

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26341

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIIMARILYN H. KINA, Plaintiff-Appellant, v. HAWAII MEDICAL SERVICE
ASSOCIATION, Defendant-Appellee, and JOHN DOES 1-10;
JANE DOES 1-10; DOE ENTITIES 1-10, DefendantsAPPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 02-1-2807)MEMORANDUM OPINION

(By: Foley, Presiding Judge, Nakamura and Fujisaki.)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

I.

Plaintiff-Appellant Marilyn H. Kina (Kina) appeals from the Final Judgment in favor of Defendant-Appellee Hawaii Medical Service Association (HMSA) entered on January 9, 2004 in the Circuit Court of the First Circuit (circuit court).¹ After careful review of the issue raised and the arguments made by the parties, as well as the record of the proceedings before the circuit court and the relevant case law, we affirm in part and remand for further proceedings consistent with this opinion.

II.

Kina filed a complaint on December 2, 2002, alleging wrongful termination in violation of public policy² after she confronted HMSA about concerns she had with some of HMSA's

¹ The Honorable Dexter Del Rosario presided.

² Marilyn H. Kina (Kina) also alleged in her complaint intentional infliction of emotional distress (Count II) and punitive damages (Count III). These claims were dismissed upon stipulation on November 3, 2003.

procedures and record keeping. HMSA filed a "Motion to Dismiss, or Alternatively, for a More Definite Statement" (First Motion to Dismiss) and Kina filed her opposition memorandum. At the First Motion to Dismiss hearing, Kina agreed to amend her complaint by identifying the statutes upon which she was relying in claiming her employment was terminated contrary to public policy.

Kina filed her First Amended Complaint (amended complaint) on April 22, 2003. HMSA filed a "Motion to Dismiss Count I of the First Amended Complaint Filed on April 22, 2003" (motion to dismiss), arguing that Kina failed to state a claim for which relief could be granted. After a hearing, the circuit court granted HMSA's motion to dismiss without prejudice and eventually entered judgment in HMSA's favor. From the January 9, 2004 Judgment entered in HMSA's favor, Kina timely appeals.

III.

Kina argues the circuit court erred by dismissing her amended complaint based on Hawai'i Rules of Civil Procedure (HRCP) Rules 8, 9(b), and 12(b)(6).

In appraising the sufficiency of the complaint under [Hawai'i Rules of Civil Procedure] Rule 12(b)(6), the accepted rule is that well-pleaded allegations of fact are taken as admitted and the 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.

Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 185-86 (1985) (citations omitted). In reviewing the sufficiency of the complaint, "[w]e must . . . view a plaintiff's complaint in a light most favorable to him or her in order to determine whether

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the allegations contained therein could warrant relief under any alternative theory." Baehr v. Lewin, 74 Haw. 530, 545, 852 P.2d 44, 52, *reconsideration granted in part and denied in part*, 74 Haw. 650, 875 P.2d 225 (1993) (citation omitted).

Kina's employment at HMSA was at-will. At-will employment is, "'by definition, ... terminable at the will of either party, for any reason or no reason at all.'" Shoppe v. Gucci America Inc., 94 Hawai'i 368, 383, 14 P.3d 1049, 1064 (2000) quoting Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 124 n.5, 920 P.2d 334, 357 n.5 (1996). However, Hawai'i courts have recognized a public policy exception to the at-will employee doctrine. Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982). "[A]n employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." Parnar, 65 Haw. at 380, 652 P.2d at 631 (footnote omitted). Acknowledging the "somewhat vague meaning of the term 'public policy,'" the Parnar court limited the public policy exception's scope to a "narrow class of cases" and directed courts to "inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy." Parnar, 65 Haw. at 379-80, 652 P.2d at 630-31 (footnote omitted).

One type of public policy recognized is "performing an important public obligation, such as jury duty, whistle blowing, or refusing to violate a professional code of ethics." Smith v.

Chaney Brooks Realty, Inc., 10 Haw. App. 250, 257, 865 P.2d 170, 174 (1994). Parnar herself claimed that she was terminated for her participation in an investigation of antitrust violations by her employer. Parnar, 65 Haw. at 380, 652 P.2d at 631.

In her amended complaint, Kina relies on the following statutes as statements of the public policies HMSA violated: (1) Hawaii Revised Statutes (HRS) § 708-830 (1993 & Supp. 2001) (theft); (2) HRS § 480-2 (1993 & Supp. 2002) (unfair and deceptive trade practices); (3) HRS §§ 431:13-102 (2005) and 431:13-103 (Supp. 2002) (unfair methods of competition and unfair and deceptive acts and practices in the business of insurance); and (4) HRS § 708-872 (1993) (falsifying business records). As in Parnar, it is clear that these statutes represent expressions of important public policies, that is, the protection of the public from wrongful retention of funds, engaging in unfair or deceptive business practices or creating false business records.³

³ Hawaii Medical Service Association (HMSA) argues on appeal that, because the public policy exception is a narrow one, more restrictive rules of pleading this exception should apply. We decline to adopt such a rule. First, while it is true the concept of "public policy" can be somewhat vague, the court in Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982), did not limit the concept to violations of statute, as Missouri Court of Appeals did in a case upon which HMSA relies. Adolphsen v. Hallmark Cards, Inc., 907 S.W.2d 333 (Mo. Ct. App. 1995). Rather, the Parnar court found it sufficient if the policy was reflected in a "constitutional, statutory, or regulatory provision or scheme" and allowed for judicial recognition of public policy only limited by the admonition that "courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." Parnar, 65 Haw. at 380, 652 P.2d at 631 (emphasis supplied).

Second, so long as the employee specifically identifies the source of the public policy relied upon, be it statutory or other authority, this should serve to place the employer on notice of the nature of the public policy, without asking the employer to defend against "a generalized belief that their termination was unfair or unwarranted" as HMSA fears.

(continued...)

Kina's amended complaint alleged the following facts:

13. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'underpaying claims' filed by medical service providers and/or facilities. This underpayment of claims resulted in medical service providers and/or facilities not being paid as much as they should have.
14. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'denying claims' filed by medical service providers and/or facilities. This nonpayment of claims resulted in medical service providers and/or facilities not being paid as they should have.
15. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'overpaying claims' filed by medical service providers and/or facilities. This overpayment of claims resulted in medical service providers and/or facilities being paid more than they should have, which results in increased annual contract renewal rates for the members and/or employer groups.
16. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'falsely classifying' audit 'errors' as 'correct' samples in order to meet the standards for NCQA accreditation and external auditors such as Blue Cross/Blue Shield, Medicare/Medicaid, Federal Government, State of Hawaii Government, private employer groups, health plans, and others. This results in providing false information to accreditors and external auditors.
17. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'providing false information' to members, member groups, service providers, service facilities, and others.
18. Through her work as a Claims Analyst II conducting audits, Plaintiff discovered that Defendant HMSA was 'keeping reimbursement monies' instead of reimbursing the member(s), member group(s), and/or secondary medical plan(s).

.....

³(...continued)

Finally, although we have no quarrel with HMSA's position that all material elements of a claim must be specifically pleaded, HMSA provides no authority for the proposition that every element of the statute relied upon to establish the public policy is also an element of the wrongful termination claim. The public policy exception as formulated in this jurisdiction can be based on contravention of "the letter or purpose of a constitutional, statutory, or regulatory provision or scheme," Parnar, 65 Haw. 380, 652 P.2d at 381 (emphasis supplied), and is not limited to literal violations of statute.

21. Defendant HMSA also terminated Plaintiff's employment because it wanted to ensure that Plaintiff would not have communications with NCQA, which could have jeopardized its accreditation by NCQA.
22. Defendant HMSA also terminated Plaintiff's employment because it wanted to ensure that Plaintiff would not have communications with external auditors from Employer Groups, Blue Cross, Blue Shield, Medicare, Medicaid, Med-Quest, and others, which were conducted periodically.

(Emphasis in original.) Under Marsland, Kina's complaint must include allegations of fact that "contain either direct allegations on every material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Marsland, 5 Haw. App. at 475, 701 P.2d at 186 (quoting 5 Wright & Miller, supra, § 1216, at 121-23 (footnotes omitted in original)). We now address, whether Kina's allegations sufficiently state violations of each statute Kina cites in her amended complaint.

A.

Kina's amended complaint states that HMSA underpaid claims to medical service providers (¶13) and that she brought this to the attention of the management of HMSA (¶19) and that as a result was, among other things, terminated from her employment (¶20). Kina does not allege that HMSA intended to permanently deprive the service providers of their funds, see HRS § 708-830 (theft),⁴ nor does she allege that she told HMSA that its

⁴ Hawaii Revised Statutes (HRS) § 708-830 (1993) provides, in pertinent part:

(continued...)

practices amounted to theft. Thus, even reading the amended complaint liberally, we cannot say it alleges sufficient facts to state a claim of termination in retaliation for reporting theft by HMSA.

B.

Kina's amended complaint does allege facts that, taken in the light most favorable to Kina, established HMSA engaged in conduct constituting unfair or deceptive trade practices under HRS § 480-2 (1993). That section declares that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., 491 F. Supp. 1199, 1226-27 (D. Haw. 1980).

Kina's amended complaint alleges that HMSA employees were denying claims that they should not have denied (¶14) and

⁴(...continued)

A person commits theft if the person does any of the following:

- (1) Obtains or exerts unauthorized control over property. A person obtains, or exerts control over, the property of another with intent to deprive the other of the property.

"Unauthorized control over property" is defined as "control over property of another which is not authorized by the owner." HRS § 708-800 (1993). "Property of another" means property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful. . . ." Id. "'Property'" includes money. Id. "'Deprive'" means, *inter alia*, "[t]o withhold property or cause it to be withheld from a person permanently. . . ." Id.

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provided false information to members, member groups, service providers, service facilities and others, (¶17) that she brought this to HMSA management's attention (¶19) and that she was, *inter alia*, fired as a result (¶20). These allegations were sufficient to state a claim that Kina was fired for trying to remedy the improper denial of claims and the provision of false information to HMSA's customers, which may constitute the unethical or unscrupulous practices injurious to HMSA's customers.

C.

Similarly, Kina's amended complaint does allege sufficient facts that may lead to a recovery under HRS §§ 431:13-102 and 431:13-103⁵ (unfair methods or competition and unfair and deceptive acts practices in the business of insurance). Paragraph 16 alleges that HMSA falsely classified audit errors as correct samples, which resulted in false information being provided to "accreditors and external auditors," that she brought this to HMSA management's attention (¶19) and that she was, *inter*

⁵ HRS § 431:13-102 (2005) unamended since 1987, prohibits unfair methods of competition or unfair or deceptive practices in the business of insurance. HRS § 431:13-103 (Supp. 2002) defines unfair methods of competition and unfair or deceptive practices in the business of insurance. For example, HRS § 431:13-103(5) (B) states:

(B) Knowingly making any false entry of a material fact in any book, report, or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom the insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, knowingly omitting to make a true entry of any material fact pertaining to the business of the insurer in any book, report, or statement of the insurer.

alia, fired as a result (§20). Thus, this allegation was sufficient to allege a violation of the insurance laws as another basis for her claim of termination in violation of public policy.

D.

Paragraphs 16 and 17 of Kina's amended complaint also allege facts that HMSA falsified business records under HRS § 708-872 (1993)⁶ by alleging HMSA (1) falsely classified audit errors as correct samples to meet the standards for NCQA accreditation and (2) provided false information to members, member groups and service providers. Therefore, the allegations in Kina's amended complaint were sufficient to make out a claim

⁶ **§708-872 Falsifying business records.** (1) A person commits the offense of falsifying business records if, with intent to defraud, the person:

- (a) Make or causes a false entry in the business records of an enterprise; or
- (b) Alters, erases, obliterates, deletes, removes, or destroys a true entry in the business records of an enterprise; or
- (c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which the person knows to be imposed upon the person by law, other than for the information of the government, or by the nature of the person's position; or
- (d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) "'Enterprise'" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional industrial, eleemosynary, or social activity.

(3) "'Business record'" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(4) Falsifying business records is a misdemeanor.

that she was fired for bringing to HMSA's attention the falsifying of business records.

E.

Finally, Kina claims the circuit court erred in dismissing her amended complaint based on HRCF Rule 9(b). HRCF Rule 9(b)⁷ requires fraud or mistake to be "stated with particularity" because fraud cannot be presumed. Shoppe, 94 Hawai'i at 386, 14 P.3d at 1067. While the circuit court did not specify the basis for dismissing the amended complaint, we agree with Kina that to the extent the circuit court dismissed her complaint for a failure to specifically allege fraud, this too was error. Kina's amended complaint alleged not fraud as a cause of action, but wrongful termination in part, because she attempted to bring to light arguably fraudulent practices. HRS §§ 708-872 and 708-830(2), upon which Kina relies, require fraudulent or deceiving intent not fraud per se.

IV.

Based on the foregoing, we vacate the Final Judgment entered by the Circuit Court of the First Circuit on January 9,

⁷ Hawai'i Rules of Civil Procedure Rule 9(b) states as follows:

RULE 9. PLEADING SPECIAL MATTERS

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

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2004 with regard to Count I of the First Amended Complaint filed on April 22, 2003. We also vacate the circuit court's August 13, 2003 Order Granting Defendant Hawaii Medical Service Association's Motion to Dismiss Count I of the First Amended Complaint Filed on April 22, 2003 and remand this case for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, September 5, 2006.

On the briefs:

Venetia K. Carpenter-Asui,
for Plaintiff-Appellant.


Presiding Judge

John L. Knorek and
Clayton A. Kamida,
(Torkildson, Katz, Fonseca,
Moore & Hetherington)
for Defendant-Appellee.


Associate Judge


Associate Judge