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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA, ex rel.
11 EVA ZEMPLENYI, M.D., and EVA
ZEMPLENYI, M.D., individually,

12 Plaintiff,

13 v.

14 GROUP HEALTH COOPERATIVE,
15 GROUP HEALTH PERMANENTE,
GROUP HEALTH OPTIONS, INC., KPS
16 HEALTH PLANS, GROUP HEALTH
NORTHWEST,

17 Defendants.

CASE NO. C09-603 RSM

ORDER GRANTING IN PART
DEFENDANTS' MOTION TO
DISMISS

18
19 **I. INTRODUCTION**

20 This matter comes before the Court on Motion to Dismiss (Dkt. #21) brought by
21 Defendants Group Health Cooperative, Group Health Permanente, Group Health Options, Inc.,
22 KPS Health Plans, and Group Health Northwest ("Defendants"). Plaintiff and relator Eva
23 Zempenyi, M.D. ("Plaintiff") brings suit individually and on behalf of the United States of
24 America. The United States has declined to intervene in this *qui tam* action. Plaintiff's Second

1 Amended Complaint (Dkt. #20) alleges fraud, in violation of the False Claims Act (“FCA”), 31
2 U.S.C. § 3729(a)(1-3), and for retaliation in violation of § 3730(h). Defendants argue that
3 Plaintiff’s Second Amended Complaint fails to plead fraud with particularity under the FCA as
4 required by Federal Rule of Civil Procedure 9(b), and fails to state a plausible theory under Rule
5 12(b)(6). Defendants also argue that Plaintiff’s retaliation claim under the FCA should be
6 dismissed under Rule 12(b)(6) because Plaintiff could not have reasonably suspected that
7 Defendants were submitting false claims.

8 9 **II. BACKGROUND**

10 Plaintiff is an ophthalmologist who was employed by Defendant Group Health and Group
11 Health Permanente from 1988 until 2007. In her Second Amended Complaint, Plaintiff alleges
12 that Defendants performed medically unnecessary cataract surgeries in order to increase revenue,
13 allegedly resulting in false claims being submitted to Medicare for reimbursements. In 2005,
14 Defendants allegedly dispensed with Medicare guidelines requiring a pre-operative examination
15 prior to surgery. Throughout 2005 and 2006, Plaintiff claims to have voiced her objections over
16 what she saw as the performance of unnecessary surgeries and reported her concerns to a
17 Medicare Compliance Officer. As a result of her actions, she alleges that her job was
18 constructively terminated, as she was subject to a negative performance review without prior
19 discussion or opportunity to respond, and subject to an investigation. In 2007, Plaintiff resigned,
20 alleging that she had little choice under the circumstances.

III. DISCUSSION

A. Fraud under the FCA

The FCA imposes liability on any individual or entity that “(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval [to the government]; (B) 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). Pursuant to the Act, a person may file a *qui tam* action on behalf of the federal government for any violation of § 3729. 31 U.S.C. § 3730(b). The Ninth Circuit has specifically held that Rule 9(b) requires a party alleging fraud or mistake to state with particularity the circumstances constituting the fraud or mistake, including “the who, what, when, where, and how of the misconduct charged.” *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010).

In applying this standard, the Ninth Circuit noted that a plaintiff alleging violations of the FCA is not required to allege all facts supporting each and every instance of fraud under the particularity standard of Rule 9(b). *Id.* However, the *Ebeid* Court explained that allegations of particular details of a scheme must be paired with “reliable indicia that lead to a strong inference that [false] claims were actually submitted.” *Id.* at 998-999. Moreover, the Ninth Circuit has made clear that claims brought under the FCA must meet the narrow requirement set forth under the statute, noting that “[i]t is not the case that any breach of contract, or violation of regulations, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA.” *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996). Finally, allegations of a fraudulent scheme alone cannot satisfy the particularity requirements set forth under Rule 9(b). *U.S. of America ex. rel. Aflatooni v. Kitsap Physicians Service*, 314 F.3d 995, 1002 (9th Cir. 2002).

1 In her Second Amended Complaint, Plaintiff has elaborated on the alleged scheme
2 describing how Defendants stand to benefit from the increase in cataract surgeries. Significantly,
3 as noted *supra*, not every violation of a regulation that results in the wrongful receipt of money
4 from the government can constitute an allegation of a fraud under the FCA. *Hopper*, 91 F.3d at
5 1265. The scheme alleged is difficult to construe as a violation of the FCA upon a consideration
6 of the capitated payment system, in which a health care provider is paid a contracted or fixed rate
7 per patient regardless of the number or type of services provided to the enrolled member. Under
8 such a system, it cannot be said that false claims are being made, since payments remain the
9 same regardless of whether a surgery is performed or not. While Plaintiff puts forth that by
10 incurring higher costs, Defendants may receive higher capitated payments for managed care
11 beneficiaries in the future, it nonetheless remains the case that those costs are self-incurred, and
12 the government continues to pay a flat rate. Defendants receive payments in a fixed amount per
13 member, per month, and thus the government is not spending additional money when an
14 individual surgery is performed. *Frew v. Hawkins*, 401 F.Supp.2d 619, 670 (E.D. Tex. 2005).

15 In addition, Plaintiff has strained to link the specific examples of patients who underwent
16 allegedly unnecessary cataract surgery to the fraudulent activity she alleges. Indeed, Plaintiff
17 describes the surgery dates and references six cases in which the patients allegedly did not meet
18 the proper criteria for surgery. Yet the allegations concerning the specific patients fail to support
19 the proposition that false claims evincing a fraudulent scheme have been filed. Amidst the
20 background of a capitated payment system, it is simply too speculative to find that the surgical
21 procedures performed on these individual patients are part of the alleged fraudulent scheme,
22 where the performance of allegedly unnecessary surgeries does not result in increased payments
23 to the Defendants.

1 Similarly, Plaintiff’s allegations of false certification cannot stand. Even if Defendants
2 were certifying compliance to the government, the allegations of false certification do not
3 comport with the law regarding what constitutes fraud under the FCA. To bring a claim under
4 the FCA based on a false certification theory, a plaintiff must prove four elements: (1) that there
5 be a false claim rather than a “mere unintentional violation,” (2) that there be scienter, or a
6 “palpably false statement, known to be a lie when it is made,” (3) that the false statement must be
7 material to the government’s decision to payout money to the claimant, and (4) that there be an
8 actual claim, “which is to say, a call on the government fisc.” *U.S. ex rel. Hendow v. Univ. of*
9 *Phoenix*, 461 F.3d 1166. 1172-73 (9th Cir. 2006). Since the conduct alleged did not alter the
10 payments made by the government, it cannot be said that any alleged false statement was
11 material to the government’s decision to pay. Furthermore, the alleged fraudulent conduct could
12 not have resulted in additional payments by the government because there was no false claim.
13 Taken together, the allegations of the existence of a scheme are not sufficiently linked to
14 “reliable indicia” that would raise a strong inference that false claims were submitted, as required
15 by *Ebeid*, 616 F.3d at 998-999.

16 Plaintiff has had repeated opportunities to amend her complaint, and there is no
17 indication that her claims brought under § 3729(a) could be saved by granting her leave to
18 amend. As such, Plaintiff’s claims under § 3729(a) are dismissed with prejudice. *See Ebeid*, 616
19 F.3d at 1001 (affirming dismissal with prejudice of second amended FCA complaint).

20 21 **B. Retaliation under the FCA**

22 Plaintiff alleges that she suffered retaliation as a result of her complaints about the
23 increased performance of cataract surgery and that such retaliation constitutes a violation of the
24 FCA. *See* 31 U.S.C. § 3730(h). The FCA protects “whistle blowers” from retaliation by their

1 employers for protected activities. Accordingly, the FCA provides relief for employees who are
2 “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated
3 against in the terms and conditions of employment because of lawful acts done by the employee..
4 . . in furtherance of an action under this section or other efforts to stop 1 or more violations of
5 this subchapter.” 31 U.S.C. § 3730(h).

6 A plaintiff alleging a FCA retaliation claim need not show that the defendant actually
7 submitted a false claim to the government, only that she reasonably suspected as much. *See*
8 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). As such, the
9 heightened pleading standard for fraud claims does not apply, and the standard employed is
10 established by Rule 12(b)(6). *Id.* To succeed on a claim for retaliation under the FCA, an
11 employee must prove three elements: (1) that the employee engaged in activity protected under
12 the statute; (2) that the employer knew that the employee engaged in protected activity; and (3)
13 that the employer discriminated against the employee because she engaged in protected activity.
14 *Id.*; *Moore v. California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 844 -845 (9th Cir.
15 2002).

16 At this early stage, Plaintiff has stated sufficient factual allegations such that her claim
17 for retaliation may move forward. For purposes of the first element, Plaintiff engaged in
18 protected activity under the FCA if she reasonably believed that Defendants were committing
19 fraud against the government, and Plaintiff investigated that fraud.

20 Plaintiff alleges that she believed that an increase in the number of cataract surgeries
21 performed along with surgeries performed on patients who had a pre-operative examination over
22 six months prior to surgery represented a violation of Medicare guidelines. In her complaint,
23 Plaintiff states enough facts to support her contention that she subjectively, and in good faith,
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1 | believed that fraud was occurring. Furthermore, it cannot be said that Plaintiff's believe was
2 | objectively unreasonable. At the 12(b)(6) stage, Plaintiff's contentions that she believed
3 | guidelines were not being followed, too many cataract surgeries were being performed, and
4 | Defendants stood to gain financially from the surgeries, constitute sufficient factual allegations
5 | to conclude that her belief was objectively reasonable.

6 | The second element of a retaliation claim requires the employer to know that Defendant
7 | was engaged in protected conduct. Unless an employer is aware that its employee is
8 | investigating fraud, the employer cannot "possess the retaliatory intent necessary to establish a
9 | violation of 3730(h)." *Hopper*, 91 F.3d at 1269 (citing *Robertson v. Bell Helicopter Textron*, 32
10 | F.3d 948, 950-52 (5th Cir. 1994)). Plaintiff alleges that she had numerous conversations with
11 | supervisors expressing her concerns, and filed reports regarding her concerns. Plaintiff's
12 | allegations are sufficient to raise the prospect that her employer knew that she was engaged in
13 | protected conduct arising from her concern that fraud was being committed.

14 | Finally, the employer must have discriminated against the employee because she engaged
15 | in protected activity. Plaintiff alleges that she was subject to negative performance reviews
16 | which typically precede termination, that she was not given an opportunity to respond, that she
17 | was the subject of an investigation, and that her supervisors intended to terminate her
18 | employment. If accepted as true, Plaintiff sufficiently alleges that she was discriminated against
19 | as a result her protected activity regarding the alleged fraud.

21 | **C. Incorporation by Reference**

22 | The Court finds that Defendants' inclusion of links to external materials constitutes
23 | presentment of matters outside the pleading under Rule 12(d). The Court did not consider these
24 | materials for purposes of this Motion.

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2 **IV. CONCLUSION**

3 Having reviewed the relevant pleadings, the declarations attached thereto, and the
4 remainder of the record, the Court hereby finds and ORDERS:

5 Defendants' Motion to Dismiss (Dkt. #21) is GRANTED as to Plaintiff's claims for
6 violations of the False Claims Act, 31 U.S.C. § 3729(a)(1-3) and DENIED as to Plaintiff's
7 claim for retaliation in violation of the False Claims Act, 31 U.S.C. § 3730(h).
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9 Dated March 3, 2011.

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12 RICARDO S. MARTINEZ
13 UNITED STATES DISTRICT JUDGE
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