IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TOPAZ BROWN, **Plaintiff,** **v.** **OKMULGEE TERRACE, INC.,** **Defendant.**	**Case No. CIV-17-157-RAW**

ORDER

Before the court is the motion of the defendant for summary judgment This is a *qui tam* action brought pursuant to the False Claims Act, 31 U.S.C. §3729 *et seq.* (FCA).[1]

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) F.R.Cv.P. An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is material if under the substantive law it is essential to the proper disposition of the claim. *J.V. v. Albuquerque Public Schs.*, 813 F.3d 1289, 1296 (10th Cir.2016). When applying this standard, the court views the evidence and draws reasonable inferences therefrom in the

[1]The Act permits a private person, called the "relator," to bring a civil action for alleged fraud on the United States government. *United States ex rel. Wagner v. Care Plus Home Health Care, Inc.*, 2018 WL 2197967 n.1 (N.D.Okla.2018). The federal government may elect to intervene, but if it declines the relator shall have the right to conduct the action. *Id.* Here, the federal government elected not to intervene (#15).

There is also an Oklahoma Medicaid False Claims Act, 63 O.S. §5053, *et seq.*, with similar provisions. Plaintiff named the State of Oklahoma and referred to the state law in the caption of the complaint (#5) but did not make allegations under the Oklahoma False Claims Act in the body of the complaint. The State of Oklahoma also declined to intervene. (#17).

light most favorable to the nonmoving party. *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1239 (10th Cir.2015).

The FCA covers all fraudulent attempts to cause the government to pay out sums of money. *United States ex rel. Polukoff v. St. Mark's Hospital*, 895 F.3d 730, 734 (10th Cir.2018). The statute is to be read broadly. *Id.* at 742. As pertinent here, the Act imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a)(1)(A).

To prove a false claim under subsections (A), a plaintiff must show that defendant: (1) made a claim; (2) to the government; (3) that is materially false or fraudulent; (4) knowing of its falsity; and (5) seeking payment from the federal government. *See United States v. The Boeing Company*, 825 F.3d 1138, 1148 (10th Cir.2016). False claims under the FCA may be either factually false or legally false. *Id.* A factually false claim involves a submission of an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided. *Polukoff*, 895 F.3d at 741. A legally false claim is one which falsely certifies compliance with a regulation or contractual provision as a condition of payment. *Id.* Plaintiff's contention here is that the submitted claims were legally false.

Continuing the taxonomy further, there are two forms of legally false claims under §3729(a)(1)(A) – express false certification and implied false certification. *Polukoff*, 895

F.3d at 741. An express false certification theory applies when a government payee falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment. *Id.* By contrast, the pertinent inquiry for implied-false-certification claims is not whether a payee made an affirmative or express false statement, but whether, through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment. *Id.* Plaintiff herein proceeds under the theory of implied false certification.

Plaintiff contends (and defendant does not dispute) that during the time plaintiff worked for defendant,[2] also employed was Jerod "Pete" Smith. He was employed in the housekeeping department. His employment was from December 15, 2010 through January 2, 2017, the date of his death. (#43-1 at ¶3). He was never a nurse aide and did not provide any medical services or assistance to Okmulgee Terrace residents. (*Id.* ¶6). Mr. Smith was a convicted felon and, because of the nature of the felony, under Oklahoma law was precluded from being hired by a nursing home but was nevertheless hired by defendant in 2010.[3] Plaintiff argues that, in submitting Medicaid/Medicare cost reports, defendant represented affirmatively that it was in compliance with the Oklahoma Nursing Home Act. Plaintiff alleges this was a false representation by defendant. Therefore, plaintiff contends defendant is liable under the Act.

[2]Plaintiff was employed by defendant from 2014 to 2016.

[3]Plaintiff relies upon then-existing 63 O.S. §1-1950.1(F)(1)(n) in this regard.

The Supreme Court has recently discussed liability under the FCA, and specifically under the implied false certification theory. The Court resolved a circuit split and held that the theory can be a basis for liability in some circumstances. The Court said "liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading." *Universal Health Services, Inc. v. United States ex rel. Escobar,* 136 S.Ct. 1989, 1995 (2016)(emphasis added). Further, the Court held that it did not matter if the requirement was expressly designated as a condition for payment. "What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id.* at 1996.

This last quoted sentence sets forth the two bases for the present motion: defendant argues that plaintiff cannot establish materiality and/or scienter.[4] The Act defines "material" to mean "having a natural tendency to influence, or be capable of influencing,

[4]"[C]oncerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.'" *Id.* at 2002 (quoting *United States v. Science Applications Int'l Corp.,* 626 F.3d 1257, 1270 (D.C.Cir.2010). "Those requirements are rigorous." *Id.*

the payment or receipt of money or property." 31 U.S.C. §3729(b)(4).[5] "[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Id.* at 2002. The Court went on to note that "[t]he materiality standard is demanding." *Id.* at 2003.

Plaintiff contends that the prohibition against hiring felons "has been adopted by the Oklahoma legislature and therefore can be presumed to be a material requirement for certification for facilities." (#48 at 7)(emphasis added). This court disagrees. The Supreme Court states that "statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment." *Id.* at 2001 (emphasis added).

The Court held that "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." *Id.* at 2003.[6] The Court also said proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the government consistently refuses to pay claims based on noncompliance with a particular requirement, or (conversely) that the government pays

[5]The Court said it "need not decide whether §3729(a)(1)(A)'s materiality requirement is governed by §3729(b)(4) or derived directly from the common law." *Id.* at 2002.

[6]Nothing in the present record indicates that compliance with the statutory provision in question was expressly identified as a condition of payment.

such claims despite actual knowledge of noncompliance. *Id.* at 2003-04. Plaintiff has presented no evidence of this type.[7]

In *United States ex rel. Brooks v. Stevens-Henager College*, 305 F.Supp.3d 1279, 1301 (D.Utah 2018), the court stated: "Materiality depends on a holistic assessment of many factors . . . and it is usually a determination that is left to the jury." Under the present record, however, the court concludes the issue may be resolved as a matter of law. *See also Esobar*, 132 S.Ct. at 2004 n.6 ("We reject Universal Health's assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment").

This court finds plaintiff has failed to demonstrate a genuine issue of material fact as to materiality under the applicable burden of proof.[8] The Supreme Court held that materiality "cannot be found where noncompliance is minor or insubstantial." *Id.* at 2003. That is, "the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations." *Id.* at 2004. In *Escobar*, Massachusetts law required specific types of clinicians on staff and detailed supervision

[7]Indeed, as defendant notes, plaintiff has not produced the contract between Okmulgee Terrace and the Government, and has not produced an invoice sent to the government or a payment received by defendant from the government. (#50 at 5).

[8]At one point, defendant states: "[Plaintiff] possesses the burden to establish her claims by clear and convincing evidence . . . " (#50 at 3 ¶16). The court finds the burden is preponderance of the evidence, pursuant to 31 U.S.C. §3731(d).

requirements for other staff. The allegations were that the facility flouted these regulations and "employed unqualified, unlicensed, and unsupervised staff." *Id.* at 1998.

In the case at bar, the court finds the noncompliance minor or insubstantial. The fact that a member of the housekeeping staff was a convicted felon does not approach the significance of "serious violations of regulations pertaining to staff qualifications and licensing requirements for [specific professional] services." *Id.* (footnote omitted). As a general matter, the Court held that liability could attach based upon omissions made by defendant "if they render the defendant's representations misleading with respect to the goods or services provided." *Id.* at 1999. The parties do not dispute that Okmulgee Terrace is an intermediate care facility for individuals with intellectual disabilities. (#43 at 1, ¶1; #48 at 1, ¶1) . Housekeeping duties, while certainly necessary and proper for the residents, are not central to Medicare/Medicaid cost reports. In the court's view, representations in regard thereto are not "misleading" as to goods and services provided by Okmulgee Terrace because of this particular violation of this Oklahoma statute. Nothing in the present record indicates that the misrepresentation about compliance was "material to the Government's payment decision." *Id.* at 2002. Summary judgment is appropriate in this regard.

The Act's scienter requirement defines "knowing" and "knowingly" to mean that a person has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the

information." 31 U.S.C. §3729(b)(1)(A). It "require[s] no proof of specific intent to defraud." §3729(b)(1)(B). In the context of implied false certification theory, "False Claims Act liability for failing to disclose violations of legal requirements" will not attach unless "the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." The difficulty of establishing knowledge of materiality by direct evidence is obvious. The court finds circumstantial evidence may be sufficient, depending upon its nature.

Plaintiff has presented evidence that one of defendant's employees, Sheila Montgomery McFalls, (in McFalls's words) "probably" knew of Smith's felony record at the time he was hired, as McFalls was responsible for filling out OSBI background checks. (#48-1 at page 28 of 30 in CM/ECF pagination). The issue is whether this raises a genuine dispute of material fact as to scienter.[9] Generally, "[t]he presence or absence of scienter is a question of fact." *United States v. DeFelice*, 2015 WL 7018018, *3 (E.D.Okla.2015)(footnote omitted). A corporation is chargeable with the knowledge of its agents and employees acting within the scope of their authority. *Western Diversified Servs. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1276 (10th Cir.2005); *Grand Union Co. v. United States*, 696 F.2d 888, 891 (11th Cir.1983)(in cases brought under FCA, knowledge

[9]Defendant cites *United States ex rel. Folliard v. Govplace*, 930 F.Supp.2d 123, 130 (D.D.C.2013) for its statement that "[w]hile scienter under the FCA is necessarily a fact-intensive inquiry, summary judgment is appropriate where plaintiff produces no evidence sufficient to support a finding of the requisite scienter." (citation and quotation marks omitted). This court does not dispute this statement, but finds the present case differs.

of an employee is imputed to the corporation when the employee acts for the benefit of the corporation and within the scope of employment).

An aggravated from of gross negligence (i.e., reckless disregard) will satisfy the scienter requirement for an FCA violation. *United States ex rel. Burlbaw v. Orenduff,* 548 F.3d 931, 945 n.12 (10th Cir.2008). Congress added the "reckless disregard" prong to the definition of knowledge in the False Claims Act "to target that defendant who has 'buried his head in the sand' and failed to make some inquiry into the claim's validity." *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 530 (6th Cir.2012). The issue is close, but viewing the record in the light most favorable to plaintiff, the court concludes it would deny summary judgment on the scienter issue. It would be an issue for the jury whether it constituted reckless disregard to conclude (without the benefit of this court's ruling as to materiality) that a knowing violation of Oklahoma law was not material to the government's payment decision. Nevertheless, the court's ruling as to materiality is sufficient to grant judgment.

It is the order of the court that the motion of the defendant for summary judgment (#43) is hereby granted.

ORDERED THIS 14th DAY OF JANUARY, 2019.

Ronald A. White

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE