memorial
Judge Sarah Evans Barker Signed on 10/29/03

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DR. JOHN CHOMER, Plaintiff,	)	
vs.	)	1:03-CV-0733 SEB-VSS
LOGANSPORT MEMORIAL HOSPITAL and LOGAN EMERGENCY PHYSICIANS, Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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DR. JOHN CHOMER, Plaintiff, vs. LOGANSPORT MEMORIAL HOSPITAL and LOGAN EMERGENCY PHYSICIANS, Defendants.	)))))))))	1:03-CV-0733 SEB-VSS

ENTRY DENYING DEFENDANTS' MOTION TO DISMISS

Defendants Logansport Memorial Hospital and Logan Emergency Physicians have moved to dismiss Plaintiff Dr. John Chomer's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants argue that Plaintiff has failed to state a claim upon which relief may be granted either for retaliation under the False Claims Act or for tortious interference with contract under Indiana law. For the reasons stated below, we DENY Defendants' Motion to Dismiss.

Factual Background

Plaintiff, Dr. John Chomer ("Plaintiff"), is an emergency room physician and an Indiana resident. Compl. ¶¶ 1, 2, 7. In March 2002, he entered into a contract with NES Healthcare Group ("NES"). Id. ¶ 6. NES subsequently leased Plaintiff to Defendants, Logansport Memorial Hospital ("Hospital") and Logan Emergency Physicians ("LEP," collectively "Defendants"), which served as joint employers of Plaintiff. Id. ¶¶ 7-8. At all times relevant to this complaint, Plaintiff's work performance met Defendants' legitimate expectations. Id. ¶ 10.

In or about May 2002, Plaintiff told Medicaid/Medicare patients that "it was inappropriate for

them to come to the emergency room for colds and non-emergency medical conditions." Informing Plaintiff's belief of the inappropriateness of such behavior was his understanding of 42 U.S.C. §§ 1320a-7 and 1320c-5, which make it unlawful for a physician or medical facility to provide medically unnecessary healthcare services to Medicaid/Medicare patients. Compl. ¶ 11.

LEP President Lazo Krszenski ("Krszenski") told Plaintiff to stop telling Medicaid/Medicare patients that it was inappropriate for them to come to the emergency room for colds and non-emergency medical conditions. Plaintiff responded that federal law required that he deter and report abuse of the Medicaid/Medicare system. "Krszenski retorted that LEP was 'trying to get the numbers up' and that Chomer 'was taking money out of [its] pocket.'" Compl. ¶ 12. Undeterred, in August 2002, Plaintiff reported what he believed to be Medicaid/Medicare abuse and fraud to the Indiana Family and Social Services Administration ("IFSSA"). Id. ¶ 13. When, in September 2002, IFSSA telephoned Plaintiff to discuss his complaint, the conversation was overheard and reported to Krszenski. Id. ¶ 14.

Krszenski warned Plaintiff never again to file an abuse or fraud complaint. Plaintiff, however, was resolute in his belief that federal law required that he report such abuses. In response, Krszenski "yelled that he didn't 'care' and that Plaintiff would 'never do that again.'" Compl. ¶ 15. About this time, the Hospital and LEP removed Plaintiff from the emergency room schedule, thereby terminating his employment with them. Id. ¶ 18. Subsequently, NES also terminated its contract with Plaintiff. Id. ¶ 19.

Plaintiff filed his complaint in this court on May 16, 2003, alleging violations of the whistle-blower provision of the False Claims Act and Indiana tort law. We have original federal question

jurisdiction over Plaintiff's FCA claim under 31 U.S.C. § 3730 and supplemental jurisdiction over his state tort claim under 28 U.S.C. § 1367(a).

Legal Analysis

A party moving to dismiss an action pursuant to Federal Rule of Civil Procedure 12(b)(6) bears a weighty burden. It must show that the pleadings themselves fail to provide a basis for any claim for relief under any set of facts. Ed Miniat, Inc. v. Globe Life Ins. Group Inc., 805 F.2d 732, 733 (7th Cir. 1986), cert. denied, 482 U.S. 915 (1987). As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 161 F. Supp. 2d 948, 950-51 (S.D.Ind. 2001) (quoting 5A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure: Civil § 1357). On a Rule 12(b)(6) motion, we treat all well-pleaded factual allegations as true, and we construe all inferences that reasonably may be drawn from those facts in a light most favorable to the party opposing the motion, Plaintiff in this case. Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7th Cir. 2001); Latuszkin v. City of Chicago, 250 F.3d 502, 504 (7th Cir. 2001).

In his complaint, Plaintiff asserts against Defendants a retaliation claim under the False Claims Act ("FCA"), 31 U.S.C. § 3730(h), as well as a state law claim for tortious interference with a contractual relationship. Defendants move to dismiss Plaintiff's complaint arguing that Plaintiff has failed to state a cause of action upon which relief may be granted because Plaintiff has not satisfied the essential elements of either claim.

