

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 15 July 2015

ALJ NO.: 2015-ACA-00005

KITTY GALLAS,
Complainant,

v.

THE MEDICAL CENTER OF AURORA,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises under the whistleblower provision of the Affordable Care Act. *See* 29 U.S.C. § 218c and the implementing regulations at 29 C.F.R. Part 1984. On March 5, 2015, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a letter dismissing Complainant’s claim. On April 6, 2015, the Complainant, Kitty Gallas (“Gallas”), objected to the Secretary’s preliminary order and requested a hearing pursuant to 29 C.F.R. § 1984.106. The hearing is scheduled for October 29, 2015.

The Respondent filed a Motion to Dismiss on May 8, 2015, and Gallas, acting *pro se*, filed a response to the motion on May 18, 2015. A telephonic conference call was held on the record with the parties on May 22, 2015. Given Gallas’ status as a *pro se* litigant, she was allowed until May 29, 2015 to file an amended complaint, and Respondent was given time thereafter to file a revised Motion to Dismiss.

On May 27, 2015, Gallas filed a “Response to Respondent’s Motion to Dismiss,” which I will treat as her amended complaint. In response to Gallas’ filing, Respondent filed a Renewed Motion to Dismiss on June 3, 2015. The Respondent argues that Gallas has failed to state a claim under the ACA because she has not alleged any activity that is protected under its whistleblower provision. R. Mot. Dismiss 3. Respondent argues that Gallas failed to allege she complained about any aspect covered under Title I of the ACA, but rather references entirely separate and distinct laws. *Id.* at 6. Gallas filed a Response to the Renewed Motion to Dismiss on June 16, 2015.

I. Standard of Review

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 20 C.F.R. § 18.70(c), “[a] party may move to dismiss part

or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” When determining whether a complaint has stated a claim upon which relief can be granted in administrative whistleblower proceedings before the Department of Labor, the proper legal standard is “fair notice.” *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 9 (ARB July 31, 2012). A complainant need only provide “(1) some facts about the protected activity, showing some “relatedness” to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.” *Id.*

II. Discussion

Gallas was employed by Respondent as a psychiatric evaluator, which involved travelling to hospital emergency rooms to evaluate patients for suicidal ideology, alcoholism, and psychotic episodes, and either refer them for admission or discharge. Secretary’s Findings (Mar. 5, 2015). In October 2013, Gallas was directed by Respondent to conduct her psychiatric evaluations via a video conference system, Telemental Health. *Id.* In her complaint filed with OSHA, Gallas alleged that she refused to perform emergency psychiatric evaluations via Telemental Health and complained of violations of the ACA, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the Examination and Treatment for Emergency Medical Conditions and Women in Labor Act (“EMTALA”), as well as Medicare/Medicaid fraud, and a substandard level of care. She also alleged that she voiced concerns about doctors refusing to provide medical care to patients without health insurance.

In Gallas’ amended complaint, filed on May 27, 2015, she identified several specific instances of alleged protected activity. Under the heading “Complainant Objections to Telemental Health, HIPPA, EMTALA, & Insurance Concerns,” Gallas alleges she engaged in the following protected activity:

In August 2013, when Complainant was informed of a new evaluation process in a group employee meeting by Respondent, she voiced her objections, concerns and refusal based on her reasonably [sic] belief this process violated several Federal statutes, HIPPA, EMTALA, and Colorado State law putting her professional license at risk. She questioned the legality associated with private and Public (Medicaid/Medicare) insurance billing, fees, costs and substandard services.

Amend. Comp. 6.

Next, under the heading “Complainant Complaints on Pre-Authorization of Insurance and Services,” Gallas alleged:

On October 31, November 9th and November 11th 2013, Complainant voiced objections, concerns and refusals based on her reasonable belief, which [Respondent] requiring a Pre-Authorization for Insurance before Admittance, based on the use of a specific form, process and procedure violated several

Federal statutes, including HIPPA and EMTALA, and Colorado State law which would put her professional license at risk. She questioned the legality associated with discriminating by private and Public (Medicaid/Medicare) insurance billing, fees, costs and substandard services. On November 19th, 2013, Complainant further met with upper management, her immediate supervisor to voice concerns, refusal, objections and complaints regarding violations of Federal statutes, ACA, HIPPA, EMTALA, fraud against insurance carriers, billing, fee fraud and substandard services

Amend. Comp. 7.

Under the heading “Complainant’s Notification to Respondent of Violations and Federal & State Reporting,” Gallas alleged additional protected activity:

In December 2013, Complainant informed Respondent, TMCA, her supervisor, upper management, Human Resource Director, Ethics and Compliance, Respondent HCA, Corporate Ethics and Compliance and HCA Human Resources of the reasonable belief of a “hostile workplace” in violation of Title 11(c), OSHA, violations of SOX, and violations of ACA, HIPPA, EMTALA, Insurance Fraud and substandard services with specificity. . . .

Amend. Comp. 8.

Under the heading “Complainant’s Notification to Respondent of Violations and Federal & State Reporting,” Gallas alleged:

On January 5, 2014 Complainant filed a formal complaint with the Joint Commission on Accreditation of Healthcare Certifications, (“JCAHO”). On February 3rd, 2014, Complainant filed a formal complaint with the Office of the Inspector General (“OIG”). Complainant informed Respondent, TMCA, her immediate supervisor, upper management, Human Resources Director, Ethics and Compliance Directors, and Respondent HCA, Corporate Ethics and Compliance and HCA Human Resources of the reasonable belief of a “hostile workplace” in violation of Title 11(c) OSHA, violations of SOX, and violations of ACA, HIPPA, EMTALA, Insurance Fraud and substandard services with specificity. . . .

Amend. Comp. 8.

Lastly, under the heading “Respondent Terminated Complainant’s Employment,” Gallas alleged:

Complainant had a right to object, refuse and complain about what she reasonably believed were violations of 11(c) OSHA, SOX and ACA. She reported these complaints to Federal agencies, regulatory bodies, state agencies and law enforcement. She also reported these issues directly to her immediate supervisors, upper management at TMCA and HCA.

Amend. Comp. 9.

Respondent asserts in its Renewed Motion to Dismiss that Gallas has failed to state a claim upon which relief can be granted because she has not alleged any activity that is protected under the ACA.

Under the ACA whistleblower provision, “[n]o employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee)” engaged in protected activity. The statute enumerates protected activity as:

- (1) received a credit under section 36B of title 26 or a subsidy under section 18071 of title 42;
- (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);
- (3) testified or is about to testify in a proceeding concerning such violation;
- (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
- (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

29 U.S.C. § 218c; *see also* 29 C.F.R. § 1984.102(2).

The reference to “this Title” in the statute and the implementing regulations refers to Title I of the ACA. *Rosenfield v. GlobalTranz Enterprises, Inc.*, No. CV 11-02327-PHX-NVW, 2012-WL-2572984 (D.Ariz. July 2, 2012); Interim Final Rule, *Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act* [hereinafter “Interim Final Rule”], 78 Fed. Reg. 13222, 13223, 13225 (Feb. 27, 2013). Title I of the ACA includes health insurance reforms such as prohibiting lifetime dollar limits on coverage, requiring most plans to cover recommended preventive services with no cost sharing, access to health insurance premium tax credits, establishing state and Federal exchanges for qualified health plans, mandatory individual enrollment in a qualified plan, mandatory employee coverage requirements for qualified employer, prohibiting denial of coverage due to pre-existing conditions, and prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates. Interim Final Rule, 78 Fed. Reg. at 13223, 13225; *Dewolf v.*

Hair Club for Men, 2012-ACA-00003, HTML at 12 (Apr. 1, 2014); *see generally* Public Law: P.L. 111-148, § 1558, 124 Stat. 261 (2010).

