

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division**

In the matter of:)
)
FIRST AMERICAN HEALTH CARE)
OF GEORGIA, INC.,)
and its wholly owned subsidiaries,)
(Chapter 11 Case 96-20188))

Adversary Proceeding
Number 98-2042

Debtor

LESLIE VISLEY,)
KATHLEEN BRANDENBURG,)
COLLEEN DEMARCO,)
LINDA LONG, SUSAN REKICH)
and JOAN RUSSO)

Plaintiffs

v.)

INTEGRATED HEALTH SERVICES,)
INC., as successor to)
FIRST AMERICAN HOME CARE)
OF GEORGIA, INC.,)
and FIRST AMERICAN HOME CARE)
OF PENNSYLVANIA, INC.)

Defendant

FILED
11 O'clock & 41 min. A.M.
Date 12/16/98
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

ORDER ON DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on the Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), filed by the Defendant Integrated Health Services, Inc. ("IHS").

Pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court may dismiss an action if the Plaintiff fails to state a claim upon which relief can be granted. FED.R.CIV.P. 12(b)(6). The Court must determine whether, under any set of facts which may be proven from the complaint, the claims made are so insufficient as to fail in court. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); see Oladeinde v. Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 507 U.S. 987, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993). For the purposes of the motion to dismiss, the Court therefore accepts all of plaintiffs' factual allegations as true and liberally construes the complaint. Any inferences must be drawn in favor of the Plaintiff. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S.Ct. 2891, 2917, 125 L.Ed.2d 612 (1993). On the other hand, legal conclusions are not afforded the same presumption of accuracy or correctness. Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir.1980). These fundamental burdens and presumptions apply as well to Defendant's motion to dismiss pursuant to Rule 12(b)(1). See Cole v. United States, 755 F.2d 873, 878 (11th Cir. 1985) (*quoting* Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)).

Plaintiffs allege that they were terminated from their positions of employment with Debtor First American in violation of the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, and in violation of Pennsylvania state law. Defendant IHS

contends that neither law affords these plaintiffs a cause of action, and that the case should be dismissed.

I. Termination Against Public Policy

As a general rule, an employer is free to terminate its at-will employees "with or without cause, at pleasure, unless restrained by some contract." Shick v. Shirey, 716 A.2d 1231 (Pa. 1998) (quoting Henry v. Pittsburgh & Lake Erie Railroad Co., 21 A. 157 (Pa. 1891)). The privilege is "not absolute, however, and may be qualified by the dictates of public policy." Shick, 716 A.2d at 1233. Where a dismissal threatens clear mandates of public policy, an exception to the general rule exists and a common law cause of action arises. Id. at 1234; *see also* Brown v. Hammond, 810 F.Supp. 644, 646 (E.D.Pa. 1993); Godwin v. Visiting Nurse Association Home Health Services, 831 F.Supp. 449, 454 (E.D.Pa. 1993), *aff'd*, 39 F.3d 1173 (3d Cir. 1994).¹

¹ This Court notes that every reported case cited by Defendant in support of its position that private employees cannot have a wrongful termination claim based upon allegations of public policy states quite clearly that no cause of action will exist unless a "clear mandate of public policy" has been violated. Clark v. Modern Group Ltd., 9 F.3d 321 (3d Cir. 1993); *see also* Hunger v. Grand Central Sanitation, 670 A.2d 173 (Pa. Super.), *appeal denied*, 681 A.2d 178 (Pa.); Kraisa v. Key punch, Inc., 622 A.2d 355 (Pa. Super. 1993); Perry v. Tioga County, 649 A.2d 186 (Pa. Commw. 1997), *aff'd*, 694 A.2d 1176 (Pa. 1997). Moreover, the fact that a Pennsylvania Superior Court dismissed a similar complaint against First American this past summer is not dispositive of the issue at hand. The order of the Superior Court dismisses that case without comment or findings, and given the myriad defenses of First American (discharge in bankruptcy, time-barred actions, etc.), citation of that case as dispositive of the issue before this Court is not helpful. *See* Spierling v. First American, Order of July 13, 1998, GD98-8104 (attached to Doc.5).

The Pennsylvania Supreme Court has emphasized that in discerning a clear mandate of public policy, the given policy must be "so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it." Mamlin v. Genoe, 17 A.2d 407 (Pa. 1941). The role of the courts in declaring public policy must be narrow, and "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." Shick, 716 A.2d at 1236 (quoting Hall v. Amica Mutual Insurance Co., 648 A.2d 755, 760 (Pa. 1994)). I find that such a clear mandate of public policy exists in this case. Obtaining reimbursements from the Medicare system and the United States government in a fraudulent manner is a criminal violation of federal law. No question can exist that public opinion is virtually unanimous that the prevention of such criminal activity is paramount.

Defendant's Motion to Dismiss the wrongful discharge action is denied.

II. Termination in Violation of 31 U.S.C. § 3729 *et seq.*

Plaintiffs also allege violations of the Federal False Claims Act in their terminations from employment with the Defendant. That statute provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated

against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h).

Defendant first contends that this Court lacks jurisdiction to consider the FCA retaliation claim because 31 U.S.C. § 3730(e)(4)(A) bars qui tam suits by parties other than “original sources” of the information in question. The retaliation provisions contained in Section 3730(h) of the FCA, however, are not subject to this jurisdictional restriction. *See Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996).

Defendant also argues that Plaintiffs cannot maintain an action under the federal statute because they never put Defendant “on notice” that their actions were intended as an investigation in furtherance of an action to be filed. The allegations of the complaint, however, indicate that Plaintiffs were acting in opposition to the fraudulent practices of First American. Plaintiffs were not, however, required to have been motivated by the protections afforded in the statute. *Childree v. UAP/GA Ag Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1080, 137 L.Ed.2d 216 (1997) (“The provision contains no knowledge requirement, and we will not read one into it.”). For purposes of a 12(b)(6) motion, Plaintiffs have sufficiently plead facts in their

complaint to support an action under the FCA.

Defendant's Motion to Dismiss is denied. Defendant is ordered to file its answer to Plaintiff's complaint within ten (10) days.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 14th day of December, 1998.