False Claims Act

In general, the FCA holds "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval" liable for civil penalties. 31 U.S.C. § 3729(a)(1). Although the Attorney General may sue to enforce the FCA, so may a private person, known as a relator, in a *qui tam* action brought "in the name of the Government," but with the hope of sharing in any recovery. 31 U.S.C. § 3730(b). Cook County, Ill. v. U.S. ex rel. Chandler, 123 S.Ct. 1239, 1242-43 (2003).

At issue in this case is the FCA whistle-blower provision, 31 U.S.C. § 3730(h), which provides in pertinent part:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

Such relief includes reinstatement, double back pay with interest, "and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees." 31 U.S.C. § 3730(h); Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 277 F.3d 936, 943-44 (7th Cir. 2002).

To state a cause of action against Defendants under § 3730(h), Plaintiff must show that: (1) his actions were taken "in furtherance of" an FCA enforcement action and were therefore protected by the statute; (2) the employer had knowledge that he was engaged in this protected conduct; and (3) the discharge was motivated, at least in part, by the protected conduct. Brandon, 277 F.3d at 944. Defendants argue that Plaintiff has failed to state a claim under § 3730(h) because, as a threshold

matter, Plaintiff's actions were unlawful and therefore not protected by the FCA whistle-blower provision.

Plaintiff alleges that he "informed" Medicaid/Medicare patients that "it was inappropriate for them to come to the emergency room for colds and non-emergency medical conditions." He argues that 42 U.S.C. §§ 1320a-7 and 1320c-5 prohibit a physician or medical facility from rendering medically unnecessary healthcare services to Medicaid and/or Medicare patients, and that he reported Defendants' provision of these allegedly unnecessary services and their alleged defrauding of Medicare to the IFSSA. Compl. ¶ 11. Defendants, on the other hand, contend that the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, requires hospital emergency departments, and the physicians practicing in those departments, to provide a medical screening to any individual who presents to the emergency department requesting an examination or treatment. Moreover, Defendants argue that the allegedly medically unnecessary and fraudulent acts, the screening examinations, reported by Plaintiff are the same acts as those required by EMTALA.

In asserting that Plaintiff confused the term "non-emergent" with the term "medically unnecessary," and therefore, that he was in error when he reported what he believed to be Medicaid/Medicare fraud to the IFSSA, Defendants rely on facts not explicitly stated in the complaint. Plaintiff has not alleged that he refused to treat Medicaid/Medicare patients presenting to the emergency department, or that he delayed treating them in favor of insured patients. Rather, he alleges only that he informed Medicaid/Medicare patients that "it was inappropriate for them to come to the emergency room for colds and non-emergency medical conditions." EMTALA prohibits refusal of treatment, not

any reporting of allegedly medically unnecessary services. Determining what acts constitute protected activity under the FCA is a fact-specific inquiry. Decalonne v. G.I. Consultants, Inc., 197 F. Supp. 2d 1126, 1133 (N.D. Ind. 2002). As the facts of this case have not been developed, Defendant's argument that Plaintiff's acts were unlawful are premature.[1] Accordingly, we turn instead to the question of whether Plaintiff's actions were taken "in furtherance of" an FCA enforcement action.

The FCA protects "investigation for, initiation of, testimony or assistance" in furtherance of an FCA enforcement action "filed or to be filed." See 31 U.S.C. § 3630(h). In Neal v. Honeywell, 33 F.3d 860 (7th Cir. 1994), the Seventh Circuit "defined an 'action' under § 3730(h) to include situations in which a *qui tam* action is a 'distinct possibility' or 'litigation could be filed legitimately--that is, consistently with Fed.R.Civ.P. 11.'" Brandon, 277 F.3d at 944, quoting Neal, 33 F.3d at 864. The Neal court did not, however, define "in furtherance of" or otherwise describe the actions the employee must have taken in relation to the possibility of litigation. Courts interpret the "to be filed" phrase of § 3730(h) "to mean the equivalent of an action that reasonably could be filed." U.S. ex rel. Yesudian v.

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[1] Notice pleading under Federal Rule of Civil Procedure 8(a) "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Indep. Distrib. Co-op. USA v. Advanced Ins. Brokerage of Am., Inc., 264 F. Supp. 2d 796, 800 (S.D.Ind. 2003) quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). We recognize that Defendants could have had any number of reasons for wanting to curtail Plaintiff's comments to patients presenting to the emergency department with non-emergent, but perhaps medically necessary, conditions. For example, ordinarily it is the hospital staff, not the patient, who must decide the appropriate place and course of treatment for the patient's condition. In addition, it seems plausible that Defendants may have felt that a more appropriate audience for Plaintiff's concerns would have been hospital administrators or even the hospital board because those people would have been in a position to affect a change in policy. Plaintiff alleges that Defendants' reason for silencing him was to perpetuate fraud on the Medicaid/Medicare system. This allegation may ultimately prove true. In any event, Plaintiff bears the burden of proof on this issue, and at this juncture in the litigation, there is no reason to prevent him from trying to meet it.

Howard Univ., 153 F.3d 731, 741 (D.C. Cir. 1998).

Although Plaintiff did not threaten specifically to file a *qui tam* action, he threatened to report and did actually report the Defendants' allegedly fraudulent conduct to the IFSSA before he was discharged. IFSSA, in turn, called Plaintiff to follow up on his complaint. "[S]upplying information that sets off an investigation" qualifies as an action in furtherance of an FCA enforcement action to be filed. See Neal, 33 F.3d at 864. Therefore, we conclude that Plaintiff has alleged facts describing acts in furtherance of an FCA enforcement action.

Next, Plaintiff must allege facts that show that the employer had knowledge that he was engaged in this protected conduct. In Brandon, the Seventh Circuit asked whether any of the actions taken by the plaintiff placed the defendant on notice of the "distinct possibility" of a *qui tam* action. Id. at 945. Notice may be accomplished by "characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved." Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 868 (4th Cir. 1999). In this case, in response to LEP President Krszenski's order to stop telling patients not to come to the emergency department with colds and non-emergency medical conditions, Plaintiff told Krszenski that "federal law required that he deter and report abuse of the Medicaid/Medicare system." Furthermore, when Krszenski told Plaintiff never again to file an abuse or fraud complaint, Plaintiff stated that he would continue to report any future abuses. At least arguably, as that is as far as we go in making a Rule 12(b)(6) ruling, such facts demonstrate that Defendants had notice of the "distinct possibility" of a *qui tam* action.

Finally, Plaintiff must allege facts showing that the discharge was motivated, at least in part, by the protected conduct. Plaintiff contends that his "work performance met the legitimate expectations of

[Defendants] at all relevant times." After he told Krszenski that he would continue to report the alleged Medicare/Medicaid fraud, however, Defendants allegedly removed Plaintiff from the work schedule, thereby terminating his employment with Defendants. Such facts, if true, would tend to show the discharge was motivated, at least in part, by the protected conduct. Therefore, we find that Plaintiff has alleged facts sufficient to state a claim for relief under FCA § 3730(h).

Tortious Interference with Contract

To state a claim for tortious interference with a contractual relationship under Indiana law, Plaintiff must allege the following elements: (1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) resulting damages. Ind. Health Centers, Inc. v. Cardinal Health Sys., Inc., 774 N.E.2d 992, 1000 (Ind. Ct. App. 2002) citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228 (Ind.1994).

Plaintiff alleges that he had a valid contract with NES Healthcare Group, which leased him as an employee to Defendants, Hospital and LEP. As such, Defendants had knowledge of Plaintiff's contract with NES. Plaintiff contends that Defendants intentionally interfered with Plaintiff's contractual relationship with NES when they removed Plaintiff from their emergency room schedule, thereby terminating Plaintiff's employment with Defendants and causing NES, too, to end its contract with Plaintiff. As stated above, Plaintiff alleges that his work performance met the legitimate expectations of Defendants Hospital and LEP at all relevant times, and therefore, that Defendants were not justified in firing him. Finally, Plaintiff asserts that he has suffered damages from Defendants' alleged tortious interference, including job termination, lost wages and benefits, and attorney fees.

Defendants challenge the "absence of justification" element of Plaintiff's claim, arguing, as they did above, that Plaintiff's actions were illegal under EMTALA, and therefore, that Defendants were justified in firing him on that ground. For the reasons discussed above, however, we conclude that the allegations in the complaint do not establish the factual basis for such an argument. Accordingly, we find that Plaintiff has stated a claim for tortious interference with a contractual relationship.

Because we determine that Plaintiff has alleged facts sufficient to state a claim for relief under FCA § 3730(h) and to state a claim for tortious interference with contract under Indiana state law, we DENY Defendants' Motion to Dismiss.

Conclusion

Defendants Hospital and LEP moved to dismiss this action, arguing that Plaintiff has failed to state a cause of action upon which relief may be granted because Plaintiff has not satisfied the essential elements either of a claim for retaliation under the False Claims Act or of a claim for tortious interference with contract under Indiana state law. For the reasons explained above, however, we find that Plaintiff has stated claims upon which relief may be granted for both retaliation and tortious interference with contract. Accordingly, Defendants' Motion to Dismiss is DENIED.

It is so ORDERED this _____ day of November 2003.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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