Appendix

United States Court of Appeals
For the Eighth Circuit

No. 18-1022

United States of America, ex rel. Stephanie Strubbe; Carmen Trader; Richard Christie, relators

Plaintiffs - Appellants

v.

Crawford County Memorial Hospital; Bill Bruce, Individually

Defendants - Appellees

Appeal from United States District Court for the Northern District of Iowa - Sioux City

Submitted: November 13, 2018

Filed: February 11, 2019

Before BENTON, BEAM, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

Stephanie A. Strubbe, Carmen Trader, and Richard Christie sued Crawford County Memorial Hospital (CCMH) as relators in a qui tam action for violations of the False Claims Act. 31 U.S.C. § 3729(a). They also sued CCMH and its Chief Executive Officer, Bill Bruce, for violating the FCA's anti-retaliation provision.

§ 3730(h). The district court[1] granted CCMH's motion to dismiss all counts of the complaint, except Strubbe's retaliation claim. As for it, the district court granted CCMH's motion for summary judgment. Strubbe v. Crawford Cty. Mem'l Hosp., 2017 WL 8792692 (N.D. Iowa Dec. 6, 2017). Having jurisdiction under 28 U.S.C.

§ 1291, this court affirms.

I.

[1] The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

Crawford County Memorial Hospital is a county-owned nonprofit hospital in Iowa. In April 2012, Bruce became its Chief Executive Officer.

At CCMH, Strubbe was an Emergency Medical Technician (EMT), and Christie and Trader were paramedics. They filed a sealed qui tam complaint as relators in April 2015. The United States declined to intervene. The relators filed an amended complaint. It alleges that CCMH submitted false claims for Medicare reimbursement and made false statements or reports to get fraudulent claims paid. Specifically, Count I alleges that CCMH violated the FCA by submitting (1) claims for breathing treatments administered by paramedics; (2) claims for laboratory services done by paramedics and EMTs; (3) claims with false credentials of service providers; (4) claims for EMT and paramedic services at Eventide, L.L.C. and Denison Care Center; and (5) cost reports with improper reimbursements and payments to vendors for non-CCMH expenses. Count II alleges CCMH knowingly made or used false statements to get false claims paid, including (1) records documenting breathing treatments at 30 minutes; (2) records listing paramedics as "specialized ancillary staff" for breathing treatments; (3) reimbursement requests and invoices for improper payments for non- CCMH expenses; (4) documents with false credentials for emergency medical staff; and (5) cost reports with false costs. Count III alleges that CCMH conspired with Eventide to violate the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b.

Strubbe, Trader, and Christie also sued CCMH and Bruce for violating the FCA's anti-retaliation provision. According to the complaint, Strubbe began reviewing hospital financial documents in July 2014. Soon after, she "spoke to all Board members about the financial situation of CCMH [and] her belief that the finances were not adding up." In November, Strubbe tore her rotator cuff at work. Initially, CCMH put her on "light duty." In July 2015, however, CCMH told Strubbe her light-duty assignments were a financial hardship for the hospital and moved her to part-time status. CCMH removed Strubbe from part-time status in March 2016 (effectively a termination).

Christie and Trader also began investigating CCMH's finances in 2014. They complained to other hospital staff that "there was something wrong with the changes in the breathing treatments." Christie also complained there was "potentially something wrong with the financial statements provided by CCMH to the Board." In January 2015, Christie reported to her supervisor that Jonathan Richard was "not properly licensed" as a paramedic. Both Christie and Trader then reported the license violation to the Iowa Department of Public Health. Four months later, CCMH transitioned Christie from night shifts to day shifts. It terminated Christie later that month for speeding while driving an ambulance. Trader still works at CCMH as a paramedic, but claims that it subjects him to harrassment and other discriminatory treatment.

CCMH moved to dismiss the complaint. The district court dismissed the substantive FCA

claims for failure to plead with particularity because the complaint did not set forth facts showing any false claims were submitted, or plead how the relators acquired this information. It also dismissed Christie and Trader's retaliation claims as not stating a plausible claim for relief. However, the court denied CCMH's motion to dismiss Strubbe's retaliation claim. CCMH then moved for summary judgment on it. Concluding that Strubbe could not prove a prima facie case of retaliation, the district court granted summary judgment to CCMH.

II.

This court reviews de novo the district court's dismissal of a claim under Rule 9(b), "accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 555 (8th Cir. 2006). The False Claims Act (FCA) imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B). "The FCA attaches liability, not to the underlying fraudulent activity, but to the claim for payment." Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063, 1070 (8th Cir. 2016). Qui tam provisions permit private persons, relators, to sue for

violations in the name of the United States and to recover part of the proceeds if successful. § 3730(b), (d).

"Because the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply with Rule 9(b)." Joshi, 441 F.3d at 556. Under Rule 9(b), "a party must state with particularity the circumstances constituting fraud or mistake." This gives defendants notice and protects them from baseless claims. United States ex rel. Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 918 (8th Cir. 2014). While Rule 9(b) is "context specific and flexible," id., a plaintiff cannot meet this burden with conclusory and generalized allegations. Joshi, 441 F.3d at 557. Where "the facts constituting the fraud are peculiarly within the opposing party's knowledge," the "allegations may be pleaded on information and belief" if "accompanied by a statement of facts on which the belief is founded." Drobnak v. Andersen Corp., 561 F.3d 778, 783-84 (8th Cir. 2009).

To satisfy the particularity requirement for FCA claims, "the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." Joshi, 441 F.3d at 556. A relator can meet the Rule 9(b) requirements by pleading (1) "representative examples of the false claims," or (2) the "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were

actually submitted." Thayer, 765 F.3d at 918. To satisfy the particular details requirement, the complaint must "provide sufficient details to enable the defendant to respond specifically and quickly to the potentially damaging allegations." Id. at 918-19.

A.

In Count I, the relators contend that CCMH submitted false claims through a wide-ranging fraudulent scheme. First, the complaint alleges that shortly after Bruce became CEO, CCMH required paramedics to perform breathing treatments previously provided by nursing staff. Hospital management told employees this change was for "billing" and "cost reimbursement purposes" and required them to document each treatment at 30 minutes, regardless of its length. The complaint alleges—upon information and belief—that these changes allowed CCMH to bill these treatments separately to get a higher reimbursement from Medicare. Further, the complaint alleges that CCMH treats paramedics as "specialized staff," making the treatments separately billable. Relators also contend—upon information and belief—that patients are receiving breathing treatments who do not need them.

Second, the complaint alleges that CCMH ordered paramedics and EMTs to perform laboratory services, like blood draws. The relators claim—upon information and belief—that this change, like the breathing treatments, was

intended to increase Medicare reimbursement by allowing CCMH to bill these services separately. Third, the complaint identifies three employees with misclassified titles. For example, the complaint alleges—upon information and belief—that CCMH billed Medicare for Richard's services as a paramedic, though he was "not properly licensed." Fourth, the relators claim paramedics and EMTs provided services at two other health care facilities—Eventide and Denison. Based on information and belief, CCMH instituted this change to increase Medicare reimbursement. Finally, the complaint alleges that CCMH reported improper expenses to Medicare. Relators contend—upon information and belief—that CCMH submitted cost reports to Medicare with payments to Bruce's relatives above the market value and with duplicate payments to the credit card companies and the sellers.

Relators did not plead representative samples of false claims. In Joshi, a hospital anesthesiologist brought a qui tam claim alleging that the hospital sought Medicare reimbursements at higher rates and submitted claims for services and supplies not provided. Joshi, 441 F.3d at 554. Joshi did not provide representative samples, but alleged that every claim over a sixteen-year period was fraudulent. Id. at 556-57. Though Rule 9(b) does not require alleging the "specific details of every alleged fraudulent claim," this court dismissed Joshi's claim because a relator "must provide some representative examples of [the] alleged fraudulent conduct, specifying the time, place, and

content of [the] acts and the identity of the actors." Id. at 557.

The relators here pleaded more than the relator in Joshi. However, like Joshi, the complaint here alleges a fraudulent scheme without representative examples with the required specificity. For instance, the complaint alleges CCMH submitted false claims for unnecessary breathing treatments. It gives one example of a patient who received an unnecessary breathing treatment, but fails to include the date, the provider performing the treatment, any specific information about the patient, what money was obtained, and most importantly, whether a claim was actually submitted for that particular patient.

Under Thayer, a relator can also satisfy Rule 9(b) by pleading the "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." Thayer, 765 F.3d at 918. The allegations in Count I are close to meeting this standard. The complaint includes some details of the fraudulent scheme. It pleads the names of the individuals that instructed them to carry out the breathing treatments and blood draws, the two-year period when these services were provided, and statements by their supervisor that the changes to the breathing treatments were for billing and cost reimbursement purposes. The complaint also pleads how hospital management told them to document each breathing treatment at 30 minutes, regardless of its length. It includes the names of three individuals who relators believed were misclassified, and how Christie and

Trader learned of Richard's licensure violation. The relators also give some details about one receipt for gas and moving expenses that was allegedly altered.

However, the complaint lacks the sufficient indicia of reliability leading to a strong inference that claims were actually submitted. In Thayer, the relator—a center manager for several Planned Parenthood clinics—alleged a fraudulent scheme. Id. at 919. This court emphasized that the relator's position as center manager gave her personal knowledge that false claims were submitted and allowed her to plead specific details about the billing system and practices, providing sufficient indicia of reliability for two of Thayer's claims. Id. This court dismissed another claim where Thayer did not have "access to the billing systems . . . [or] knowledge of their billing practices," leaving her "only able to speculate that false claims were submitted . . . ." Id. at 919- 20.

The relators here—paramedics and EMTs—did not have access to the billing department. The complaint did not include any details about CCMH's billing practices. See United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190-91 (5th Cir. 2009) ("Confronting False Claims Act defendants with both an alleged scheme to submit false claims and details leading to a strong inference that those claims were submitted—such as dates and descriptions of recorded, but unprovided, services and a description of the billing system that the records were likely entered into—gives defendants adequate notice of the claims."). Nor did the complaint allege that the

relators had personal knowledge of the billing system or the submission of false claims. See United States ex rel. Prather v. Brookdale Senior Living Cmtys., 838 F.3d 750, 769-70 (6th Cir. 2016) (relator's allegations gave reliable indicia because she had knowledge of billing documentation and pleaded specific details like the treatment of four patients, the dates of care, the dates the false certification occurred, and the amount requested for final payment). Some of the facts pleaded—such as their supervisor's statements that the changes to breathing treatments were for billing and cost reimbursement purposes—shows the possibility that CCMH submitted claims. However, the facts pleaded do not "lead to a strong inference that claims were actually submitted." Thayer, 765 F.3d at 918 (emphasis added). See Chesbrough v. VPA, P.C., 655 F.3d 461, 472 (6th Cir. 2011) ("[T]his is not a situation in which the alleged facts support a strong inference—rather than simply a possibility—that a false claim was presented to the government."); Corsello v. Lincare, Inc., 428 F.3d 1008, 1013 (11th Cir. 2005) (declining to "make inferences about the submission of fraudulent claims because such an assumption would 'strip[ ] all meaning from Rule 9(b)'s requirements of specificity'") (alteration in original).

The relators pleaded many key facts upon information and belief, without providing a "statement of facts on which the belief is founded." Drobnak, 561 F.3d at 784. See, e.g., Compl. ¶ 59 ("Upon information and belief, Richard's services were billed, in part, to Medicare. Richard was not,

however, licensed in the State of Iowa as a paramedic."). They allege, "Certain vendors paid by the hospital are personally related to Bruce and their services are paid well above market value. For example, thousands of dollars have been paid to Bruce's brother, who, upon information and belief, owns an out-of-state moving company . . . [which] is paid from CCMH funds to move doctors . . . when it would be more economical to use a local moving company." Id. ¶ 74. Relators then claim, upon information and belief, that these expenses were included in cost reports to Medicare. They do not explain how they know Bruce's brother owns a moving company or that CCMH is using it. A generalized allegation that the hospital paid vendors above market value and submitted a false cost report—without a statement of facts on which the belief is founded—does not sufficiently demonstrate that these were improper expenses or were included on cost reports. See Drobnak, 561 F.3d at 784 (when pleading on information and belief, allegations must be "accompanied by a statement of facts on which the belief is founded").

Other allegations, which are not pleaded upon information and belief, similarly do not identify the underlying basis for the assertions. See Thayer, 765 F.3d at 919 ("Thayer's claims thus have sufficient indicia of reliability because she provided the underlying factual bases for her allegations."). For instance, the relators plead, "The paramedics were told by their managers, in writing, that no matter how long the breathing treatments took, to document on the timesheets

that the treatments took at least 30 minutes. These timesheets are used in billing to Medicare." Compl. ¶ 30. The relators—who do not allege personal knowledge of the hospital's billing practices—do not explain how they knew the timesheets were used to bill Medicare. They also do not plead a single example where they performed a breathing treatment in less than 30 minutes.

Because the relators failed to plead fraud with particularity, the district court properly dismissed Count I under Rule 9(b).

B.

In Count II, relators sued under 31 U.S.C. § 3729(a)(1)(B), which imposes liability on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." The false statements alleged include: records for 30-minute breathing treatments, records for breathing treatments listing paramedics as "specialized ancillary staff," improper payment requests for non-CCMH expenses, documents misclassifying employees like Richard, and cost reports listing false costs. Though claims under § 3729(a)(1)(B) do not require proof that CCMH submitted a false claim, relators must still "plead a connection between the alleged fraud and an actual claim made to the government." United States ex rel. Ibanez v. Bristol-Myers Squibb Co., 874 F.3d 905, 916 (6th Cir. 2017). See United States ex rel. Grant v.

United Airlines, Inc., 912 F.3d 190, 200 (4th Cir. 2018) (reasoning that a relator asserting a claim under § 3729(a)(1)(B) "is still required to show that a false claim was submitted to the government"). Cf. Grubbs, 565 F.3d at 193 ("[T]he recording of a false record, when it is made with the requisite intent" to get a false claim paid "is enough to satisfy the statute . . . ."). The complaint here, as discussed above, fails to connect the false records or statements to any claim made to the government. Further, like Count I, many of the allegations are founded upon information and belief without a statement of facts on which the belief is founded. Drobnak, 561 F.3d at 784. Count II was properly dismissed.

C.

Count III alleges that CCMH conspired with Eventide to violate the Anti- Kickback Statute. To satisfy Rule 9(b)'s particularity requirements, this claim must plead the details of a conspiracy, including an agreement between CCMH and Eventide, and an overt act in furtherance of the conspiracy. Grubbs, 565 F.3d at 193. Because the complaint does not include any details about an agreement, the relators fail to plead the conspiracy with particularity. The district court properly dismissed the conspiracy claim.

III.

The FCA protects employees who are "discharged, demoted, . . . harassed, or in any other manner discriminated against in the terms and conditions of employment

because of lawful acts done by the employee . . . in furtherance of" a civil action under the FCA "or other efforts to stop 1 or more violations" of the FCA. 31 U.S.C. § 3730(h). To prove retaliation in violation of the FCA, a plaintiff must prove that "(1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew that the plaintiff engaged in the protected activity; (3) the employer retaliated against the plaintiff; and (4) the retaliation was motivated solely by the plaintiff's protected activity." Schuhardt v. Washington Univ., 390 F.3d 563, 566 (8th Cir. 2004).

The relators allege that Bruce can be held individually liable for his acts in their FCA retaliation claims. CCMH—not Bruce—is the relators' employer. They appear to argue that a 2009 amendment to the FCA—which removed an explicit reference to retaliatory acts by an "employer"—expands liability. Before the 2009 amendment, federal courts—including this court—uniformly held that the FCA did not impose individual liability for retaliation claims. See United States ex rel. Golden v. Arkansas Game & Fish Comm'n, 333 F.3d 867, 870-71 (8th Cir. 2003). After the 2009 amendment, numerous courts still hold that the FCA does not create individual

liability because Congress deleted the word "employer" so contractors and agents could bring FCA retaliation claims. E.g., Howell v. Town of Ball, 827 F.3d 515, 529- 30 (5th Cir. 2016). "Congress acts with knowledge of existing law, and [ ] absent a clear manifestation of contrary intent, a . . . revised statute is presumed to be harmonious with existing law and its judicial construction." Estate of Wood v. C.I.R., 909 F.2d 1155, 1160 (8th Cir. 1990). Because Congress did not amend the FCA to impose individual liability, the FCA does not impose individual liability for retaliation claims. The district court correctly dismissed the claims against Bruce.

A.

To survive a motion to dismiss, the complaint must "state a claim to relief that is plausible on its face," meaning that the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). This court reviews de novo the dismissal for failure to state a claim. Drobnak, 561 F.3d at 783.

The district court found that Christie and Trader did not engage in protected activity and dismissed their claims. Christie and Trader claim they engaged in two different types of protected activity: (1) complaining to hospital staff about the breathing treatments, and (2) reporting Richard's

license violation to the State. Additionally, Christie claims his investigations into CCMH's financial matters are protected activity. An employee's conduct must satisfy two conditions to constitute protected activity. Schuhardt, 390 F.3d at 567. First, it "must have been in furtherance of an FCA action" or an effort to stop one or more FCA violations.

§ 3730(h); Schuhardt, 390 F.3d at 567. Second, the conduct "must be aimed at matters which are calculated, or reasonably could lead, to a viable FCA action," meaning the employee "in good faith believes, and . . . a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." Schuhardt, 390 F.3d at 567.

Even assuming Christie and Trader engaged in protected activity, their retaliation claims fail to state a plausible claim because they did not adequately plead that CCMH knew they were engaging in protected activity. They must show CCMH knew they were "either taking action in furtherance of a private qui tam action . . . [,] assisting in an FCA action brought by the government," or taking some other action to stop an FCA violation. Id. at 568; § 3730(h). Christie and Trader both complained to hospital staff about the breathing treatments and the financial situation at CCMH. Christie also emailed the compliance manager to inform CCMH he made a report about Richard's license "as required by Iowa law." However, to provide actual or constructive knowledge, employees must connect the alleged misconduct to fraudulent or illegal activity or the

FCA. See Schuhardt, 390 F.3d at 568-69 (plaintiff gave her employer notice of protected activity after she advised her supervisor that the organization's conduct could be "fraudulent and illegal" and that "if the OIG would come in they would frown upon us and they'd pretty much wipe us out"). The complaint here does not allege that Christie and Trader told CCMH or the State that CCMH's behavior was fraudulent or potentially subjected it to FCA liability. Reporting a license violation to the State does not tell CCMH that these employees believe it is acting fraudulently, especially where Christie pleaded he was "required to tell" state officials about Richard's license because "otherwise he himself could lose his licensure" under state law. Likewise, complaining to hospital staff about CCMH's financial situation and the changes to breathing treatments does not give CCMH notice that Christie and Trader were taking action in furtherance of a qui tam action or to stop an FCA violation. Id. at 568.

Because the relators did not sufficiently plead that CCMH knew they were engaging in protected activity, the district court properly dismissed their retaliation claims.

B.

This court reviews de novo the grant of summary judgment, viewing all evidence most favorably to the nonmoving party. Id. at 566. Summary judgment is appropriate if there is no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). CCMH is entitled to summary judgment if Strubbe "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In the absence of direct evidence of retaliation, courts apply the McDonnell Douglas framework to retaliation claims. McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973). While this court has not explicitly adopted this framework for FCA retaliation claims, it applies it to other whistleblower statutes. See, e.g., Elkharwily v. Mayo Holding Co., 823 F.3d 462, 470 (8th Cir. 2016) (assuming without deciding that the framework applies to the Emergency Medical Treatment Active Labor Act). Most of the other circuits use the framework for FCA retaliation claims. See Diaz v. Kaplan Higher Educ., L.L.C., 820 F.3d 172, 175 & n.3 (5th Cir. 2016) (collecting cases and adopting the framework for FCA retaliation claims). This court will apply the McDonnell Douglas framework to FCA retaliation claims.

Under McDonnell Douglas, Strubbe bears the initial burden of establishing a prima facie case of FCA retaliation. Elkharwily, 823 F.3d at 470. To establish a prima facie case, Strubbe must show that (1) she engaged in protected conduct, (2) CCMH knew she engaged in protected conduct, (3) CCMH retaliated against her, and

(4) "the retaliation was motivated solely by [Strubbe's] protected activity." Schuhardt, 390 F.3d at 566. If Strubbe establishes a prima facie case, the burden shifts to CCMH to "articulate a legitimate reason for the adverse action." Elkharwily, 823 F.3d at 470. The burden then shifts back to Strubbe to demonstrate that "the proffered reason is merely a pretext and that retaliatory animus motivated the adverse action." Id.

Like Christie and Trader, Strubbe's complaints to the CCMH Board and sheriff about "financial wrongdoing" and her investigations into CCMH's finances are not protected activity. There is no indication they were made in furtherance of an FCA action or were an effort to stop an FCA violation. She did not connect her concerns about CCMH's finances to fraud, the FCA, or any unlawful activity. See Green v. City of St. Louis, 507 F.3d 662, 667-68 (8th Cir. 2007) (reasoning the plaintiff did not engage in protected activity because he admitted he did not know whether the city submitted any document with false information when he complained about the city's policy). See also Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir. 1994) (recognizing that to engage in protected activity, an employee should "express concerns about possible fraud to their employers"). However, Strubbe's filing of an FCA claim is protected conduct. § 3730(h).

The complaint was unsealed in November 2015, alerting CCMH that Strubbe engaged in protected activity. Strubbe claims that CCMH had notice

before this because the federal government sent informal interrogatories to CCMH in August 2015 that mimicked the open records request her attorney sent in March. Strubbe presented no evidence, however, that CCMH knew her attorney sent that records request. Strubbe has shown only that CCMH had knowledge of her protected activity beginning in November 2015.

Retaliatory acts under the FCA include discharging, demoting, suspending, threatening, harrassing, or otherwise discriminating against an employee.

§ 3730(h)(1). Strubbe's removal from part-time status—effectively a termination—in March 2016 is a retaliatory act.

Strubbe cannot prove that her termination was solely motivated by protected activity. She contends causation can be inferred because CCMH assigned her light- duty work after she was injured, but stopped once it learned of her FCA claim. Meanwhile, Stacey Kruse, another employee with a shoulder injury, continued to get light-duty work. Strubbe claims that an email from CCMH to Kruse, describing Kruse as a "low key injured employee," provides further proof CCMH removed her from part-time status because of her protected conduct. However, these events all occurred before CCMH knew Strubbe brought the FCA claim. They do not demonstrate CCMH terminated Strubbe solely because of her protected conduct.

CCMH did not terminate Strubbe until four months after learning of her involvement in the

FCA claim. By then, she had not performed work at CCMH for six months. A temporal connection between the protected conduct and adverse action may be sufficient to establish a prima facie case where the proximity is "very close."

Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (per curiam); Smith v. Allen Health Sys., Inc., 302 F.3d 827, 833 (8th Cir. 2002) (two weeks between protected conduct and adverse action sufficient to establish prima facie case). Generally, however, "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc). Here, the four months between the unsealing of the complaint and her removal from part-time status is too attenuated to establish a prima facie case. See Kipp v. Missouri Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002) (two months between complaint and termination "dilutes any inference of causation").

Even if the facts suggested Strubbe's removal was solely motivated by her protected conduct, CCMH has provided a legitimate, non-discriminatory reason. CCMH claims it removed Strubbe from part-time status under its policy requiring employees to have worked in the previous six months. Strubbe can prove this reason is pretextual by showing CCMH "(1) failed to follow its own policies, (2) treated similarly-situated employees in a disparate manner, or (3) shifted its explanation of the employment decision."

Schaffhauser v. United Parcel Serv., Inc., 794 F.3d 899, 904 (8th Cir. 2015). CCMH's policy states, "The minimum requirement to remain a per diem employee is to have worked in the past six months . . . ." CCMH followed this policy when it terminated Strubbe. By the time it removed her from part-time status, Strubbe had not worked as an EMT for over a year and had not performed any work for CCMH for six months. CCMH has not changed its explanation for Strubbe's termination.

Strubbe claims that CCMH treated Kruse, a similarly situated employee, differently by giving her light-duty work. Strubbe has not demonstrated that Kruse is similarly situated. She did not provide sufficient information detailing the significance of Kruse's injury, her physical limitations, her position at CCMH, or whether she had worked in the last six months. Further, CCMH sent Kruse the email

describing her as a "low key injured employee" before CCMH learned of Strubbe's FCA claim. Strubbe cannot show that CCMH's reason for her termination was pretextual.

The district court properly granted summary judgment for CCMH.

* * * * * * *

The judgment is affirmed.

BEAM, Circuit Judge, dissenting in part and concurring in part.

I acknowledge that fraud cases receive more scrutiny at the pleadings stage than the average civil case. In a fraud case, rather than simply providing notice in the pleadings under Federal Rule of Civil Procedure 8, a plaintiff must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Originally, Rule 8 required something akin to, "I'm hurt, you did it, pay me." See Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (holding that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). But see Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) & Ashcroft v. Iqbal, 556 U.S. 662 (2009) (effecting a landslide erosion of Conley's liberal construction of Rule 8's pleading standard). Because the FCA is an anti-fraud statute, the complaint's false-claim allegations must comply with Rule 9(b). However because Rule 9 does not eliminate Rule 8's notice pleading standard, Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015), and the relators' pleadings in Counts I and II of their complaint more than adequately give notice, with particularity, of the fraud they are alleging, I dissent in part.

> "To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent

> acts, including when the acts occurred, who engaged in them, and what was obtained as a result." United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006). As the majority opinion acknowledges, "[t]he relators here pleaded more than the relator in Joshi" and that "[t]he allegations in Count I are close to meeting this standard." Ante at 6-7 (emphasis added). And yet, the court still requires more of a relator than is necessary at this stage of the proceedings.

I would find that the relators have met Rule 8 and 9 (and Joshi's) requirement for pleading fraud with particularity. 441 F.3d at 556. Indeed, the majority opinion and the district court essentially require that the relators here witness the Medicare forms being submitted in order to get past the pleading stage in this case. If that were the case, only someone with access to the hospital's internal accounting records could successfully bring a qui tam action in this situation. Indeed, as relators point out, the accounting records became unaccessible to employees and the public once Bill Bruce became CEO (and incidentally, the HR manager) of the hospital. Bruce and the hospital can thus effectively eliminate any civil liability for false claims by eliminating access to financial information.

The complaint contained 198 paragraphs, including 55 paragraphs in the "Specific and Detailed Allegations" section, and spelled out the impropriety of EMTs and paramedics being asked

to perform work differently, and to perform work–(i.e., breathing treatments on inpatients)–that EMTs and paramedics were not the most qualified and certainly not the most conveniently situated to perform. The complaint alleges the relators were told the reason for this abrupt change in procedure and policy was for "billing" purposes. Comp. ¶¶ 26-28. The complaint detailed the exponential increase in separately billed "breathing" treatments even while the number of hospital patients declined. ¶¶ 33-35. The complaint detailed how relators were required to make false entries into the computer system that was used for Medicare billing–averring that the treatments lasted at least thirty minutes regardless of how long the treatment lasted. ¶¶ 30, 98. Requiring the relators to plead an exact day in which any one of them performed a breathing treatment in less than 30 minutes, see ante at 9, is more than is necessary. United States ex. rel Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 917-18 (8th Cir. 2014) (holding that a relator does not have to plead specific examples in every case, and instead a "relator can satisfy Rule 9(b) by 'alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted'") (quoting United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)).

Further, the relators did provide a concrete example of a terminal patient who clearly did not need a breathing treatment but was required to get one. ¶ 37. Relators pleaded with particularity that "Patient A, known to Relator Trader, was ordered

to receive breathing treatments despite having been in a traumatic, clearly terminal, accident." Id. Two of the relators questioned the hospital's nurses about giving breathing treatments to other patients who clearly did "not need the treatments, but they were told to give the treatments anyway." ¶ 38. The complaint goes on to explain that breathing treatments given by paramedics, as opposed to nurses, are billed differently and generate more revenue for the hospital. ¶¶ 39-53. There are links to governmental and industry documents explaining this process.[2] The complaint details specific accounts of staff who were held out to be, and required to perform, acts of paramedics and phlebotomists despite their lack of certification. ¶¶ 59-63.

Although relators were not in a position to see the bills generated after such computer entries, the pleadings gave adequate notice of the natural inference that the breathing treatments were fraudulently and inflatedly billed the way they were entered. Further, evidence of fraud–Bruce's purported misuse of a hospital credit card–is documented with particularity in the complaint including: the day of payment to "Money Gram," the amount of payment, and the outcome of an open records request which resulted in the production of an altered receipt. ¶ 70.

In short, the district court, and a majority of this court, essentially hold that short of the

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[2] Some of the government website links no longer work or have been moved, but many of the links do indeed provide the documentation described in the complaint.

relators committing criminal activity by illegally accessing the hospital's billing records, they cannot successfully plead a false claims act case of Medicare billing fraud. This should not be the state of the law, especially as here "when the opposing party is the only practical source for discovering the specific facts supporting a pleader's conclusion." Bos. & Maine Corp. v. Town of Hampton, 987 F.2d 855, 866 (1st Cir. 1993), overruled on other grounds by Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66-67 (1st Cir. 2004). In such cases, "less specificity of pleading may be required pending discovery." 987 F.2d at 866. See also United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 37-41 (1st Cir. 2017) (noting that inferences can be used at the pleading stage of a fraud case, especially where the relators have little access to documentation, but clear knowledge of the scheme), cert. denied, 18 S. Ct. 1551 (2018). Accordingly, I dissent from Part IIA and IIB of the opinion affirming the dismissal of Counts I and II of the complaint. I concur in the remainder of the court's opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

STEPHANIE STRUBBE,

Plaintiff,

vs.

CRAWFORD COUNTY MEMORIAL HOSPITAL,

Defendant.

No. C15-4034-LTS

ORDER ON MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case is before me on a motion (Doc. No. 46) for summary judgment filed by defendant Crawford County Memorial Hospital (CCMH). Plaintiff Stephanie Strubbe (Strubbe) filed a resistance (Doc. No. 50) and CCMH filed a reply (Doc. No. 58). The motion is fully submitted and ready for decision.

II. RELEVANT FACTS

The following facts are undisputed, except where otherwise noted. CCMH is a county-owned non-profit critical access hospital. Strubbe began

working as an Emergency Medical Technician B (EMT-B) at CCMH in March 2014. As part of the job requirement, an EMT-B must be able to lift, carry, push and pull objects that weigh more than 70 pounds.

On November 24, 2014, Strubbe injured her back and right shoulder. On December 2, 2014, Strubbe's doctor issued a work restriction against lifting more than five pounds. Six days later, CCMH assigned Strubbe to light duty work. On March 18, 2015, Strubbe's doctor ordered that she do no lifting at all. On April 6, 2015, Brad Bonner, CCMH's Human Resources Director, offered Strubbe a temporary work assignment as support to lab work, which included duties such as removing staples and scanning documents. On April 24, 2015, Strubbe had rotator cuff repair surgery and continued to be unable to perform work duties. She was again issued a full lifting restriction. On May 4, 2015, Bonner offered Strubbe another temporary work assignment.

On May 15, 2015, Strubbe's doctor adjusted her work restriction by prohibiting her from repetitive motion and lifting, but allowed Strubbe to do clerical work. However, on May 28, 2015, and June 1, 2015, she reported experiencing pain when reaching while performing her assigned clerical work. She was then offered a temporary work assignment of proof-reading, but continued to experience pain. On July 14, 2015, CCMH changed Strubbe's work status to part-time casual status due to her inability to perform the functions of an EMT-B. On July 23, 2015, Strubbe was issued another restriction prohibiting her from lifting ten pounds or more and

from forceful pushing or pulling greater than ten pounds. Those restrictions were extended on August 19, 2015. Strubbe did not perform any work for CCMH after August 2015.

Since April 2013, CCMH had maintained a policy for part-time employees that "the minimum requirement to remain a per diem employee is to have worked in the past six months and to have attended all mandatory in-service training required for the position." Doc. No. 46-2 at 79–80. As of March 4, 2016, Strubbe had not worked at CCMH in any capacity for over six months and was subsequently removed from part-time casual status, thus ending her employment with CCMH.

While Strubbe was injured and on part-time status, events were taking place that led to the filing of a False Claims Act (FCA) action. Strubbe claims that at some point in late November 2014, she spoke with hospital board members about "conducting an investigation into financial wrongdoing of CCMH." Doc. No. 52-1 at 7. The board members told her they would look into her complaints, but did not follow through. On March 27, 2015, Angela Campbell, counsel for Carmen Trader and Richard Christie, submitted an open records request under Iowa law for certain CCMH financial documents. On April 9, 2015, CCMH obtained counsel to respond to the records request. On April 28, 2015, Strubbe joined with Trader and Christie to file an FCA *qui tam* complaint against CCMH.[1] On June 23, 2015, Bonner responded to

[1]Strubbe, Trader and Christie will be referred to collectively herein as the Relators.

the open records request. In early August 2015, CCMH was advised by the United States Attorney's office of a civil investigation into its financial reporting. On August 27, 2015, CCMH received interrogatories and a request for document production from the United States Attorney's office. CCMH responded on October 16, 2015. The *qui tam* complaint was unsealed in November 2015.[2]

The Relators' amended complaint (Doc. No. 12), filed on June 6, 2016, alleged that CCMH and its CEO Bill Bruce filed false claims with Medicare, made false records or statements in order to make fraudulent claims, and retaliated against the Relators following protected activity, all in violation of the FCA. Doc. No. 29 at 2. CCMH and Bill Bruce then filed a motion (Doc. No. 23) to dismiss for failure to state a claim. I dismissed Bruce as a defendant and dismissed all claims against CCMH except Strubbe's claim of retaliation in violation of 31 U.S.C. § 3730(h). Doc. No. 29. CCMH filed the current motion for summary judgement on August 16, 2017.

III. SUMMARY JUDGMENT STANDARDS

Any party may move for summary judgment regarding all or any part of the claims asserted in a case. Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

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[2] CCMH argues that it was not aware of Strubbe's involvement in the qui tam action until the complaint was unsealed.

together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A material fact is one that "'might affect the outcome of the suit under the governing law.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, "the substantive law will identify which facts are material." Id. Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. Id.

An issue of material fact is genuine if it has a real basis in the record, Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)), or when "'a reasonable jury could return a verdict for the nonmoving party' on the question." Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005) (quoting Anderson, 477 U.S. at 248). Evidence that only provides "some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, or evidence that is "merely colorable" or "not significantly probative," Anderson, 477 U.S. at 249-50, does not make an issue of material fact genuine.

As such, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." Anderson, 477 U.S. at 248-49. The party moving for entry of summary judgment

bears "the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." Hartnagel, 953 F.2d at 395 (citing Celotex, 477 U.S. at 323). Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue for trial. Mosley v. City of Northwoods, 415 F.3d 908, 910 (8th Cir. 2005). The nonmovant must show an alleged issue of fact is genuine and material as it relates to the substantive law. If a party fails to make a sufficient showing of an essential element of a claim or defense with respect to which that party has the burden of proof, then the opposing party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322.

In determining if a genuine issue of material fact is present, I must view the evidence in the light most favorable to the nonmoving party. Matsushita, 475 U.S. at 587-88. Further, I must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. Id. However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 784 (8th Cir. 2004). Instead, "the court's function is to determine whether a dispute about a material

fact is genuine." Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996).[3]

IV. DISCUSSION

The FCA protects employees from retaliation for lawful acts the employee committed in furtherance of a civil action against the employer for making false claims. 31 U.S.C. § 3730(h); *Schuhardt v. Wash. Univ.*, 390 F.3d 563, 566 (8th Cir. 2004). Under the statute, an employee is entitled to all relief necessary to make that employee whole if he or she 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 [the FCA].

31 U.S.C. § 3730(h).

When there is no direct evidence of retaliation, CCMH argues that the court should apply the

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[3] Strubbe incorrectly cites outdated case law for the proposition that summary judgment is disfavored in employment law cases. Doc. No. 52-1 at 3-4. While this sentiment was occasionally expressed by panels of the Eighth Circuit Court of Appeals, and repeated by district courts, it was laid to rest over six years ago in *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc) (holding that there is no "discrimination case exception" to the usual summary judgment standards and disavowing "panel statements to the contrary").

McDonnell Douglas[4] burden-shifting framework. Doc. No. 46 at 4. Strubbe does not dispute the application of this framework. The Eighth Circuit has applied the *McDonnell Douglas* framework when addressing other whistleblower statutes. *See Elkharwily v. May Holding Co.*, 823 F.3d 462, 470 (8th Cir. 2016) (assuming without deciding that the framework applies to claims under the Emergency Medical Treatment and Active Labor Act and the Minnesota Whistleblower Act). In *Townsend v. Bayer Corp.*, 774 F. 3d 446 (8th Cir. 2014), the Eighth Circuit declined to decide whether the entire *McDonnell Douglas* framework applies to FCA retaliation claims but agreed that evidence of pretext, such as treating similarly situated employees differently, was relevant to establishing whether the employee's protected activity was the sole reason for the adverse employment action. *Id.* at 460 n.3. Other circuits have applied the *McDonnell Douglas* framework to FCA retaliation claims. *See United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1240 (D.C. Cir. 2012); *Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668 F.3d 25, 31 (1st Cir. 2012); *United States ex rel. King v. Solvay Pharm., Inc.*, 871 F.3d 318, 332 (5th Cir. 2017); *Miller v. Abbott Labs.*, 648 Fed. Appx. 555, 559 (6th Cir. 2016); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d. Cir. 2001) (applying the same burden-shifting approach without identifying it as the *McDonnell Douglas* framework).

In light of these authorities, and given the fact that Strubbe does not argue otherwise, I will apply the *McDonnell Douglas* framework here. Under that

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[4] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

framework, the plaintiff must first establish a prima facie case of retaliation. *Miller*, 648 Fed. Appx. at 559. If the plaintiff establishes a prima facie case, then the defendant may rebut the presumption of retaliation by showing a legitimate, non-retaliatory reason for the adverse employment action. *Id*. The plaintiff must then show by a preponderance of the evidence that the employer's stated reason is merely pretext. *Id.*

A. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation under the FCA, the plaintiff must prove "(1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew that the plaintiff engaged in the protected activity; (3) the employer retaliated against the plaintiff; and (4) the retaliation was motivated solely by the plaintiff's protected activity." *United States ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 505 (8th Cir. 2016) (quoting *Schuhardt v. Wash. Univ.*, 390 F.3d 563 (8th Cir. 2004)).

1. Protected Activity

I have previously found that Strubbe's filing of the present action on April 28, 2015, was protected activity for purposes of an FCA retaliation claim. Doc. No. 29 at 22. However, the parties dispute whether Strubbe's alleged actions during 2014 – speaking to CCMH's board and to the Sheriff about CCMH's "financial wrongdoing" – also constituted protected activity.

a. Parties' Arguments

CCMH argues that simply raising internal concerns about the hospital's finances, or discussing those concerns with law enforcement, does not constitute FCA protected activity. Doc. No. 46-1 at 5–6. CCMH contends that the concerns Strubbe voiced were not raised to protect the government against false or fraudulent claims and that she had no reason to believe CCMH had made a false or fraudulent claim to the government at that time. *Id.* Strubbe argues that speaking to hospital board members and the Sheriff about her concerns with CCMH's financial practices was similar to conduct that other courts have found to constitute protected activity. Doc. No. 52-1 at 6.

b. Analysis

To be classified as protected activity, an employee's conduct must have been both (1) in furtherance of an FCA action and (2) "aimed at matters which are calculated, or reasonably could lead, to a viable FCA action." *Schuhardt*, 390 F.3d at 567. Employee conduct meets this second requirement when the employee believes in good faith, and a reasonable employee in the same or similar circumstances might believe, that the employer is potentially committing fraud against the government. *Id.*

In general, protected activity should be interpreted broadly. *Collins v. Ctr. for Siouxland*, No. C10-4015-PAZ, 2011 WL 2893038 at *10 (N.D. Iowa, July 15, 2011). To be protected, the plaintiff does not necessarily have to file an FCA lawsuit or "have developed a winning claim at the time of the alleged retaliation." *Schuhardt*, 390 F.3d at 567 (quoting *United States ex rel. Karvelas v. Melrose-Wakefield*

Hosp., 360 F.3d 220, 236 (1st Cir. 2004)). On the other hand, merely "grumbling to an employer about regulatory violations or reporting wrongdoing to supervisors" is not sufficient. *Hutchins*, 253 F.3d at 188; *United States ex rel. Ray*, 2015 WL 874824, at *6; *Mahony v. Universal Pediatric Servs., Inc.*, 753 F. Supp. 2d 839, 847 (S.D. Iowa 2010) (merely reporting wrongdoing to supervisors or refusing to falsify records are not "sufficiently connected to exposing fraud against the federal government" to constitute protected activity).

There should be some evidence that the employee complained in order to investigate or assist in the FCA action. *U.S. ex rel. Ray v. Am. Fuel Cell & Coated Fabrics Co.*, No. 1:09-CV-01016, 2015 WL 874824, at *6 (W.D. Ark. Mar. 2, 2015). Expressing concern about the employer's non-compliance with federal or state regulations is not enough. *Hutchins*, 253 F.3d at 187–88; *Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911, 914 (4th Cir. 1997) ("simply reporting his concern of a mischarging to the government to his supervisor does not suffice"). Complaints about the employer's behavior generally should include some indication of their legal significance with respect to fraud and the FCA. *See Ray*, 2015 WL 874824, at *5; *Hutchins*, 253 F.3d at 186–87; *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 51 (5th 1994); *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000). The key focus is whether the employee alleged fraud on the government. *Ray*, 2015 WL 874824, at *6.

In *Schuhardt*, the court found for summary judgment purposes that the plaintiff engaged in

protected activity when she took patient records home to confirm the existence of fraud. 390 F.3d at 567. Doctors at Washington University's Department of Surgery were allegedly changing patient records to affect what they could bill to Medicare. *Id.* at 565. The plaintiff told her supervisor that such activity may be fraudulent and that a government agency would forbid the practice if it knew about the activity. *Id.*at 567–68. She also complained to the University about the fraud through its confidential hotline and copied the files as evidence when nothing was done. *Id.* at 567. Under those circumstances, the court found that the first condition – that the action was in furtherance of an FCA claim – was satisfied. *Id.*

In *Mahony*, the Southern District found that the plaintiff engaged in protected activity by writing to the employer a memo alleging FCA violations, advising the employer of an intention to file an FCA action, presenting evidence of the fraud to the FBI and gathering evidence that showed another employee had committed fraud. *See Mahony,* 753 F. Supp. 2d at 847–48 (listing examples of other circuits' treatment of the "in furtherance of" condition). By contrast, the Eighth Circuit found no protected activity in *Green v. City of St. Louis, Mo.*, 507 F.3d 662 (8th Cir. 2007). Green worked for the City's Development Corporation, having been hired to certify businesses owned by women and minorities. *Id.* at 664. He protested the certification process and was laid off. *Id.* at 665. The court stated that Green had merely alerted his employer that its certification system was flawed, such that its reports were likely flawed and less reliable than

reports generated by other systems. *Id.* at 668. He did not allege that the flawed practice resulted in any false statement to the government and none of the evidence he presented described any false claims. *Id.* Therefore, his complaints were not considered protected activity. *Id.*

Here, the only alleged protected activity during 2014 involved Strubbe's discussions with CCMH board members and the Crawford County Sheriff about CCMH's finances. In her amended complaint, Strubbe states that she "went to several CCMH Board members, including, Carol Swanson, Virgie Dieber-Henningsen, Greg Kuehl, and Kevin Fineran." Doc. No. 12 at 20. She spoke to them about CCMH's "financial situation" and her belief that "the finances were not adding up" and asked them why the public could not access the company's and the CEO's credit card statements. *Id.* The board addressed her concerns and announced an investigation, though the board never followed through with the investigation. *Id.* at 20. Strubbe then met with the Crawford County Sheriff "about her concerns with financial mishandling of CCMH funds." *Id.* at 21. Strubbe provides no additional details as to what she told the board, or the Sheriff. Doc. No. 52-4 at 4.

Strubbe argues that the facts of this case are on point with those in *Collins*. Doc. No. 52-1 at 6. In *Collins*, the court highlighted the fact that the employee had warned her employer about possible legal action by the government and made copies of files she believed were evidence of the fraud. *Collins*, 2011 WL 2893038 at *11. She ultimately took the files home and delivered the documents to

government investigators. *Id.* Moreover, the allegations the employee made to her employer were far more specific than those Strubbe made here. Strubbe merely brought concerns to the board about "financial wrongdoing." There is no indication that she raised concerns about fraudulent statements to the government or provided documentary evidence to investigators. While she did have a discussion with the Sheriff, there is no evidence that she advised the Sheriff of any concerns that CCMH was defrauding the government.

I find Strubbe's actions during 2014 to be more akin to those in *Green*. Strubbe simply voiced concerns about general financial wrongdoing. Even when viewing the facts in a light most favorable to Strubbe, I find that her actions were not sufficiently connected to an FCA action to qualify as protected activity. However, because her filing of the *qui tam* complaint in 2015 was protected activity, I will address the other elements of the prima facie case.

2. CCMH's Knowledge

Parties' Arguments

CCMH argues that while Strubbe joined the other Relators in filing a *qui tam* compliant on April 28, 2015, it did not learn about that complaint until November 9, 2015. Doc. No. 46-1. CCMH states that there is no evidence on the record to show it had any knowledge of Strubbe's involvement before November 9, 2015, meaning any adverse action before that date is irrelevant. *Id.*

Strubbe argues that CCMH's behavior "contemporaneous with or occurring at times" that

events relating to the *qui tam* complaint took place indicates CCMH's knowledge. Doc. No. 52-1 at 7. She argues that because the Relators' attorney served CCMH with an open records request and an attorney for the government served interrogatories on CCMH, the timing of the decision as to Strubbe's employment status in relation to those events presents an inference of CCMH's knowledge sufficient to resist summary judgment. *Id.* at 7-9.

Analysis

The plaintiff must show that the employer had either actual or constructive knowledge of the employee's protected activity to maintain a claim for retaliation. *Schuhardt*, 390 F.3d at 568. What the employer knows must essentially mirror the activity in which the employee engaged to qualify for FCA protection. *Hutchins*, 253 F.3d at 188. The knowledge prong requires that the plaintiff prove the employer was on notice of the "distinct possibility" of FCA litigation. *Id.* at 188; *McKenzie*, 219 F.3d at 517–18. The employer is entitled to treat suggestions for improvement as suggestions, rather than as a precursor to litigation. *Id.* at 189. An employer has sufficient notice of the possibility of litigation when the employee acts in a way that reveals his or her intent to report or assist the government in pursuing an FCA violation. *Id.*

Whether the employer had knowledge of the plaintiff's protected activity is a question of fact. Therefore, in order to establish a prima facie case, Strubbe must present evidence permitting a finding that CCMH knew she was involved in this *qui tam* action at the time CCMH took adverse action against her. As noted above, the Relators filed the

action on April 28, 2015, but the complaint was not unsealed until November.

Strubbe argues that CCMH knew of her involvement before the complaint was unsealed in November, pointing to the fact that on March 27, 2015, attorney Angela Campbell mailed an open records request for financial documents to CCMH. She also highlights the fact that CCMH retained counsel for the records request on April 9, 2015, and responded to the request in June 2015. While these events clearly occurred, there is no evidence permitting a finding that CCMH knew Strubbe had any connection to them. Strubbe acknowledges that CCMH did not learn about the *qui tam* complaint until November 9, 2015. Doc. No. 52-2 at 3. Strubbe's workers' compensation attorney states in an affidavit that the hospital's behavior toward Strubbe changed "after the federal *Qui Tam* complaint was unsealed *and the hospital realized that she was behind the complaints*." Doc. No. 52-4 at 10–11 [emphasis added]. None of the facts or events Strubbe relies on come close to hinting at the possibility that CCHM knew of Strubbe's involvement before November 9, 2015. As a matter of law, any actions against Strubbe before that date could not have been retaliatory. The question remains whether the record suggests retaliatory actions after that date.

3. Retaliation

An act of retaliation under the FCA includes discharging, demoting, suspending, threatening, harassing or otherwise discriminating against an employee. 31 U.S.C. § 3730(h)(1). CCMH argues that the only act of retaliation taken against

Strubbe after November 9, 2015, was her termination (or, more precisely, her removal from casual part-time status) in March 2016. Strubbe does not argue otherwise, instead relying on actions that occurred prior to November 9, 2015. Thus, I will address the question of whether a genuine issue of material fact exists as to whether CCMH's removal of Strubbe from casual part-time status was retaliatory.

4. Causation

Parties' Arguments

CCMH argues that Strubbe's removal from casual part-time status was solely pursuant to CCMH's policy requiring that part-time employees perform some work within six-month increments and attend all mandatory in-service training required "for the position." Doc. No. 46-1 at 8. Because Strubbe had not worked for six months as of March 2016, she no longer met the requirements for casual part-time status. *Id.* Therefore, she was discharged and cannot show that retaliation was the sole motivation for the adverse action. *Id.*

Strubbe contends that the only policy she violated was "being too hurt to work," not any policy relating to bad conduct. Doc. No. 52-1 at 11-12. She argues that the policy CCMH cites is simply a policy for classifying employees, not one that could present a reason for discharging them, and that the timing of CCMH's decision to fire her shows causation. *Id.*

Analysis

To establish a prima facie case of retaliation under the FCA, the employee must show that the employer's decision to take adverse action was solely motivated by the employee's protected activity. *Elkharwily*, 823 F.3d at 470; *Norbeck v. Basin Elec. Power Co-op.*, 215 F.3d 848, 851 (8th Cir. 2000).[5] "Generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc). However, temporal proximity is a relevant factor and, for purposes of establishing a prima facie case, may be sufficient by itself if the proximity is "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (per curiam). Thus, in *Smith v. Allen Health Systems, Inc., 302 F.3d 827, 833 (8th Cir. 2002)*, the court held that a two-week interval between the protective activity and the adverse action was sufficient to allow an inference of causation at the prima facie stage of the retaliation analysis.

In *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1190, 1194-95 (8th Cir. 1995), the court held that a

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[5] In Collins, another judge of this court determined that the Eighth Circuit imposed the "sole motivation" requirement erroneously in *Norbeck v. Basin Electric Power Cooperative*, 215 F.3d 848, 851 (8th Cir. 2000). *Collins*, 2011 WL 2893038 at *14. However, in various post-*Norbeck* cases the Eighth Circuit has continued to state that "sole motivation" is the applicable standard. See, e.g., Miller, 840 F.3d at 505; *Schuhardt*, 390 F.3d at 566; *Wilkins v. St. Louis Housing Authority*, 314 F.3d 927, 933 (8th Cir. 2002). If the "sole motivation" requirement was imposed in error, it is for the Court of Appeals, not this court, to correct the error.

three-month interval was not too long to permit a finding of causation when other acts of a seemingly-retaliatory nature occurred between the protected conduct and discharge. However, in *Kipp v. Missouri Highway and Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002), the court overturned a verdict in favor of the plaintiff and held that an interval of two months "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link." In *Kipp*, there appeared to be no evidence of other retaliatory acts during the two-month interval. *Id.* at 896-97.

Here, Strubbe seeks to infer causation from the fact that she was injured, was provided light work for a time, and then was no longer provided light work. In 2014, before CCMH knew of the *qui tam* complaint, Strubbe injured her back and right shoulder. Doc. No. 46-2 at 2; 52-2 at 1. She was issued a work restriction against lifting and CCMH assigned her to light duty work. *Id.* During the time between her injury and CCMH's discovery of the complaint, she was offered temporary work assignments that included removing staples, scanning documents and performing other clerical work in response to multiple lifting and motion restrictions from her doctor and her continued reports of pain. Doc. No. 46-2 at 2–4; Doc. No. 52-2 at 2.

On July 14, 2015, four months before learning of the *qui tam* complaint, CCMH changed Strubbe's work status to part-time casual. Doc. No. 55 at 3–4. The letter informing her of the change

stated that Strubbe's status was changed due to her inability to perform essential job functions. *Id.* The letter also stated that she should keep her uniform and badge for when she was able to return to work and that CCMH looked forward to her returning to work when her health status changed. *Id.*

On July 23, 2015, Strubbe's doctor issued another lifting, pulling and pushing restriction, which was extended on August 19, 2015. Doc. No. 46-2 at 4; Doc. No. 522 at 2. Strubbe ultimately performed no work for CCMH after August 2015.[6] *Id.* In March 2016, about four months after CCMH learned of the *qui tam* complaint, Strubbe was removed from casual part-time status, effectively terminating her employment with CCMH. Consistent with *Kipp*, I find that a four-month interval "so dilutes any inference of causation" to require a finding, as a matter of law, that temporal proximity cannot support an inference of a retaliatory motive. 280 F.3d at 897.

Apart from timing, Strubbe points to an email message from CCMH to another injured employee, Stacey Kruse, which thanked Kruse for being a "low key" injured employee. Doc. No. 52-1 at 16; Doc. No. 52-2 at 14. This message was sent in June 2015 – five months before CCMH knew of the *qui tam* complaint – and makes no mention of Strubbe. Other than sheer speculation, there is absolutely nothing to

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[6] In her amended complaint, Strubbe alleges that she had a second surgery in January 2016 but was expected to make a full recovery. Doc. No. 12 at 22. However, the summary judgment record contains no records concerning that surgery, or of any subsequent work restrictions.

connect this email message to CCMH's decision to discharge Strubbe nine months later.

As a matter of law, Strubbe has failed to establish a prima facie case of FCA retaliation because there is no evidence from which the finder of fact could conclude that CCMH's decision to terminate her employment in March 2016 was solely motivated by its discovery of Strubbe's involvement in the *qui tam* complaint, four months earlier. Nonetheless, I will proceed to analyze the remaining steps of the *McDonnell Douglas* framework.

B. Legitimate Reason and Pretext

Parties' Arguments

CCMH states that it had a legitimate, nondiscriminatory reason for its discharge decision, as Strubbe violated its policy requirements for maintaining part-time status. Doc. No. 46-1 at 8–9. CCMH further contends that Strubbe is unable to establish that this reason is pretextual. *Id.* at 9.

Strubbe contends that CCMH's explanation is, in fact, pretextual. She argues that no explanation was given for her change in employment status in July 2015, which occurred after CCMH responded to the open records request in June 2015. Doc. No. 52-1 at 16. She also argues that under the hospital's policy, she only had to work one day in a period of six months to maintain her status. *Id.* She alleges that she was willing to work but CCMH did not give her any work, thus showing pretext. *Id.*

Analysis

Once the plaintiff has established a prima facie case for retaliation, under the *McDonnell Douglas* framework the defendant may rebut the presumption of retaliation by showing a legitimate, non-retaliatory reason for the action and the employee may in turn respond by showing pretext. *Miller*, 648 Fed. Appx. at 559. As with causation, "[m]ore than temporal proximity is required to demonstrate the employer's proffered reason for the employment action was pretextual," even if temporal proximity established the prima facie case of retaliation. *Schoonover*, 492 F. Supp. 2d at 1158; *Stoddard v. BE & K, Inc.*, 993 F. Supp. 2d 991, 1005 (S.D. Iowa 2014) (discussing pretext in a Title VII sex discrimination context).

As I noted in a prior case, "[p]retext can be demonstrated in several ways, including showing 'that an employer (1) failed to follow its own policies, (2) treated similarly-situated employees in a disparate manner, or (3) shifted its explanation of the employment decision.'" *Peterson v. Martin Marietta Materials, Inc.*, No. C14-3059-LTS, 2016 WL 2886376, at *8 (N.D. Iowa May 17, 2016) (citing *Schaffhauser v. United Parcel Serv.*, Inc., 794 F.3d 899, 904 (8th Cir. 2015), *in turn quoting Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874 (8th Cir. 2010)). With regard to following its own policies, CCMH's stated reason for discharge is based on a 2013 policy stating that "the minimum requirement to remain a per diem employee is to have worked in the past six months and to have attended all mandatory in-service training required for the position." Doc. No. 46-2 at 80. As an initial matter, the parties appear to disagree about what kind of

work Strubbe had to perform in order to satisfy the requirements of the work policy. She claims that CCMH had to give her only one day of any kind of light duty work within the six months for her to maintain her status. Doc. No. 52 at 15. CCMH argues that the policy requires the employee to have worked in the position for which she was hired in order to maintain her status. Doc. No. 55 at 4. This means Strubbe would have had to work as an EMT-B within the six months to maintain her status. *Id.*

The language of the policy is ambiguous with respect to the kind of work that is required. However, it is undisputed that Strubbe had not worked *in any capacity* for six months by the time she was discharged. Under either party's interpretation, Strubbe failed to meet the policy's requirements and, therefore, was subject to losing her status. Strubbe has failed to show that CCMH failed to follow its own policies concerning her employment status.

Strubbe next argues that CCHM did not apply its policy consistently. Doc. Nos. 52-2 at 2; 52 at 15–16. She again points to fellow employee Kruse, arguing that she was a similarly-situated employee who was treated differently. Doc. Nos. 52-1 at 15; 52-4 at 11. Strubbe claims that Kruse was given light work while Strubbe was not and, therefore, that Kruse was not discharged.

The only evidence Strubbe cites to show that CCMH treated Kruse differently is the affidavit by Strubbe's workers' compensation attorney (Doc. No. 52-4 at 11–12) and the email to Kruse, which stated that "[Brad Bonner] really does appreciate your efforts and the fact you are his low key injured

employee" and noted that Bonner would take this into consideration when finding light duty work for Kruse. Doc. No. 52-4 at 14. This information is far from sufficient to demonstrate that Kruse was similarly situated to Strubbe and was treated more advantageously. *See Schoonover*, 492 F. Supp. 2d at 1137 (engaging in a detailed factual analysis to determine whether an employee was similarly situated); *Mariani-Colon*, 511 F.3d at 222 (requiring the plaintiff to show that others were similarly situated in all relevant respects). The record does not disclose the type of injury Kruse suffered or the restrictions placed on Kruse's work activities. Nor does the record reflect whether Kruse met the policy's work requirements. Strubbe has failed to present sufficient information to show that Kruse was similarly situated and was treated differently.

Similarly, Strubbe has failed to show that CCMH provided shifting explanations for its decisions or otherwise acted in a manner suggesting pretext. According to Strubbe's workers' compensation attorney, CCMH told Strubbe in April 2015 that the hospital was committed to getting her back to work. Doc. No. 52-4 at 10. In July 2015, CCMH advised Strubbe that it had no additional light duty work for her and removed her to part-time status. Doc. No. 52-4 at 10. According to CCMH, the length of Strubbe's leave created a hardship for the hospital. Doc. Nos. 46-3 at 74; 52-4 at 9. Of course, and as noted above, this change of status occurred months before CCMH became aware of the *qui tam* complaint.

Finally, and while acknowledging that she was not able to perform her regular job functions during

this period of time, Strubbe states that she applied for two open positions that were filled by less experienced people. Doc. No. 52-4 at 5. She does not indicate when these applications were made or otherwise provide sufficient information to suggest that CCMH's selection of other applicants demonstrates pretext.

In short, after viewing the record in a light most favorable to Strubbe, I find no genuine issue of material fact on the issue of whether CCMH's stated reason for discharge is pretextual. Even if Strubbe could establish a prima facie case of retaliation under the FCA, her claim would fail as a matter of law.

V. CONCLUSION

For the reasons set forth herein, defendant's motion (Doc. No. 46) for summary judgment is granted. Because this order disposes of the only remaining claim, judgment shall enter in favor of the defendant and against the plaintiff. The Clerk of Court shall close this case.

IT IS SO ORDERED.

DATED this 6th day of December, 2017.

/s/ Leonard T. Strand

Leonard T. Strand, Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA WESTERN DIVISION

STEPHANIE STRUBBE,

Plaintiff,

vs.

CRAWFORD COUNTY MEMORIAL HOSPITAL,

Defendant.

CASE NO. C17-4034-LTS

JUDGMENT

This matter came before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED THAT:

Plaintiff take nothing and this case is dismissed.

DATED: December 6, 2017 Robert L. Phelps

Clerk of Court, US District Court

Northern District of Iowa

S/src

By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, *ex rel*. Stephanie Strubbe, Carmen Trader and Richard Christie, and Individually,

Plaintiffs,

vs.

CRAWFORD COUNTY MEMORIAL HOSPITAL and BILL BRUCE, Individually,

Defendants.

No. C15-4034-LTS

ORDER ON DEFENDANTS' MOTION TO DISMISS

VI. INTRODUCTION

This case is before me on a motion (Doc. No. 23) to dismiss filed by defendants Crawford County Memorial Hospital (CCMH) and Bill Bruce. Plaintiffs have filed a resistance (Doc. No. 26) and defendants have filed a reply (Doc. No. 27). Having considered these filings, I find that oral argument is not necessary. *See* N.D. Ia. L.R. 7(c). The motion is fully submitted and ready for decision.

VII. PROCEDURAL HISTORY

On April 28, 2015, plaintiffs and *qui tam* relators Stephanie Strubbe, Carmen Trader and Richard Christie (Relators) filed a *qui tam* complaint (Doc. No. 1) under seal. On April 4, 2016, the United States of America (United States) declined intervention. Doc. No. 9. As such, the complaint was unsealed and the Relators were directed to effect service on defendants. Doc. No. 10. On June 6, 2016, the Relators filed an amended complaint. Doc. No. 12.

On August 8, 2016, defendants filed a motion (Doc. No. 23) to dismiss for failure to state a claim upon which relief may be granted. The Relators filed a resistance (Doc. No. 26) on August 29, 2016, and defendants filed a reply (Doc. No. 27) on September 8, 2016. The United States filed a statement of interest (Doc. No. 28) on November 2, 2016.

VIII. OVERVIEW OF THE CLAIMS

As set out in the amended complaint (Doc. No. 12), the Relators bring this *qui tam* suit on behalf of the United States and allege that the defendants (1) filed false claims to Medicare in violation of the False Claims Act (FCA), 31 U.S.C. § 372(a), (2) made false records or statements in order to make fraudulent claims in violation of the FCA and (3) retaliated against the relators following protected activity. Under federal law, a relator who initiates a meritorious *qui tam* suit receives a percentage

of the ultimate damages award, plus attorney's fees and costs. 31 U.S.C. § 3730(d).

CCMH is a county-owned, non-profit hospital located in Crawford County, Iowa. Doc. No. 12 at 2. It is a critical access hospital (CAH) as defined by Medicare. *See* 42 C.F.R. § 485. Bruce became CCMH's chief executive officer in April 2012. *Id.* at 2. All of the Relators were employed at CCMH during the relevant period of time. Doc. No. 12 at 4-5. Strubbe was employed as an emergency medical technician (EMT) from March 4, 2014, until March 7, 2016. Doc. No. 12 at 4. Christie was employed as a paramedic from November 9, 2007, until May 2015. *Id.* at 5. Trader is currently employed as a paramedic and was hired on March 1, 2010. *Id.*

As a CAH, CCMH must meet certain regulatory qualifications. Among other things, CAHs participate in the state's Medicare program and are located in rural areas that are not in close proximity to other health service providers. CAHs must provide 24-hour emergency services seven days a week. CAHs are paid for most inpatient and outpatient services to Medicare patients at 101% of reasonable costs.

The Relators allege that after Bruce was hired, CCMH undertook a series of practices that resulted in fraudulent billings to Medicare. Count I alleges FCA violations for claims made to Medicare regarding (1) breathing treatments administered by paramedics, (2) EMT services for laboratory work, (3) claims that listed false credentials of service providers, (4) EMT and paramedic services provided

to Eventide, L.L.C. (Eventide), and Denison Care Center (Denison) and (5) cost reports that included improper reimbursements and payments to vendors that were not actual CCMH expenses. Doc. No. 12 at 18. Count II alleges FCA violations for presenting false records or statements to Medicare for (1) requiring employees to document each breathing treatment as a 30 minute service, regardless of the actual time, (2) listing paramedics as "specialized ancillary staff" on time and medical records for breathing treatments despite the fact that these employees were not "specialized ancillary staff," (3) reimbursement requests, invoices and payments for improper payments to vendors that were not for CCMH business expenses, (4) documents listing Jonathan Richard as a paramedic and both Relator Strubbe and Heather Rasmussen as phlebotomists and (5) cost reports submitted to Medicare listing false costs. *Id.* at 19.

Count III alleges that the defendants conspired with Eventide to violate the Anti-Kickback statute. *Id*. at 19-20. Counts IV, V and VI allege retaliation against each Relator based on protected conduct. *Id*. at 20-30. The Relators seek treble damages on behalf of the United States, civil penalties, awards pursuant to 31 U.S.C. § 3730, attorney fees and expenses and court costs. *Id*. at 31.

IX. APPLICABLE STANDARDS

A. Motions to Dismiss Under Rule 12(b)(6)

The Federal Rules of Civil Procedure authorize a pre-answer motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R.

Civ. P. 12(b)(6). The Supreme Court has provided the following guidance in considering whether a pleading properly states a claim:

> 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 [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)], 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.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955. The plausibility standard is not akin to

> a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.*, at 557, 127 S. Ct. 1955 (brackets omitted).
>
> Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009).

Courts assess "plausibility" by "'draw[ing] on [their own] judicial experience and common sense.'" Whitney v. Guys, Inc., 700 F.3d 1118, 1128 (8th Cir. 2012) (quoting Iqbal, 556 U .S. at 679). Also, courts "'review the plausibility of the plaintiff's claim as a whole, not the plausibility of each individual allegation.'" Id. (quoting Zoltek Corp. v. Structural Polymer Grp., 592 F.3d 893, 896 n. 4 (8th Cir. 2010)). While factual "plausibility" is typically the focus of a Rule 12(b)(6) motion to dismiss, federal courts may dismiss a claim that lacks a cognizable legal theory. See, e.g., Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013); Ball v. Famiglio, 726 F.3d 448, 469 (3d Cir. 2013); Commonwealth Prop. Advocates, L.L.C. v. Mortg. Elec. Registration Sys., Inc., 680 F.3d 1194, 1202 (10th Cir. 2011); accord Target Training Intern., Ltd. v. Lee, 1 F.Supp.3d 927 (N.D. Iowa 2014). "The well-pleaded facts alleged in the complaint, not the legal theories of recovery or legal conclusions identified therein, must be viewed to determine whether the pleading party provided the necessary notice and thereby stated a claim in the manner contemplated by the

federal rules." Topichian v. JPMorgan Chase Bank, N.A., 760 F.3d 843, 848 (8th Cir. 2014) (quoting Parkhill v. Minn. Mut. Life Ins. Co., 286 F.3d 1051, 1057–58 (8th Cir. 2002)).

In deciding a motion brought pursuant to Rule 12(b)(6), the court may consider certain materials outside the pleadings, including (a) "the materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint,'" Whitney, 700 F.3d at 1128 (quoting Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 n. 4 (8th Cir. 2003)), and (b) "'materials that are part of the public record or do not contradict the complaint.'" Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 (8th Cir. 2012) (quoting Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999). Thus, the court may "consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned;' without converting the motion into one for summary judgment." Miller, 688 F.3d at 931 n. 3 (quoting 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)).

B. Motions to Dismiss Under Rule 9(b): Heightened Pleading Standard

Under Federal Rule of Civil procedure 9(b), when alleging fraud or mistake, "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

"Rule 9(b)'s 'particularity requirement demands a higher degree of notice than that required for other claims,' and 'is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations.'" United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (quoting United States ex rel. Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2003) (in turn citing Abels v. Farmers Commodities Corp., 259 F.3d 910, 920–21 (8th Cir. 2001)). "In other words, 'the complaint must identify the who, what, where, when, and how of the alleged fraud.'" Olson v. Fairview Health Services of Minnesota, 831 F.3d 1063, 1070 (8th Cir. 2016) (quoting Joshi, 441 F.3d at 556). Under Rule 9(b), "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." E-Shops Corp. v. U. S. Bank Nat. Ass'n, 678 F.3d 659, 663 (8th Cir. 2012).

When allegations are "based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief." Parnes v. Gateway 2000, Inc., 122 F.3d 539, 550 (8th Cir. 1997); see also Drobnak v. Andersen Corp., 561 F.3d 778, 784 (8th Cir. 2009) (finding Rule 9(b) is satisfied if "allegations are accompanied by a statement of facts on which the belief is founded."). However, "allegations of fraud regarding matters peculiarly within the opposing party's knowledge could be based on information and belief, so long as accompanied by a statement of the facts on which the belief was founded." Florida State Bd. of Admin. v. Green Tree

Financial Corp., 270 F.3d 645, 668 (8th Cir. 2001) (citations omitted).

X. DISCUSSION

Defendants argue that the amended complaint lacks the plausibility required by Rule 8(a) and the particularity demanded by Rule 9(b). Relators contend that they have met all applicable pleading requirements.

A. Applicable Substantive Law Standards

The FCA imposes liability on those who knowingly "present false claims, or cause false claims to be presented, to the government for payment or approval; [knowingly] use false statements, or cause false statements to be used, to get a false claim paid or approved by the government; or conspire to defraud the government, among other things." *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 916 (8th Cir. 2014) (quoting *United States ex rel. Raynor v. Nat'l Rural Utils. Coop. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012) (in turn citing 31 U.S.C. § 3729(a)(1)(3)). Under the FCA, private individuals are permitted "to bring a civil action in the name of the United States against those who violate the [FCA]'s provisions." *Id.* (quoting *In re Baycol Prod. Litig.*, 732 F.3d 869, 874 (8th Cir. 2013)). "Liability under the FCA attaches 'not to the underlying fraudulent activity, but to the claim for payment.'" *Id.* (quoting *Baycol Prod. Litig.*, 732 F.3d at 875) (in turn quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)).

"Because the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply with Rule 9(b)." *Joshi*, 441 F.3d at 556. "Under Rule 9(b), 'the circumstances constituting fraud ... shall be stated with particularity.'" *Id.* "This particularity requirement demands a higher degree of notice than that required for other claims." *Thayer*, 765 F.3d at 916 (quoting *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003)).***B. The Amended Complaint***

The amended complaint alleges violations of the FCA with regard to filing false claims pertaining to (1) breathing treatments, (2) classification of employees, (3) blood draws for nursing homes, (4) hospital expenditures and (5) employment actions. As set forth above, I must assume that all factual allegations set forth in the amended complaint are true for purposes of considering defendants' motion to dismiss.

1. Breathing treatments

Relators contend that starting in November 2014, paramedics "were required on nights and weekends to perform breathing treatments for inpatients of CCMH whenever a respiratory therapist was not onsite." Doc. No. 12 at 5, ¶ 27. CCMH employees were told that this change was for "billing" and "cost reimbursement" purposes. *Id.* Previously, these treatments were administered by nursing staff at CCMH. *Id.*, ¶ 26. Paramedics did not receive additional training to perform these treatments and are not as qualified to do so. *Id.*, ¶¶ 28-29. They were told that they were to document

each treatment as 30 minutes, regardless of the time the actual treatment took. *Id.,* ¶ 30.

The complaint alleges, upon information and belief, that if nurses continued to provide these treatments, they would be "included in the bills already submitted to Medicare." *Id.* at 6, ¶ 32. However, if the treatments are performed by paramedics, then "CCMH is able to additionally and improperly bill for the paramedics' services for the treatment." *Id.* Relators also allege, on information and belief, that "patients are receiving breathing treatments who do not require such treatments." Id. at 7, ¶ 37. They allege, as an example, that "Patient A, known to Relator Trader, was ordered to receive breathing treatments despite having been in a traumatic, clearly terminal, accident." Id. Relators contend that because of these practices, "a higher percentage of the patient population has been receiving the breathing treatments." Id at 6, ¶ 33. They allege that in December 2014, despite fewer patient admissions, "CCMH saw a 77% increase in the number of patients who received breathing treatment as compared to December of 2013." Id., ¶¶ 33-35.

Relators also allege that CCMH "treats all 'non-nurse' staff, such as paramedics, as 'specialized staff' claiming that makes respiratory therapy services provided by them 'separate billable ancillary services under the inpatient hospital benefit' when they otherwise wouldn't be separately billable." Id., ¶ 40. They further contend that "CCMH has been billing respiratory therapist services provided to inpatients as separately

billable ancillary services under the inpatient hospital benefit," which is disallowed by Medicare. Id., ¶¶ 41-43.

2. Pulmonary services

The Amended Complaint also alleges Medicare fraud concerning pulmonary

services. Relators allege that under most circumstances, pulmonary rehabilitation services are billable to Medicare only if provided on an outpatient basis. Id., at 8 ¶ 50. They contend that CCMH has required paramedics to document each outpatient pulmonary rehabilitation service as 30 minutes, regardless of the actual treatment time. Id. at 9, ¶ 51. They also allege that "paramedics do not meet the rules of being properly trained staff to bill separate outpatient pulmonary rehabilitation services as ancillary staff, even if these services were being done on an outpatient basis." Id., ¶ 52.

Additionally, Relators allege that beginning in July 2014, paramedics and EMTs were required to perform laboratory work, including drawing blood from patients. Id. Relators allege upon information and belief that if the laboratory employees of CCMH performed the blood draws, rather than the EMTs or paramedics, only Medicare part A would be billed as part of a bundled service." Id., ¶ 56. By contrast, "[i]f the EMTs or paramedics perform the blood draws, then Medicare is billed for added services in addition to the bundled service for which the patient has already been billed." Id. Relators allege, upon information and belief, that CCMH requires EMTs and paramedics to perform

these services "so that CCMH can submit additional, unnecessary and improper bills to Medicare that CCMH would not be able to submit if the blood draws were performed by nurses or laboratory personnel at CCMH." Id., ¶ 57.

3. Employee misclassification

Relators allege FCA violations based on the misclassification of employees in the emergency medicine department, creating the impression that "the employees providing the services are more qualified than their qualifications and licensing suggest." Id. at 10, ¶ 58. As an example, they allege that Jonathan Richard was employed by CCMH as a paramedic and he performed all services provided by paramedics despite the fact that he was not licensed in the State of Iowa as a paramedic. Id., ¶ 59. Relators allege, on information and belief, that some of Richards' services were billed to Medicare. Id. They allege that on January 29, 2015, Relators Christie and Trader reported this information to the Iowa Department of Public Health (DPH). Id., ¶ 60.

Relators allege that another employee Zachary Rasmussen, "was listed as a 'phlebotomist' on schedules and internal CCMH paperwork." Id., ¶ 61. They contend that "Rasmussen is not an EMT, nor a paramedic, and upon information and belief, has not been trained in phlebotomy." Id. They further allege, on information and belief, that "CCMH bills Rasmussen as a phlebotomist, despite not being a certified phlebotomist." Id., ¶ 62. Relators further allege, on information and belief, that CCMH bills Medicare for Relator

Strubbe's blood draws despite the fact that she is not a certified phlebotomist. Id. at 10-11, ¶ 63.

Finally, Relators allege that CCMH has defrauded Medicare by sending EMTs and paramedics to Eventide, a care center, and Denison Care Center, a nursing home, to draw blood for patients at those facilities, despite the fact that those facilities employ staff that are capable of performing that service. Id. at 11, ¶¶ 64-65. Relators allege, on information and belief, that these arrangements allow CCMH to submit improper bills to Medicare. Id.

4. Other Alleged Practices

Relators allege that after Bruce was hired, a policy change was made to require EMT or paramedic staff to be present in the emergency room during shifts. Id., ¶ 66. They contend, on information and belief, "that this change in policy was solely to allow for increased billings to Medicare." Id., at 11.

Relators also allege that "as CCMH was increasing its number of breathing treatments, and increasing its number of blood draws, CCMH was also paying its doctors by "RVUs," which include a mathematical calculation of services provided to determine physician pay structure." Id., ¶ 67. They contend, upon information and belief, that "this method of calculation of pay resulted in increased pay to the physicians providing services to CCMH." Id. They also allege, on information and belief, that CCMH has engaged in certain practices to overstate its actual costs in reports submitted to Medicare, and/or included

items that were not legitimate hospital expenses. Id. at 12-13, ¶¶ 6876.

C. Analysis

1. Counts I and II

As noted above, Count I alleges FCA violations based on false claims made to Medicare, while Count II alleges FCA violations based on the presentation of false records or statements to Medicare. Defendants argue that the Relators have failed to meet Rule 9(b)'s heightened pleading standard by failing allege the "who, what, where, when and how," of the alleged fraudulent claims. Defendants further argue that even if Relators have satisfied this requirement, they have failed to allege information as to (a) whether false claims were actually submitted and (b) how the Relators acquired knowledge of those claims. Relators argue that both counts have been properly pled with sufficient particularity.

The Eighth Circuit requires persons bringing claims under the FCA to provide specific information regarding the fraudulent billing scheme. See United States ex. rel. Joshi v. St. Luke's Hospital, Inc., 441 F.3d 552, 556-57 (8th Cir. 2006). A limited exception exists if the person bringing the claim has intimate knowledge of the billing scheme. See Thayer, 765 F.3d at 917-18. Relators allege that they have met this standard.

In Thayer, the court distinguished Joshi as follows, "unlike Dr. Joshi, who had no direct connection to the hospital's billing or claims department and could only speculate that false claims were submitted, Thayer was the center

manager for two of Planned Parenthood's clinics, oversaw Planned Parenthood's billing and claims systems, and was able to plead personal, first-hand knowledge of Planned Parenthood's submission of false claims." 765 F.3d at 917. The court held that "a relator can satisfy Rule 9(b) by 'alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" Id. (quotation and collected cases omitted).

Here, no Relator alleges a direct connection to CCMH's billing procedures. Instead, they base their allegation that various claims were billed and submitted fraudulently upon information and belief. Although Relators are correct that not all qui tam actions require detailed recitations of every fraudulent claim submitted, they have failed to allege facts giving rise to a strong inference that false claims were actually submitted. Their complaint is more akin to the one dismissed in Joshi.

Joshi was a qui tam action filed by an anesthesiologist who alleged that the defendant hospital and its chief of anesthesiology systematically violated the FCA in (a) seeking Medicare reimbursements at higher rates than those to which they were entitled and (b) submitting claims for services and supplies they did not provide. Joshi, 441 F.3d at 554. Joshi alleged that he was an original source with direct and independent knowledge of the information underlying his claims. Id. The Eighth Circuit found that the complaint did not allege

"specifically the date, amount, or content of, or the persons involved in making, any false claims submitted by St. Luke's" or "the dates on which supplies or prescriptions were used or billed, the patients who received the supplies or prescriptions, or the type of supplies or prescriptions involved in the alleged fraudulent scheme." Id. Instead, Joshi's complaint alleged that all of the work done during this time period was fraudulent. Id. In finding that the compliant lacked the requisite particularity necessary under Rule 9(b), the court stated:

> Absent from the complaint are any mention of (1) the particular CRNAs who allegedly performed patient care and administered anesthesia services unsupervised, (2) when Dr. Bashiti falsely claimed to have supervised or directed CRNAs, (3) who was involved in the fraudulent billing aspect of the conspiracy, (4) what services were provided and to which patients the services were provided, (5) what the content was of the fraudulent claims, (6) what supplies or prescriptions were fraudulently billed and to which patients the supplies or prescriptions were provided, (7) what dates the defendants allegedly submitted the false claims to the government, (8) what monies were fraudulently obtained as a result of any transaction, or (9) how Dr. Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment. Simply put, the complaint fails to

> identify specifically the "who, what, where, when, and how" of the alleged fraud.

Id. at 556. The court held that even assuming the complaint alleged that every instance of billing was fraudulent, "Rule 9(b) requires more than such conclusory and generalized allegations." Id. (citing Schaller Tel. Co. v. Golden Sky Sys., Inc., 298 F.3d 736, 746 (8th Cir. 2002)).

As I will explain below, I find the Joshi analysis to be dispositive here. Like Dr. Joshi, Relators have not alleged sufficient, specific factual information as to the "who, what, where, when, and how" of the alleged fraud, nor as to how they learned of such information.

a. Breathing treatments

In Count I, Relators allege FCA violations relating to the submission of claims for breathing treatments. They contend that prior to Bruce's hiring, these treatments were administered by nursing staff and included in the "bundled" services that were billed to Medicare. Relators allege that because the personnel who administered the breathing treatment changed, this resulted in improper and additional billings to Medicare. They contend that all bills for breathing treatment submitted in this manner violated the FCA, but do not allege intimate knowledge of CCMH's billing process or personal knowledge of any bills actually submitted. While they note that their allegations do not address a timeframe as lengthy as that in Joshi, they nonetheless fail to allege information as to how they know that any allegedly-false claims were actually submitted. See

Thayer, 765 F.3d at 918 ("Liability under the FCA attaches 'not to the underlying fraudulent activity, but to the claim for payment.'") (quoting Baycol Prod. Litig., 732 F.3d at 875) (in turn quoting Costner v. URS Consultants, Inc., 153 F.3d 667, 677 (8th Cir. 1998)).

At most, Relators allege that breathing treatment services should have been bundled but were not, and that this alleged practice violates Medicare's rules and regulations. They assert, upon information and belief, that if these services were provided by nurses, then they would be included in bundled services. Doc. No. 12 at 6, ¶ 32. They additionally claim, upon information and belief, that CCMH has ordered more breathing treatments per patient and that more patients have been ordered to receive those treatments. Id. at 6-7, ¶¶ 35-36. Other than a statistical comparison, however, Relators have failed to allege facts indicating that any breathing treatments were improperly ordered or that the alleged practice actually violates Medicare's rules. Moreover, even if the alleged practice does violate Medicare, Relators did not allege facts sufficient to show that billings arising from the alleged practice were actually submitted for payment.While the amended complaint includes general allegations as to the alleged billing schemes, it does not set forth the "'who, what, where, when, and how' of the alleged fraud." See Joshi, 441 F.3d at 556 (quoting contractor United States ex rel. Costner v. United States, 317 F.3d 883, 888 (8th Cir. 2003)) (in turn citing Parnes v. Gateway 2000, Inc., 122 F.3d 539, 550 (8th Cir. 1997)). As an example, Relators cite

to paragraph 75 of the amended complaint, which states, "[u]pon information and belief, these expenditures, as well as other expenditures, were made by CCMH for expenses which are not actually hospital expenses, or which are improper hospital expenses, but yet were included in cost reports submitted to Medicare." Doc. No. 12 at 13. This is a mere conclusory and generalized allegation, similar to those in Joshi, with no indicia that these expenses were actually billed and that funds were fraudulently obtained as a result, and with no information as to how Relators acquired this knowledge. See Joshi, 441 F.3d at 557 (citing Corsello v. Lincare, Inc., 428 F.3d 1008, 1011 (11th Cir. 2005)).

Relators also argue that the amended complaint is sufficient because they allege that management told staff to document breathing treatments as 30 minutes regardless of actual duration and that they were told by their supervisor, Musgrave, that this was being done for cost reimbursement purposes. They contend that the amended complaint alleges Medicare as the entity subject to fraud and that the cost reports submitted to Medicare resulted in fraudulently obtained funds. Nonetheless, they failed to allege facts indicating that any claims were actually submitted and that any money that was obtained as a result of those claims.

"If it alleges a systematic practice of submitting fraudulent claims, the FCA complaint 'must provide some representative examples of [the] alleged fraudulent conduct,' specifying 'the time, place, and content of the defendant's false

representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result.'" United States ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 822 (8th Cir. 2009) (quoting Joshi, 441 F.3d at 556–57; accord United States ex rel. SNAPP, Inc. v. Ford Motor Co., 532 F.3d 496, 506 (6th Cir. 2008)). Here, Relators failed to present representative examples. Their general allegation that certain practices are employed for "cost reimbursement" and "billing purposes" does not give rise to a plausible inference that any false claims were actually submitted to Medicare. Thus, Relators have not satisfied Rule 9(b). See United States ex rel. Dunn v. N. Mem'l Health Care, 739 F.3d 417, 420 (8th Cir. 2014) (finding Relator's complaint insufficient because it failed to "identify even one example of an actual false claim submitted . . . for reimbursement.").

Finally, Relators argue that they may base allegations on information and belief if certain aspects of the alleged fraud are outside their knowledge and control, citing Tuchman v. DSC Communications Corp., 14 F.3d 1064, 1068 (5th Cir. 1994). However, when allegations are "based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief." Goughnour v. REM Minnesota, Inc., No. CIV. 06-1601 PAM/RLE, 2007 WL 4179354, at *2 (D. Minn. Nov. 20, 2007) (quoting Parnes v. Gateway 2000, Inc., 122 F.3d 539, 550 (8th Cir. 1997). Relators have not met this requirement. Defendants' motion to dismiss will be

granted with regard to allegedly false claims concerning breathing treatments.

b. Laboratory Work

Relators allege that claims relating to services provided by paramedics and EMTs for laboratory work violated Medicare's bundling rules. They contend that pulmonary rehabilitation services can be billed separately from bundled services only if those services are performed on an outpatient basis. They further allege that CCMH requires paramedics to perform these services and to document each session as taking 30 minutes, regardless of actual time. Finally, they assert that paramedics are not properly trained to allow CCMH to bill their services as ancillary staff, even if the services are actually performed on an outpatient basis. After making these allegations, Relators allege upon information and belief that these changes were done to improperly and fraudulently bill Medicare. Doc. No. 12 at 9-10, ¶ 57. Again, however, the amended complaint does not set forth the "who, what, where, when, and how" of the alleged fraud. Nor does it allege facts sufficient to show (a) that false claims were actually submitted and paid and (b) how the Relators acquired such information. Defendants' motion to dismiss will be granted with regard to allegedly false claims concerning laboratory work.

Misclassification of Employees

Relators allege that CCMH billed for services performed by personnel without the proper credentials, resulting in fraudulent payments from Medicare. They assert that Jonathan Richard was

given the title of paramedic despite his lack of training and performed all services performed by paramedics. They contend, upon information and belief, that services performed by Richard were submitted to Medicare as if he were a paramedic. They also allege, upon information and belief, that CCMH has billed for services performed by Relator Strubbe and employee Zachary Rasmussen as if they were trained and certified phlebotomists, despite the fact that they are not. Doc. No. 12 at 10-11, ¶¶ 59-63.

Again, these allegations are insufficient. They do not set forth the "who, what, where, when, and how" of the alleged fraud. Nor do they set forth facts sufficient to show (a) that false claims were actually submitted and paid and (b) how the Relators acquired such information. Defendants' motion to dismiss will be granted with regard to allegedly false claims arising from the classification of employees.

Care Center Billing

Relators allege that CCMH sends employees to Eventide and Denison to perform certain services for the residents of the facilities that could have been performed by staff at those facilities and, thus, included each facility's "bundled services." They contend, upon information and belief, that this practice is employed to allow CCMH to bill Medicare for the services as if the recipients of the services were outpatients of CCMH. Doc. No. 12 at 11, ¶¶ 64-65. For the same reasons discussed above concerning other allegedly-false claims, these generalized and conclusory allegations fall far short of meeting Rule 9(b)'s heightened pleading

requirements. Defendants' motion to dismiss will be granted with regard to allegedly false claims arising from services performed at care centers.

e. Improper expenses

Relators allege that after hiring Bruce, CCMH has reported various false or fraudulent expenses and contend, upon information and belief, that this has been done for the purpose of increasing CCMH's Medicare reimbursements. Doc. No. 12 at 1213, ¶¶ 68-76. As an example, they describe a specific credit card expenditure and suggest that the circumstances are contrary to what would be "normal business practice." Id. at 12, ¶¶ 70-72. Instead, they contend, upon information and belief, that the expense was not incurred for the stated purpose. Id. ¶ 73.

As with their other theories of Medicare fraud, Relators' allegations as to improper expenses do not satisfy Rule 9(b). They allege no facts indicating that the defendants actually submitted false information to Medicare in an effort to receive improper payments, or that any such payments were actually received. Nor do Relators allege facts indicating the manner in which they learned of such allegedly-false submissions. Defendants' motion to dismiss will be granted with regard to allegedly false claims arising from the reporting of improper expenses.

f. Summary

Counts I and II are based largely on conjecture, speculation and, it seems, gossip. While making serious allegations that the defendants have defrauded Medicare, the material allegations are

founded upon information and belief, with no indication of the source of the information or the basis for the belief. Counts I and II must be dismissed for failure to state a claim upon which relief may be granted.

2. Count III: The Conspiracy Claim

Count 3 alleges that the defendants and Eventide have conspired to violate the Anti-Kickback Statute and asserts that "[b]y virtue of the false or fraudulent claims submitted, paid, or approved as a result of Defendant's [sic] conspiracy to defraud the Government, the United States has suffered substantial monetary damages." Doc. No. 12 at 19-20, ¶¶ 100-02. Defendants argue that the Relators have failed to allege the facts necessary to support a conspiracy claim. Specifically, Defendants argue that the Relators did not allege with particularity (1) the existence of an unlawful agreement among the alleged conspirators to have a false or fraudulent claim allowed or paid and (2) at least one act performed in furtherance of the agreement.

Rule 9(b)'s particularity requirements apply to allegations of a conspiracy to violate 31 U.S.C. § 3729(a). See, e.g., United States ex rel. Ellis v. City of Minneapolis, No. 11–cv–00416, 2014 WL 3928524, at *15 (D. Minn. July 24, 2014) (citing United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 193 (5th Cir. 2009)). Here, Relators have failed to provide the "who, what, where, when, how" required by Rule 9(b). The amended complaint alleges no specific facts indicating that the defendants and Eventide entered into an agreement to defraud the United States. Among

other deficiencies, it provides no details about (1) who entered into the alleged agreement on behalf of Eventide, (2) when and how the alleged agreement was formed and executed or (3) the terms of the alleged agreement. Nor have Relators alleged facts indicating the source of their knowledge concerning the alleged agreement. Thus, they have failed to set forth facts sufficient to give rise to a plausible conspiracy claim. Defendants' motion to dismiss will be granted with regard to Count III.

3. Count IV, V and VI: Retaliation

The FCA prohibits retaliatory action against persons who engage in action in furtherance of a claim under the FCA. 31 U.S.C. § 3170(h). The elements of an FCA retaliation claim are:

(1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew that the plaintiff engaged in the protected activity; (3) the employer retaliated against the plaintiff; and (4) the retaliation was motivated solely by the plaintiff's protected activity.

Schuhardt v. Washington Univ., 390 F.3d 563, 566 (8th Cir. 2004). An employee's actions are protected by the FCA if two conditions apply: (1) they were "in furtherance of and FCA action" and (2) they were "aimed at matters which are calculated, or reasonably could lead, to a viable FCA action." Id. at 567 (citing United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996)). The second condition is satisfied if "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar

circumstances might believe, that the employer is possibly committing fraud against the government." Id. (quoting Wilkins v. St. Louis Hous. Auth., 314 F.3d 927, 933 (8th Cir. 2002) (quoting in turn Moore v. Cal. Inst. Tech Jet Propulsion Lab, 275 F.3d 838, 845 (9th Cir. 2002))).

Defendants argue that the Relators have failed to allege that they engaged in protected activities aimed at matters that were calculated to lead, or reasonably could have led, to a viable FCA action. Instead, defendants contend that Relators allege, at most, that they were investigating financial matters, a characterization that is not synonymous with an action under the FCA. Additionally defendants argue that the amended complaint fails because Relators do not allege that the retaliatory conduct was motivated "solely" by their protected activity.

a. Count IV – Strubbe

Strubbe's allegations in support of her retaliation claim include the following:

Strubbe "started participating in a protected activity in July of 2014, which included reviewing Board packets and questioning whether something was not right with the finances." She "went to several CCMH Board members, including, Carol Swanson, Virgie Dieber-Henningsen, Greg Kuehl, and Kevin Fineran, and spoke to all Board members about the financial situation of CCMH, her belief that the finances were not adding up, asked why the public could not get CCMH and Bruce's credit card statements, and about other concerns that she had about the management of

CCMH." During a board meeting in September 2014, "the Board addressed Strubbe's concerns, and announced there was going to be an investigation into some [of] Strubbe's allegations." This development was reported in a newspaper article. However, board member Kuehl called Strubbe two days later to say "that there was not going to be an investigation and the Board was going to give Bruce a 'clean slate.'"

Strubbe and others also met with the Crawford County Sheriff in September 2014 about the mishandling of CCMH funds. During this time frame, CCMH board members Swanson and Dieber-Henningsen resigned from the board. Both Bruce Musgrave (Relators' supervisor) and Kurt Wilkins (CCMH's prior human resources manager) told Relators that Bruce may have been misusing CCMH's credit card.

On November 24, 2014, Strubbe injured her back and right shoulder while working at CCMH. She was assigned various types of light duty work while under a no-lifting restriction. However, in July 2015, she was advised that "her injury and light duty assignments were creating a financial hardship on CCMH, and therefore she was demoted to casual part time, losing her benefits effective August 1st." In August 2015, she was told that she would not be discharged and, indeed, that she would be placed back in her original position once she was released by her doctor for full-time duty. In November 2015, CCMH learned that Strubbe was a plaintiff in this case. On January 21, 2016, Strubbe underwent a second surgery and was expected to make a full recovery. However, her

employment was terminated on March 4, 2016, and the only reason she was given was that "she had not worked in more than six months." CCMH then took action in an effort to have the State's licensing authorities suspend or revoke Strubbe's license. See Doc. No. 12 at 20-22, ¶¶ 104-26. Accepting these allegations as true, Strubbe engaged in two types of conduct that may have constituted protected activity under the FCA: (1) her inquiry into CCMH's financial situation in the fall of 2014 and (2) her commencement of this FCA action in 2015. While I have serious doubts as to whether Strubbe's inquiry into CCMH's finances rose to the level of protected activity, I need not decide that issue at this stage of the case because her participation in this FCA action certainly did.

As for the other elements of an FCA retaliation claim, Strubbe's allegations are sufficient to establish a plausible claim that the defendants knew about her protected activity and retaliated against her solely because of that activity. As such, the motion to dismiss will be denied with regard to Count IV.

b. Count V – Christie

Christie's allegations in support of his retaliation claim include the following:

Christie began investigating potential financial mismanagement in the hospital in mid-2014. For example, he requested information concerning employee salaries over the previous year or two. About ten minutes after making the request, Christie was advised that Bruce needed to meet with him. Bruce then came to the emergency room

to tell Christie that it would cost Christie about $100 to get a copy of the salaries.

In November 2014, Christie started telling nurses and other employees that there was something wrong with (1) the changes in the breathing treatment procedures and (2) the financial statements provided by CCMH to the board. It was common knowledge that Christie was investigating the hospital, and Christie was specifically told by Jess Emsweiler, the nurse manager, that she had heard he was investigating CCMH.

On December 29, 2014, Jonathan Richard started his employment with CCMH. On January 28, 2015, Christie discovered that Richard was not properly licensed and advised his supervisor (Musgrave) and others of this issue. In addition, Christie asked Richard if he had a State of Iowa paramedic card. When Richard stated that he did not, Christie told him not to touch another patient until he was properly licensed. The next day, however, Musgrave told Richard to "tell no one" and get a card, as that would take care of the problem. Richard informed Christie and Strubbe of Musgrave's statement and went to Health Department to get a paramedic card.

Christie called Steve Mercer at the Iowa DPH to report that Richard was not properly licensed. Mercer indicated that the department would investigate the matter and requested Christie, and anyone who had supervised Richard, to send an email detailing the matter. Accordingly, Christie advised CCMH employees DeLong and Trader that they should send emails to Mercer. In addition,

Christie sent an email to Bruce and to Heather Rasmussen (CCMH's compliance manager) informing them that he had made the report about Richard as required by Iowa law. Bruce immediately threatened to fire Christie, DeLong and Trader.

On February 5, 2015, a meeting was scheduled for Richard and Strubbe to discuss the matter with Bruce. When Bill Bruce was informed that Strubbe intended to record the meeting, it was rescheduled for a week later. The following week, the meeting occurred with Bruce, Paula Cole, Trader, Richard, and Strubbe in attendance. [Bruce called Rick Eilander and told him that he was going to fire all three individuals who had reported CCMH to the State, specifically Christie, Trader, and DeLong.][1] [Within the electronic patient care report software used by CCMH, either Bruce or Musgrave had entered Richard's basic EMT number but changed his title to paramedic.] [As such, Richard's services were knowingly and intentionally billed to Medicare as a "paramedic" despite Richard not being a licensed paramedic in the State of Iowa.] During this time, Richard performed paramedic duties, including breathing treatments, provision of medication and tending to emergency room patients.

Ultimately, the State of Iowa conducted an investigation. By early May of 2015, May, Musgrave and Bruce conspired to have Christie fired. On May 5, 2015, Musgrave alleged that

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[1] Allegations in [brackets] are asserted upon information and belief.

Christie had referred to a patient as "fat." Christie had injured his back and called to request extra lifting help for the patient. Trader was present for the ambulance run. On May 6, 2015, Musgrave wrote a complaint alleging that Christie had called the patient "fat." On May 14, 2015, Trader was interviewed and denied that Christie had called the patient "fat." Two police officers who had been present at the ambulance call likewise denied hearing anything to that effect. On May 17, 2015, Christie was notified that he would be switched to day shift, resulting in a pay cut. On May 19, 2015, Christie was again called in for an investigation. Strubbe was present as Christie's union representative.

On May 20, 2015, CCMH and Richard were cited by the State for violations of the State's licensing rules. On May 27, 2015, Musgrave and Bruce continued to work together to get Christie fired, this time for speeding in an ambulance, at 2:00 a.m., while en route to a time-sensitive medical emergency call. Christie and Trader responded to the emergency and saved the patient's life. The ambulance had a governor installed to prevent it from reaching excessive speeds. In addition, Iowa law allows ambulances to exceed the speed limits. On May 28, 2015, CCMH terminated Christie's employment. CCMH then took steps to try to have Christie's paramedic license revoked by the State of Iowa. See Doc. No. 12 at 23-28, ¶¶ 134-73.

Even accepting all of these allegations as true, I find that Christie has failed to set forth a plausible FCA retaliation claim. Christie alleges

that during 2014, he requested salary information and told some employees that something was "wrong" with certain CCMH practices. Inquiring into the validity of certain organizational practices is a far cry from investigating whether CCMH was engaging in fraud against the United States. Christie's allegations simply do not suggest that his conduct was aimed at matters that were calculated to, or reasonably could have led to, a viable FCA action. Thus, they do not establish that he engaged in protected activity under the FCA.

Moreover, even if Christie's actions in 2014 qualified as protected activities under the FCA, he does not allege that the defendants retaliated against him at that time. Instead, the alleged retaliation (including the formation of an alleged conspiracy to arrange his discharge) began months later, after Christie reported Richard's licensing issue to the State of Iowa. According to Christie, that report led to an investigation by the State which, in turn, led to a citation for violating the State's licensing rules. Christie contends that he was discharged just eight days after the citation was issued. These allegations do not give rise to a plausible claim that the sole motivation for the alleged retaliation was protected FCA activity. If anything, Christie's allegations suggest that he was discharged in retaliation for reporting a licensing violation to the State of Iowa, not for engaging in activities relating to a potential FCA claim. Defendants' motion to dismiss Count V will be granted.

c. Count VI – Trader

Trader's allegations in support of her retaliation claim include the following:In 2014, Trader began investigating financial matters at CCMH, a fact that became widely known at CCMH. Trader complained to nurses about the inappropriate use of breathing treatments on patients beginning in late 2014.

In January 2015, Trader reported details concerning Jonathan Richard to the State of Iowa, as already detailed above. In February 2015, she was demoted from nights to days, resulting in a pay decrease. Trader contends, on information and belief, that this was done in retaliation for both her financial inquiries and her report of the Richard matter to the State.

On July 7, 2015, while responding to a car accident, a volunteer from the Westside Volunteer Fire Department assisted Trader in treating a patient. Trader allowed the volunteer to assist because Trader had been told that the volunteer had a nurse exemption. This turned out to be incorrect. On July 30, 2015, Trader received a letter from the State indicating that CCMH had reported her because the volunteer who had said he had a nurse exemption did not have the exemption.

On July 20, 2015, Trader asked for time off to go to a nephew's funeral, but was told in front of other employees that she had to provide a copy of the obituary before being allowed to take a day off, implying that she was lying about the funeral. The requirement of providing an obituary for a family funeral is not a regular practice or policy of the hospital. Nonetheless, on July 22, 2015, Trader

gave the obituary, various Facebook posts and other information to Brad Bonner, in-house counsel for CCMH. Trader told Bonner of her belief that CCMH was engaging in harassment and retaliation against Trader for engaging in protected activities. Trader has also continued to face unspecified forms of discrimination, harassment and derogatory statements from CCMH management and Bruce. New employees with less experience have been hired at a higher rate of pay than Trader receives. Doc. No. 12 at 28-29, ¶¶ 178-89.

Accepting these allegations as true, I find that Trader – like Christie – has failed to set forth a plausible claim for retaliation under the FCA. Her general allegations that 26 she investigated "financial matters" and complained about breathing treatments do not suggest that her conduct was aimed at matters that were calculated to, or reasonably could have led to, a viable FCA action. Thus, they do not establish that she engaged in protected activity under the FCA.

Further, Trader's allegations do not give rise to an inference that the sole motivation for any retaliation against her was conduct protected by the FCA. She contends that the first retaliatory act (a demotion to the day shift) occurred in February 2015, after she was involved in reporting Richard's situation to the State of Iowa. She alleges no additional retaliatory conduct until July 7, 2015, approximately five months later. She does not allege that she engaged in any specific, FCA-related conduct between February and July of 2015. Like Christie, Trader's allegations suggest

that any retaliatory conduct against her occurred because she reported a licensing violation to the State, not because she engaged in activities protected by the FCA. Defendants' motion to dismiss Count VI will be granted.

4. Individual Liability

Relators allege that Bruce can be held individually liable for his actions with regard to their FCA retaliation claims. Defendants argue that individuals are not subject to claims of retaliation under the FCA. I agree. In Scott v. Bonnes, 135 F. Supp. 3d 906 (S.D. Iowa 2015), the court noted that the FCA was amended in 2009 and that the phrase "by his or her employer" was removed at that time. Id. at 919. The court examined case law and legislative history concerning the 2009 amendment and determined that Congress' intention in removing that phrase "was to expand the number of plaintiffs, such as independent contractors and agents, who can bring an action under the FCA, but not to expand the number of defendants who can be held liable." Id. at 920 (citations omitted).

As explained in *Scott*, Congress intended to correct a Section 3730(h) "loophole" under which "individuals who are not technically employees within the typical employee-employer relationship, but nonetheless have a contractual or agent relationship with the employer," were not protected under the FCA. S. Rep. 110-507, 26-27. In explaining the proposed amendment, the Senate Judiciary Committee wrote: "The Committee believes this is a vitally important clarification that respects the spirit and intent of

the 1986 Amendments while offering whistleblower protections to contractors and agents who may come across fraud against the Government and report it under the FCA." *Id.* at 27. Further, I agree with the observation in *Scott* that "in light of the numerous courts' rejection of individual liability in pre-2009 cases," Congress had the opportunity to draft the amendment in a manner that would have imposed individual liability but chose not to do so. *Scott*, 135 F. Supp. 3d at 921.

Because I conclude that Section 3730(h)(1) does not impose individual liability in FCA retaliation claims, I will grant defendants' motion to dismiss Count IV (the only surviving retaliation claim) as against Bruce.

XI. CONCLUSION

For the reasons set forth herein:

Defendants' motion (Doc. No. 23) to dismiss is granted with regard to Counts I, II, III, V and VI of the amended complaint. Those counts are hereby dismissed.

Defendants' motion to dismiss Count IV of the amended complaint is granted in part and denied in part. Specifically, it is granted with regard to defendant Bill Bruce and denied with regard to defendant Crawford County Memorial Hospital. Count IV is hereby dismissed as against Bruce.

This case will proceed with regard to Count IV only, with Stephanie Strubbe

as the sole plaintiff and Crawford County Memorial Hospital as the sole defendant.

IT IS SO ORDERED.

DATED this 3rd day of February, 2017.

/s/ LEONARD T. STRAND

LEONARD T. STRAND

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1022 United States of America, ex rel Stephanie Strubbe, Relator, et al. Appellants v. Crawford County Memorial Hospital and Bill Bruce, Individually Appellees

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Appeal from U.S. District Court for the Northern District of Iowa - Sioux City

(5:15-cv-04034-LTS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 20, 2019 Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit. _____

/s/ Michael E. Gans Appellate