A complainant's ACA complaint must "allege the existence of facts and evidence to make a prima facie showing," including that "the employee engaged in protected activity." 29 C.F.R. § 1984.104(e)(2)(i). In order to have a "reasonable belief" that a violation occurred under sections 218c(a)(2) and (5), a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. Interim Final Rule, 78 Fed. Reg. at 13226 (*citing Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011)).

Gallas has consistently alleged that she engaged in protected activity by reporting violations of HIPAA and EMTALA. However these two statutes are not covered under the ACA. *See* Public Law: P.L. 111-148, § 1558, 124 Stat. 261 (2010) (no reference to HIPAA and only reference to EMTALA simply states: "Nothing in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including section 1867 of the Social Security Act (popularly known as 'EMTALA')"). HIPAA and EMTALA are separate and independent statutes apart from the ACA. *See Stroud v. Mohegan Tribal Gaming Authority*, ALJ No. 2013-ACA-00003 (ALJ Dec. 3, 2013), *aff.* ARB No. 14-014 (ARB Nov. 26, 2014). HIPAA is not referenced or incorporated into the ACA. Although EMTALA is referenced in Title I of the ACA, it is simply to acknowledge independent requirements outside the scope of the ACA. Therefore any complaints or reports Gallas made of violations of these two statutes does not constitute protected activity under the ACA. Furthermore, any alleged violations of Colorado state law are not covered under the ACA.¹

Gallas only generally states that she reported "violations of the ACA." *See generally* Amend. Comp. Gallas has failed to identify any specific provisions of the ACA which she reasonably believed the Respondent violated. As Gallas is proceeding *pro se* in this matter, I am mindful that her complaint must be construed "'liberally in deference to [her] lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co.*, ARB No. 01067, ALJ No. 2000-TSC-00003, at 6 (ARB Apr. 25, 2003) (internal citations omitted), *quoted in Dewolfe*, 2012-ACA-00003 at 12. However, Gallas must still meet her burden of stating a claim upon which relief can be granted. *See id.*

Gallas did allege that she "questioned the legality associated with private and Public (Medicaid/Medicare) insurance billing, fees, costs and substandard services" in regard to the Respondent's new Telemental Health process. Amend. Comp. 6. Similarly she alleged she "questioned the legality associated with discriminating by private and Public (Medicaid/Medicare)² insurance billing, fees, costs and substandard services" based on

¹ As I explained to Gallas during a conference call held on May 6, 2015, I do not have jurisdiction over Gallas' Section 11 claim under the OSHA statute, and that claim is not before me. 5/6/15 Conf. Call. Tr. 7. Gallas' SOX claim, ALJ No. 2015-SOX-00013, will be addressed by separate order.

² To the extent Gallas alleges Medicaid/Medicare fraud, this is not covered by the ACA. *See OSHA Fact Sheet: Filing Whistleblower Complaints under the Affordable Care Act*, <https://www.osha.gov/Publications/whistleblower/OSHA-FS-3641.pdf> (last visited July 14, 2015); R. Mot. Dismiss 7 & n.4

Respondent's requirement of a pre-authorization for insurance before admittance. Amend. Comp. 7. She stated she voiced concerns and complaints of violations including "fraud against insurance carriers." *Id.* She alleges Respondent made "material misstatement of facts and omissions from reporting accurate insurance billing and fees, from both private and public insurance providers through prearranged agreements to preauthorized or provide substandard services." Amend. Comp. 4.

Gallas has not pointed to anything that shows the ACA protects employees who report substandard care or insurance fraud involving billing, fees or costs. A review of Title I does not establish such allegations constitutes a violation of the ACA. Public Law: P.L. 111-148, § 1558, 124 Stat. 261 (2010).

Before there can be a valid whistleblower claim under the ACA, there must first be a violation of the ACA. *Porter v. The Housing Authority of Columbus Georgia*, 2015-ACA-00001, PDF at 6 (Dec. 19, 2014). I find Gallas has not alleged any violation of the ACA. Accordingly, her claim under the ACA is hereby **DISMISSED** for a failure to state a claim upon which relief can be granted under 20 C.F.R. § 18.70(c).

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts