UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, et al.
ex rel. BONNIE ALVORD,

Plaintiffs,

vs. **Case No.: 8:10-CV-52-T-17EAJ**

LAKELAND REGIONAL MEDICAL CENTER, INC., et al.,

Defendants.
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REPORT AND RECOMMENDATION

Before the Court are Defendants' **Motion for Return of Medical, Psychiatric, and Substance Abuse Treatment Records, and for Dismissal or Other Sanctions** (Dkt. 10) and Relator's **Memorandum of Law in Opposition** (Dkt. 15).[1]

Bonnie Alvord ("Relator") alleges that her former employer, Lakeland Regional Medical Center, Inc. ("LRMC"), and Lakeland Regional Health Systems, Inc. ("LRHS") (collectively "Defendants") incorrectly billed for medical services in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. and the Florida False Claims Act ("Florida FCA"), Fla. Stat. § 68.801 et seq.

Defendants ask the Court to compel Relator to return all copies of patient medical, psychiatric, and substance abuse treatment records (hereinafter "medical records") in her possession

[1] The Court has also reviewed the Affidavit of Relator (Dkt. 15 Ex. 1), Relator's Notice of Filing the Affidavit of Dale T. Gobel, Esq. (Dkt. 22), Defendants' Notice of Filing (Dkt. 11), which includes the Affidavit of Sylvia Armstrong-Hughes (Dkt. 11 Ex. 1), and Defendants' Notice to the Court Regarding HIPAA Notification (Dkt. 20), as well as Exhibit 1, an exhibit introduced by Defendants at the hearing.

and to dismiss this case with prejudice. Oral argument has been held. For the reasons explained below, the Court **RECOMMENDS** that Defendants' motion be **GRANTED in part and DENIED in part**.[2]

Background

In March 2009, Defendant LRMC hired Relator as a "coder" of bills for physician services. (Relator Aff. ¶ 2) Her duties primarily consisted of assigning ICD-9 and CPT codes to bills for physician services provided by physicians employed by LRMC and its affiliated organizations. (Id. ¶ 3)

At the time she was hired, Relator signed LRMC's Code of Conduct stating that she would "obey all state and federal laws and regulations . . . and obey all other organizational policies and procedures" and "maintain the confidentiality of all patient information." (Dkt. 11 Ex. 1 at 12-14) Among the policies Relator committed to follow is LRMC Policy No. 1.54.010.4, Confidentiality of Patient Information, which provides guidelines for protecting patient privacy and maintaining the confidentiality of patient information. (Id. at 15-16) Another policy is LRMC Policy No. 1.46.022.2, HIPAA: Use and Disclosure of Protected Health Information ("HIPAA Policy"), which provides guidelines for the use and disclosure of protected health information. (Id. at 17-21)

LRMC's HIPAA Policy provides that protected health information may be disclosed, without an authorization, "[t]o health oversight agencies for purposes of legally authorized health oversight activities, such as audits and investigations necessary for oversight of the healthcare system and

[2] The District Judge referred the motions to the undersigned for a Report and Recommendation. (Dkt. 16) See 28 U.S.C. § 636(b) (2009).

government benefit programs." (Id. at 20)[3]

During her employment at LRMC, Relator allegedly discovered that LRMC engaged in false and fraudulent billing practices resulting in the submission of higher charges to Medicare and Medicaid. (Relator Aff. ¶¶ 2, 4-5) Relator reported and repeatedly discussed these issues with her superiors. (Id. ¶ 5) Relator made copies of medical records demonstrating that LRMC submitted unlawful claims. (Id. ¶ 6) Relator provided all of the documents she copied to her superiors at LRMC. (Id. ¶ 10) Relator states that all of the documents that she copied were directly related to and proved that LRMC was submitting false and fraudulent charges to the U.S. Government. (Id. ¶ 10) Relator never took or removed original medical records from LRMC. (Id. ¶ 7)

When LRMC did nothing to remedy the alleged unlawful conduct, Relator contacted an attorney in November 2009. (Id. ¶ 9) After providing the documents to her attorney, Relator did not retain a copy of the documentation. (Id.) Relator did not disclose or provide copies of the documents to anyone other than her superiors and her attorney. (Id. ¶ 11)

While Relator was still employed by LRMC on January 8, 2010, Relator's counsel filed under seal a copy of the complaint and exhibits containing a portion of the documents copied by Relator.[4] (Relator Aff. ¶ 13) (Dkt. 15 at 6) In August 2011, Relator resigned from her employment

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[3] A health oversight agency is defined in the HIPAA Policy as "[a]n entity to whom authority is granted by an agency or authority of the United States . . . that is authorized by law to oversee the healthcare system or government programs in which PHI is necessary to determine eligibility or compliance . . . ." (Dkt. 11 Ex. 1 at 18)

[4] Exhibits A, B, E, H, and M contain billing records revealing the name, dates and descriptions of medical services, and payor information for six patients, and for three of these six patients, the records also include their dates of birth and diagnostic information. Exhibits D, F, G, I, K, L contain billing records and medical records, including detailed treatment progress notes, for six patients. Exhibit J contains an inpatient superbill providing the names, dates of birth, and treating health care professional for thirteen patients. Silvia Armstrong-Hughes, Assistant Director

at LRMC because she was offered a job teaching elementary school. (Relator Aff. ¶ 13) (Dkt. 11 Ex. 1 at 23)

On April 9, 2012, the Government filed notice of its decision not to intervene, and on April 11, 2012, the Court unsealed the complaint and the exhibits. (Dkts. 2, 3) Relator's counsel had filed a motion on April 9, 2012 to extend the order to seal to protect Relator's identity as the qui tam relator, but the Court denied Relator's motion on April 12, 2012. (Dkts. 5, 6)

After learning of the lawsuit, Defendants filed an emergency unopposed motion on April 13, 2012 to seal the exhibits to the complaint containing the unredacted medical records, which the Court granted that same day. (Dkts. 8, 9) The unredacted medical records were publicly available on the PACER and CM/ECF internet databases from April 11, 2012 until April 13, 2012.[5]

On April 12, 2012, Law360, an internet subscription service, published an article on Relator's lawsuit revealing the name and the case number of the action, although it did not refer to the medical records attached as exhibits to the complaint. (Dkt. 11 Ex. 1 at 24-25) Relator's counsel states that the author of the article advised that he "did not make copies or download the exhibits attached to the complaint." (Gobel Aff. ¶ 3) The documents not filed as exhibits to the complaint have not been disclosed to anyone other than Relator's counsel and remain in Relator's counsel's sole possession. (Id. ¶ 2)

Defendants allege that Relator unlawfully misappropriated from Defendants and publicly disclosed unredacted medical records containing protected health information in violation of federal

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of the Professional Revenue Cycle for LRMC, provides an overview of the information in each exhibit. (Hughes Aff. Dkt. 11 Ex. 1 at 5-7)

[5] PACER stands for Public Access to Court Electronic Documents and CM/ECF stands for Case Management/Electronic Case Filing.

law and in breach of her contractual duties under LRMC's Code of Conduct.[6] Defendants ask the Court to compel Relator to return to Defendants all copies of the medical records in her possession and dismiss this case with prejudice, or alternatively, impose other sanctions, such as awarding attorneys' fees and costs incurred in filing Defendants' motion, ordering Relator to pay costs for any legally mandated responses due to the disclosure of the medical records, and precluding Relator's use of the stolen documents for any purpose in the litigation.

Relator responds that the public disclosure of the medical records by her counsel was inadvertent and unintentional, and any misappropriation of the records and disclosure to her attorney and the Government is protected under the FCA pursuant to public policy.

Discussion

The FCA permits private persons to file qui tam actions on behalf of the United States government against any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "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). "The purpose of the Act . . . is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward." Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1237 n.1 (11th Cir. 1999).

Pursuant to 31 U.S.C. § 3730(b)(2), "a copy of the complaint and written disclosure of and substantially all material evidence and information the person possesses shall be served on the

[6] Defendants also contend that Relator's misappropriation and disclosure of the medical records violates state law and the rights of Defendants and the patients. While Defendants' motion raises other legal grounds for the requested relief, at the hearing Defendants focused solely on federal authorities, statutory and caselaw. Accordingly, the Court finds it unnecessary to address any other grounds raised in Defendants' motion.

Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure." 31 U.S.C. § 3730(b)(2). To allow the government time to investigate and intervene, the complaint must be filed "in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." § 3730(b)(2); see Klusmeier v. Bell Constructors, Inc., 469 F. App'x 718, 720 n.4 (11th Cir. 2012). A failure to comply with the procedural filing requirements of § 3730(b)(2) may result in dismissal of an FCA claim. Foster v. Savannah Commc'n, 140 F. App'x 905, 908 (11th Cir. 2005) (per curiam).

The Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996), requires "covered entities" to protect, and keep confidential, "protected health information." The term "covered entities" includes healthcare providers who transmit health information electronically. See 45 C.F.R. §§ 160.102-103. As HIPAA applies only to "covered entities," its provisions apply to Defendants, but do not apply to Relator or Relator's counsel. See Graham v. Fleissner Law Firm, 2008 WL 2169512, at *3 (E.D. Tenn. 2008) (noting that law firms are not covered entities and are not regulated under HIPAA). "Protected health information" means "individually identifiable health information." 45 C.F.R. § 160.103. HIPAA regulates a covered entites' disclosure of protected health information during a judicial proceeding. 45 C.F.R. § 164.512(e).[7]

Under HIPAA, a "breach" occurs when there is an impermissible disclosure of protected

[7] A covered entity may disclose protected health information in the course of a judicial proceeding in response to a court order, or absent a court order, in response to a subpoena or discovery request if the party seeking the information gives satisfactory assurance to the covered entity that reasonable efforts have been made to: (1) give notice to the individual who is the subject of the protected health information; or (2) secure a qualified protective order. 45 C.F.R. § 164.512(e)(1)(I)-(ii).

health information which poses a significant risk of financial, reputational, or other harm to those affected. 45 C.F.R. § 164.402.[8] Following the discovery of a breach of unsecured protected health information, a covered entity must "notify each individual whose unsecured protected health information has been, or is reasonably believed by the covered entity to have been, accessed, acquired, used, or disclosed as a result of such breach." 45 C.F.R. § 164.404(a)(1).[9]

While not conceding that Plaintiff breached LRMC's Code of Conduct, Plaintiff relies on a line of cases holding that a confidentiality agreement "cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government." U.S. ex. rel. Grandeau v. Cancer Trt. Ctrs. of Amer., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); see also U.S. ex. rel. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009) ("Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision."); X Corp. v. Doe, 805 F. Supp. 1298, n.24 (E.D. Va. 1992) (noting that a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government").

In both Grandeau and Kane, a relator brought a qui tam action against an employer, and the

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[8] HIPAA immunizes a "covered entity" if a "workforce member . . . believes in good faith that the covered entity has engaged in conduct that is unlawful" and discloses that information to a health oversight agency or an attorney. 45 C.F.R. § 164.502(j). "Workforce" means "employees, volunteers, trainees, and other persons whose conduct, in the performance of work for a covered entity, is under the direct control of such entity . . . ." 45 C.F.R. § 160.103.

[9] The notice must describe, to the extent possible: (1) the breach; (2) the types of unsecured protected health information involved; (3) any steps individuals should take to protect themselves from potential harm resulting from the breach; (4) what the covered entity is doing to investigate the breach, to mitigate harm to individuals, and to protect against any further breaches; and (5) contact information for the covered entity. See 45 C.F.R. § 164.404(c).

employer counterclaimed under a breach of contract theory alleging the employee violated contractual duties under an employment agreement. See Kane, 668 F. Supp. 2d at 152 (dismissing employer's breach of contract counterclaim for failure to return an email to employer in violation of a separation agreement as void against public policy); Grandeau, 350 F. Supp. 2d at 773 (finding employee not liable for breach of confidentiality agreement for disclosure of documents to the Government requested by subpoena allegedly showing that employer engaged in fraudulent healthcare billing practices).

Defendants rely on other cases holding that public policy does not exempt whistleblowers from contractual duties under confidentiality agreements with employers. In these cases, the employees invoked public policy as a defense to a breach of contract claim brought by their former employers, but the courts determined that the breach of the employment agreement trumped public policy concerns. See U.S. ex. rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1062 (9th Cir. 2011) (finding that public policy concerns under the FCA did not excuse a relator's breach of a confidentiality agreement); E.A. Renfroe & Co. v. Moran, 249 F. App'x 88, 92-93 (11th Cir. 2007) (per curiam) (unpublished) (finding that the public policy concern of "ferreting out corporate wrongdoing" did not justify the employees' breach of the confidentiality agreement); JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697, 702 (E.D. Va. 2007) (rejecting public policy defense that an employee may breach an employment agreement to function as an effective Sarbanes-Oxley whistleblower because employees "would feel free to haul away proprietary documents, computers, or hard drives in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers . . . .").

Caffasso affirmed the district court's summary judgment in favor of an employer, despite the

public policy defense that the relator, Mary Cafasso ("Cafasso"), disclosed confidential business information in furtherance of an FCA action. Cafasso, 637 F.3d at 1062-63. Cafasso copied "nearly eleven gigabytes of data" that amounted to "tens of thousands of pages" and did not attempt to copy only information relevant to her FCA claim. Id. at 1062. The Ninth Circuit stated that "we see some merit in the public policy exception that Cafasso proposes," however, "[a]n exception broad enough to protect the scope of Cafasso's massive document gather in this case would make all confidentiality agreements unenforceable as long as the employee later files a qui tam action." Id.

Renfroe upheld a preliminary injunction that prohibited former employees from disclosing or using copies of 15,000 insurance claim-related documents the employees obtained while working at a company that provided adjusters to insurance companies. Renfroe, 249 F. App'x at 89, 92-93. Due to an ongoing criminal investigation, the injunction did not preclude law enforcement agencies from requesting the documents. Id. at 92-93. Seeking to expose fraudulent and potentially criminal activities related to the disposition of State Farm insurance claims, the employees shared the documents with a lawyer, the Mississippi Attorney General, and the Federal Bureau of Investigation. Id. at 89. They also discussed "their find before a national television audience" by appearing on a network news show. Id.

Jennings granted summary judgment in favor of the employer on the breach of contract claim. Jennings, 473. F. Supp. 2d at 704-05. In Jennings, JDS Uniphase Corporation ("JDSU") brought an action against Jennings, a former employee, for breach of an agreement that prohibited Jennings from "disclos[ing] any proprietary information . . . to anyone outside the company . . . or remove from company premises such information." Id. at 699. During JDSU's investigation of Jennings' allegations of retaliation, JDSU became aware that Jennings removed proprietary

documents in violation of the agreement. Id. at 700-01. The court determined that the agreement trumped Jennings' public policy argument that he needed to remove documents from JDSU to "pursue his wrongful discharge claim against the company" and "function as an effective Sarbanes-Oxley whistleblower," and the court ordered Jennings to return the documents. Id. at 702, 705.

The employees in Renfroe secretly copied 15,000 documents, shared them with a lawyer, and discussed the alleged fraud on national television. In contrast, Relator first disclosed the information to her superiors, and then solely to an attorney and the U.S. Government. (Relator Aff. ¶¶ 9, 11); see Renfroe, 249 F. App'x at 89. Relator's actions do not constitute surreptitious conduct as she repeatedly reported and discussed the alleged unlawful claims to her superiors and provided all of the documentation she copied to her superiors. (Relator Aff. ¶¶ 5-6)

Cafasso is also distinguishable as the court stated that any public policy exception for enforcement of confidentiality agreements for whistleblowers would not cover an employee's appropriation and dissemination of a massive and "vast and indiscriminate" number of documents. Cafasso, 637 F.3d at 1062. Here, all of documentation that Relator copied "was directly related to and proved that LRMC was submitting false and fraudulent charges to the U.S. Government." (Relator Aff. ¶ 10)

Relator maintained a copy of the documents in connection with these allegedly false claims as it was her "belief and opinion that there would be no way for the U.S. Government to verify the accuracy of my report and to trace back LRMC's false and fraudulent billing activities." (Id. ¶ 8); see Cafasso, 637 F.3d at 1062 (stating that those asserting protection under a public policy exception "would need to justify why removal of the documents was reasonably necessary to pursue an FCA

claim").[10]

Also, LRMC's HIPAA Policy provides an exception allowing an employee to disclose, without authorization, protected health information to health oversight agencies. (Dkt. 11 Ex. 1 at 12-14) Although Relator also provided copies of the documents to her attorney, she did so in connection with her FCA claim. (Relator Aff. ¶ 11) In contrast, there is no indication that the agreements in the cases cited by Defendants had a whistleblower exception. See Cafasso, 637 F.3d at 1061; Renfroe, 249 F. App'x at 89; Jennings, 473. F. Supp. 2d at 699.

Sanctions

Nothing in this opinion should be construed as a ruling that Defendants do not have a viable breach of contract claim or that Relator has a viable FCA claim. Indeed, Defendants' duty to file a responsive pleading has been stayed pending a ruling on the pending motion. However, Defendants have failed to demonstrate that Relator's conduct, and that of her attorneys, deserve the drastic sanction of dismissal or evidence preclusion due to Relator's copying and disclosure of medical records to her attorneys and the United States in connection with her FCA claim, at least based on the current record. See Kane, 668 F. Supp. 2d at 152; Grandeau, 350 F. Supp. 2d at 773. Additionally, as the medical records may be necessary for purposes of this FCA litigation, Relator's counsel should not be required to return the documents to Defendants at this state of the ligitation.

Any alleged wrongdoing by Relator in engaging in self-help instead of subpoenaing the documents does not justify the non-monetary relief sought either. Relator's conduct was aimed at disclosing evidence of an alleged fraud in support of her FCA claim. "The FCA requires that

[10] Relator also states that she observed Defendants shredding and destroying documentation. (Relator Aff. ¶ 14) However, Defendants take issue with Relator's position that documents were being disposed of improperly.

relators serve upon the United States 'written disclosure of substantially all material evidence and information the person possesses' in order to enable the government's own investigation to proceed expeditiously." Kane, 668 F. Supp. 2d 146 at 152. The purpose of the FCA's procedural requirements is to provide an opportunity for the Government to intervene and permit the relator to file the action without giving notice to the defendant while the Government investigates the case. See 31 U.S.C. § 3730(b)(2); Klusmeier, 469 F. App'x at 720 n.4.

The Court finds that the public disclosure of the records due to Relator's counsel actions should not be imputed to Relator. After providing the documents to her attorney, Relator did not retain a copy of the documentation. (Relator Aff. ¶ 9) While a party may be responsible for the actions taken by his attorney, nothing in the record suggests that Relator or her counsel acted willfully or in bad faith.

At the same time, Relator's counsel must be held accountable for the unsealing of the medical records attached to the complaint, even if inadvertent and for a brief period of time. Relator's counsel violated the Court's CM/ECF procedures,[11] which resulted in disclosure of records containing protected health information. See 45 C.F.R. § 164.402. Certainly, Relator's attorneys knew or should have known that the patient records would be unsealed eventually and that, as a result, the personal identifying information contained in those records should have been redacted when they were filed with the complaint.

[11] Pursuant to the Middle District of Florida's CM/ECF procedures, only the last four digits of a social security number, tax identification number, and financial account number may be listed; a minor may be identified only by his or her initials; only a person's year of birth, not the month or day, may be provided; and only the city and state of a home address should be listed. See www.flmd.uscourts.gov/CMECF/default.htm (follow "CM/ECF Administrative Procedures" hyperlink).

As required by HIPAA, Defendants sent breach notification letters on June 12, 2012 to all patients identified in the medical records filed as exhibits to the complaint. (Dkt. 20) Accordingly, it is recommended that monetary sanctions be assessed against Relator's attorneys to reimburse Defendants for the reasonable fees and costs associated with notifying individuals affected by the unsealing of the medical records.

Further, within fifteen days of the Court's final ruling on the motion, Relator should provide Defendants with a description of any disclosure, other than to her attorneys or the Government, that she knows has been made of the documents, including the dates of such disclosure, the records disclosed, the reason for the disclosure, and the name and address of the individual to whom the records were disclosed. Realtor should, within the same time period, notify Defendants of any additional medical records Relator obtained during her employment with Defendants.

Relator should also redact the "individually identifiable health information" from the medical records, so the records will no longer contain "protected health information" under HIPAA. See 45 C.F.R. § 160.103. The parties should enter into a confidentiality agreement, to be approved by the Court, governing use of the medical records qualifying for HIPAA protection. Relator and her attorneys should be prohibited from filing any further medical records with "individually identifiable health information" in this case, absent court order.

As the extent of the disclosure of the unredacted medical records (due to their being unsealed for several days on the Court's docket) is unknown,[12] the parties may engage in further discovery

[12] Between the date the Court unsealed the complaint and attached exhibits on April 11, 2012 to the date that the exhibits were placed under seal again on April 13, 2012 they were available for public inspection. Anyone viewing the docket through the Pacer system (http://www.pacer.gov), or otherwise, could have accessed the information in the patient records. Certainly, Defendants were able to view and download the records. And the record shows that an

to determine the severity of the disclosure. If future circumstances arise warranting further sanctions, it may be appropriate to reconsider the other relief sought by Defendants.

Conclusion

Accordingly, and upon consideration, it is **RECOMMENDED** that:

(1) Defendants' Motion for Return of Medical, Psychiatric, and Substance Abuse Treatment Records, and for Dismissal or Other Sanctions (Dkt. 10) be **GRANTED IN PART AND DENIED IN PART**.

Dated: September 14, 2012

ELIZABETH A JENKINS
United States Magistrate Judge

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of this service shall bar an aggrieved party from attacking the factual findings on appeal. See 28 U.S.C. § 636(b)(1).

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author of an article on Relator's lawsuit did so as well, although the affidavit of Relator's counsel indicates that the author of the article told counsel that he "did not make copies or download the exhibits attached to the complaint." (Gobel Aff. ¶ 3) Although it is plausible, given the short period of time the records were on the public docket that no one else viewed or downloaded the patient records, the burden should be on the disclosing party, Relator, rather than the Defendants as the party objecting to the disclosure, to establish the parameters of the extent of the disclosure.