**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Case No. 17-5850**
**ELECTRONICALLY FILED**

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**SUE SMITH**

**Plaintiff-Appellant**

**v.**

**LHC GROUP, INC., a Delaware corporation; KENTUCKY LV, LLC, a Kentucky limited liability company, d/b/a Deaconess – Lifeline Home Health**

**Defendants-Appellants**

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**Appeal from the United States District Court**
**For the Eastern District of Kentucky at Lexington**
**Civil Action No. 5:17-CV-15**
**Hon. Karen K. Caldwell**

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# BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 17-5850

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SUE SMITH

Plaintiff-Appellant

v.

LHC GROUP, INC., a Delaware corporation; KENTUCKY LV, LLC, a Kentucky limited liability company, d/b/a Deaconess – Lifeline Home Health

Defendants-Appellants

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

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Pursuant to Sixth Circuit Rule 25, Plaintiff-Appellant Sue Smith makes the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation?

RESPONSE: No.

2. If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

RESPONSE: See the Response above.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

RESPONSE: See Response above.

/s/ Robert L. Abell
Robert L. Abell
Counsel for Appellant

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## STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully suggests that oral argument would be helpful to the Court in this case and requests that it be granted.

## STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Kentucky had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1367, because plaintiff Sue Smith pleaded claims under federal law, the False Claims Act, 31 U.S.C. § 3730(h), and Kentucky state law. (Complaint, RE 1, Pg.ID 5).

On June 30, 2017, the court below granted defendants' motion to dismiss and entered an opinion and order and a judgment. (Opinion and Order, RE 13, Pg.ID 87; Judgment, RE 14, Pg.ID 101). Smith timely appealed on July 26, 2017. (Notice of Appeal, RE 15, Pg.ID 102). The district court's judgment is reviewable by this Court pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a nurse is constructively discharged from employment when she leaves her employment rather than continuing it and participating in healthcare fraud and harm to patients?

2. Whether a state law tort claim for wrongful discharge contrary to public policy is pleaded sufficiently by factual allegations that Smith's employer intended and expected her to violate a law as a term and condition of her employment?

## STATEMENT OF THE CASE

Sue Smith is an experienced nurse and was employed by appellees as the Director of Nursing for their home healthcare operations in and about Lexington, Kentucky.

Smith learned that certain of appellees' employees were engaging in practices that both constituted healthcare fraud and endangered patients. She reported these practices to appellees' management and attempted to have them stopped. Appellees' management responded, in essence, that they were making a lot of money from the practices and took no action to change or stop the practices.

Faced with the choice of continuing her employment and knowingly participating in and aiding and abetting practices constituting healthcare fraud and endangering patients or leaving her employment, Smith resigned. Smith then sued appellees claiming that she was constructively discharged from her employment and pleading claims under the False Claims Act, 31 U.S.C. § 3730, and Kentucky state law for wrongful discharge.

The district court dismissed Smith's complaint and made two key rulings on which this appeal turns: (1) that Smith was not

constructively discharged; and, (2) the Kentucky tort of wrongful discharge required that Smith plead and prove as an element that she was explicitly and directly ordered to participate in healthcare fraud and/or practices endangering patients and she had refused to do so.

## STATEMENT OF FACTS

### Background and Smith's Complaint

Appellees LHC Group, Inc. and Kentucky LV, LLC are in the business of providing home healthcare services to patients needing such services. (Complaint, RE 1, ¶ 12 at p. 4, Pg.ID 4). They employed plaintiff Sue Smith as their Director of Nursing (DON) for Home Health in their Lexington, Kentucky office. (Complaint ¶ 7, Pg.ID 3). Smith is licensed as a Registered Nurse (R.N.) and therefore subject to the licensure regulation of the Kentucky Board of Nursing. (*Id.* ¶ 9, Pg.ID 3).

The procedure by which a home healthcare patient was enrolled is key to understanding Smith's claims and appellees' healthcare fraud scheme. Patients are referred to appellees by a physician, hospital, nursing home and/or other healthcare provider. (*Id.* ¶ 13, Pg.ID 4). Typically, a patient referral would come with a doctor's order specifying the home healthcare services required by the patient.

(*Id.* ¶ 14, Pg.ID 4). The services could include, for instance, skilled nursing care, occupational therapy, physical therapy, social worker and/or home health aide services. (*Id.*).

Smith's job duties required her to review the patient referral and determine whether appellees had available staff to provide the services indicated as necessary for the patient. (*Id.* ¶ 15, Pg.ID 4). This process entailed, for instance, assessing whether appellees had sufficient home healthcare staff available so that a new patient requiring skilled nursing and occupational therapy services could be accepted and provided adequate care. If Smith determined that adequate staff was available to properly care for the patient, she was authorized to accept the patient and to direct initiation of the patient enrollment procedures. (*Id.* ¶ 16, Pg.ID 5). However, if Smith determined that adequate staff to properly care for the new patient was not available, she was authorized merely to recommend the referral be declined, the final decision being reserved for higher management. (*Id.* ¶ 21, Pg.ID 6).

In instances where Smith determined that the referred patient could be accepted, the next step was for a skilled nurse or physical therapist (depending on the initial referral order) to visit with,

examine and assess the patient. (*Id.* ¶ 17, Pg.ID 5). This initial clinical assessment sometimes resulted in a determination that additional home healthcare services were necessary, sometimes that the indicated services were not necessary or not feasible and/or had been rejected by the patient. (*Id.* ¶¶ 18-19, Pg.ID 5). In any event, whenever the initial clinical assessment determined that some deviation from the services indicated by the initial doctor's order was indicated, the appropriate step was to so inform the doctor and have the doctor decide whether the patient's order should be changed accordingly. (*Id.* ¶ 20, Pg.ID 6).

This case arises because Smith learned that appellees had established a practice of bypassing her and enrolling patients whose orders had been changed without the "patient being seen or evaluated by any of the [appellees'] clinical staff, so that the services and care needed for the patient would be consistent with [appellees'] available clinical staff." (*Id.* ¶¶ 22-23, Pg.ID 6). The changes in the patient's orders were made without the patient being first evaluated by any of the appellees' clinical staff. (*Id.*). Put more simply, Smith discovered a practice in which proper clinical assessment of the patient was disregarded so that the patient could be enrolled and, more

importantly to appellees, the payment stream from Medicare or other payors started.

Smith described in her complaint a number of specific instances in which patient orders were changed prior to the patient being seen or evaluated by any of appellees' clinical staff: "(1) the deletion of skilled nursing care where [appellees] lacked skilled nursing staff sufficient to cover the patient; (2) the deletion of skilled nursing from a patient's order disciplines without any order to discontinue nursing; (3) the deletion of skilled nursing without any note canceling the service; (4) admitting a patient with a disciplines in the intake notes did not match the doctor's orders; and, (5) admitting a patient solely on the email of one of [appellees'] employees; and other examples." (*Id.* ¶ 28, Pg.ID 8).

Beyond changing a patient's orders, "[appellees] also followed a practice of admitting patients without adequately documenting either the patient's need for home healthcare services or the type of home healthcare services that the patient needed." (*Id.* ¶ 29, Pg.ID 8-9). Smith described in her complaint some examples of this practice: (1) creation of an intake note identifying skilled nursing and physical therapy as the ordered disciplines where no nursing notes whatever

were received; (2) assigned skilled nursing, physical therapy and occupational therapy as the disciplines where no note or order so indicated; (3) accepting a patient prior to receiving any doctor's order regarding the patient, which came three days later; (4) accepting a patient with a general order for "home healthcare services" but no indication that orders were clarified; (5) admitting a patient after disciplines were supposedly changed by a social worker without entry of a doctor's order." (*Id.*).

In sum, there were two avenues by which appellees' patient intake procedure was manipulated without regard for the patients' welfare: (1) clinical assessments were bypassed and patient orders changed to assure that the patient's purported needs were consistent with appellees' available staffing; and, (2) patients were accepted and appellees enrolled them for payment without proper documentation regarding the need for healthcare services. The purpose of both, of course, was to enable appellees to turn on the money flow coming from Medicare and other payors.

Smith did not participate in the changing of patient orders prior to the patient being evaluated or in the other manipulations of the patient enrollment process. (*Id.* ¶ 30, Pg.ID 9). She reported to

appellees' management personnel instances of its occurrence on numerous occasions when she became aware of it. (*Id.*). Not only were Smith's reports disregarded and/or ignored, a member of appellees' "management personnel stated on one occasion that the employee principally responsible for these practices was bringing in $6 million annually for defendants." (*Id.* ¶ 39, Pg.ID 11). In essence, appellees' response to Smith's reports was "thank you for that report, but we're going to keep on doing these things because we're making a lot of money off of them."

Appellees, having made it plain that the wrongful practices not only were to be tolerated but were welcomed, established as a term and condition of Smith continued employment that she go along and/or turn a blind eye to the healthcare fraud scheme. Since neither Smith nor any reasonable person could or would be expected to knowingly participate in or aid and abet healthcare fraud that endangered patients as a term and condition of here employment, she was constructively discharged. (*Id.* ¶ 41, Pg.ID 11).

**Smith's Claims and Causes of Action**

Smith pleaded three causes of action in her complaint. However, as to only two of them does she now seek review of the district court's ruling.

First, Smith claimed in Count I of her complaint that the termination of her employment violated the False Claims Act at 31 U.S.C. § 3730(h). (Complaint, RE 1, ¶¶ 45-49, Pg.ID 12-13). More particularly, Smith alleged that her efforts to stop the practice of altering and/or falsifying the patient records were attempts to stop or prevent violations of the False Claims Act. (*Id.* ¶ 47, Pg.ID 13).

Second, Smith claimed in Count III that the termination of her employment constituted a wrongful discharge under Kentucky law, because she refused to continue employment and violate KRS 314.091(1)(d), which makes it unlawful for a nurse to act in a manner inconsistent with the practice of nursing, and/or 314.091(1)(h), which makes it unlawful for a nurse to falsify an essential record in the course of her employment. (*Id.* ¶¶ 52-53, Pg.ID 13-14).

**The District Court's Ruling**

The district court erred in two key rulings toward granting appellees' motion to dismiss.

First, the court below asserted that Smith's constructive discharge theory failed, because "she has not alleged that Defendants perpetrated the alleged fraud – or that any of the concomitant effects of such a fraud – with the specific intention of forcing her to [resign her employment.]" (Opinion & Order, RE 13, Pg.ID 93). This is error, because Smith may prove appellees' intent with facts showing that her resignation "was a foreseeable consequence of the employer's actions." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999).

It would seem unquestionable that Smith pleaded facts sufficient to indicate that her quitting her job was a foreseeable consequence of appellees' actions. The district court itself observed: "Quite reasonably, Smith felt like she had to quit her job." (Opinion & Order at 6, Pg.ID 92).

Second, as to Smith's wrongful discharge claim in Count III of her complaint, the court below ruled that "because Smith does not allege that Defendants requested that she violate the law, Smith cannot maintain a wrongful termination claim under the refusal exception to Kentucky's at-will employment doctrine." (*Id.* at Pg.ID 96). But Smith reported the wrongful actions and endeavored to get

them stopped, appellees replied that the practices were very profitable and would continue putting Smith in a position where, as the district court acknowledged, she could "go along and get along or quit." (*Id.* at Pg.ID 92). Where an employer has established violation of a law as a term and condition of an employee's employment, it has directed or requested wrongdoing sufficiently that an employee may refuse, resign and maintain a cause of action for wrongful discharge.

## SUMMARY OF ARGUMENT

The court below erred in ruling that Smith had not pleaded facts sufficient to sustain a finding that she was constructively discharged, because she did not allege the employer specifically intended to cause her resignation by perpetuating a healthcare fraud scheme that harmed patients. However, the intent requirement for a constructive discharge is met where the employer's actions made it foreseeable that Smith would resign her employment. The district court observed that the employer's actions put Smith in a position where she "go along and get along or quit" and she "[q]uite reasonably" resigned her employment. Accordingly, Smith has pleaded facts sufficient to sustain a finding that she was constructively discharged, because the

employer's actions made it reasonably foreseeable that she would resign.

The court below erred in ruling that the tort of wrongful discharge under Kentucky law requires that an employer specifically direct an employee to violate the law in the course of her employment. A wrongful discharge claim does require proof that the employer intended or expected the employee to violate a law in the course of her employment. Smith pleaded that the employer established her participation in a healthcare fraud scheme that harmed patients as a term and condition of her employment. Since an employer intends an employee to comply with the terms and conditions of her employment and since Smith doing so would cause her to violate the law in the course of her employment, Smith pleaded facts sufficient to sustain her wrongful discharge claim.

## STATEMENT OF THE STANDARD OF REVIEW

A *de novo* standard of review applies to this case. A district court's ruling on a motion to dismiss is reviewed *de novo*. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996), *cert. denied,* 520 U.S. 1251 (1997). All allegations in Smith's complaint are taken as true and all favorable inferences that can be drawn therefrom are

drawn. *Id.* Dismissal pursuant to a Rule 12(b)(6) motion is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

## Argument

### Point 1

#### Smith Has Pleaded Facts that She Was Constructively Discharged from Her Employment with Appellees

Smith may sustain her constructive discharge claim by pleading facts showing that her resignation was a foreseeable consequence of the employers' actions. This she did. The district court described her allegations as establishing that she was put in a position by appellees "to go along and get along or quit" and that "[q]uite reasonably, Smith felt like she had to quit her job." The court below's error was imposing an overly rigid specific intent requirement on Smith that misstates the applicable standard.

The existence of a constructive discharge "depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee." *Smith v. Henderson*, 376 F.3d 529, 533 (6th Cir. 2004), *quoting*, *Held v. Gulf Oil Co.*, 684 F.2d

427, 432 (6th Cir.1982). Smith can show appellees' intent "by demonstrating that quitting was a foreseeable consequence of the employer's actions." *Moore v. KUKA Welding Sys. & Robot Corp.,* 171 F.3d 1073, 1080 (6th Cir. 1999).

This Court has stated that the ultimate question in a constructive discharge case is whether a reasonable person would have continued working in the job given the terms and conditions intentionally established by the employer. *Easter v. Jeep Corp.,* 750 F.2d 520, 522-23 (6th Cir. 1984). Kentucky state law and this Court articulates the test in the same material terms: "the commonly accepted standard for constructive discharge is 'whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign.'" *NE Health Mgmt., Inc. v. Cotton,* 56 S.W.3d 440, 445 (Ky. App. 2001), *quoting Commonwealth, Tourism Cab. v. Stosberg,* 948 S.W.2d 425, 427 (Ky. App. 1997). The allegations in Smith's complaint meet these requirements.

Smith described in her complaint in substantial detail a "two-pronged" scheme by which, as the district court observed, "Defendants allegedly cooked the books to allow Defendants to take

on patients it otherwise could not accommodate to generate income." (Opinion and Order, Pg.ID 89). Smith reported what she had learned to appellees' senior management personnel in an effort to have the scheme stopped. (Complaint ¶¶ 30-39, Pg.ID 9-11). Appellees responded not with corrective action but disregarded Smith's concerns and even boasted of the profitability of the wrongful practices. (*Id.* ¶ 39, Pg.ID 10-11). As a result and as the district court aptly observed, Smith was left in a position of "go along and get along or quit" and "[q]uite reasonably, Smith felt like she had to quit her job." (Opinion and Order, Pg.ID 92). Smith pleaded sufficient and plausible facts supporting a finding that a reasonably foreseeable consequence of the employers' actions including its response to Smith's efforts was her resignation.

The court below made two other errors in its analysis of the constructive discharge issue. First, this Court identified in *Logan v. Denny's Inc.,* 259 F.3d 558, 569 (6th Cir. 2001), a list of seven factors to guide analysis of a constructive discharge claim. The court below discussed the *Logan* factors as an exclusive list and observed that Smith's complaint "critically fail[s] to allege any fact that fits within any of the seven factors identified by the Sixth Circuit." (Opinion and

Order, RE 13, Pg.ID 92). This Court has advised that the *Logan* factors are nonexclusive. *Saroli v. Automation & Modular Components, Inc.,* 405 F.3d 446, 451 (6th Cir. 2005). It has emphasized that the question is whether continuing employment under the attendant circumstances would be intolerable to a reasonable person and recognized that this is a case by case analysis. *Smith v. Henderson, supra*. However, the court below ultimately did not treat the issue as dispositive, relying instead on the intent issue discussed above. (*See* Opinion and Order, Pg.ID 92).

The court below erroneously characterized Smith's theory of constructive discharge as "expansive." (*Id.* at 93). This is incorrect and unfair for at least two reasons, one factual and the other legal. First, the court below asserts that "it is doubtful that Defendants conducted this alleged scheme with an intention to make any employee feel the need to quit." (*Id.*). This may be correct but is immaterial. The only question at this point is whether Smith quitting was a reasonably foreseeable consequence of appellees' choice to disregard her concerns, continue the scheme and establish her participation in and/or aiding and abetting of it as a term and condition of her employment. The question is not whether appellees

wanted Smith to quit; it is whether it was reasonably foreseeable that she would decide to quit rather than "go along and get along" with the scheme's perpetuation. "Quite reasonably," Smith elected to quit and so it is plausible that it was reasonably foreseeable to appellees that she would do so. Smith's constructive discharge arises from far more severe and perilous circumstances than, for instance, being reassigned to work under a younger supervisor, which is one of the factors relevant to a constructive discharge recited by this Court in *Logan*. 259 F.3d at 569.

The court below also criticized Smith for contending that "the atmospheric conditions of her place of work were so toxic that anyone and everyone who knew and were bothered by defendant's alleged actions could quit and sue for compensation because Defendant's scheme implicated everyone." (Opinion and Order, Pg.ID 93). Smith has not alleged that all appellees' employees were infected by the scheme; indeed, the scope of who was and who was not implicated cannot be known at this point and is not relevant in any event. Appellees' scheme corrupted the patient intake and enrollment process, one which Smith participated in as a regular and material part of her duties. Smith took actions on a regular if not daily basis to

enroll patients for appellees. She alone was being called upon to participate in a patient intake process she knew to be corrupted by healthcare fraud and to pose danger to patients. She was responsible for assigning staff once a patient was enrolled. As such, Smith bore unique if not singular perils were she to continue employment and act in a capacity that she knew would support and facilitate continuation and perpetuation of appellees' wrongful scheme.

Smith's concerns about these irregular and improper processes is not whimsy. A home health care agency is required to certify as a predicate to being paid by Medicare and other payors that it is and will provide the home healthcare services that the patient requires and needs. This requirement is not met and the patient is misserved if not endangered where the home healthcare agency manipulates the process in a manner appearing to eliminate some of the patients' needs for care so that the needs appear consistent with the agency's staffing capabilities and the money stream turned on.

Smith's position was this: (a) she was aware that appellees were regularly engaging in conduct and actions manipulating the patient enrollment process to the detriment of patients; (b) she had reported to appellees' management her concerns and acted to have these

actions stopped; and, (c) appellees' management had responded by boasting of how profitable this misconduct had proved, not by taking corrective action or explaining to Smith how her concerns were unfounded. And so, as the district court observed, Smith was placed in a position where she could "go along and get along" if she wanted to continue her employment.

The potential perils for Smith (which the court below did not consider) had she continued working for appellees and facilitating the wrongful practices were grave. "To commit health-care fraud, one must 'knowingly and willfully execute [ ], or attempt [ ] to execute, a scheme or artifice to defraud an healthcare benefit program' or fraudulently obtain 'any of the money or property owned by, or under the custody or control of, any health care benefit program regarding the delivery of or payment for health care benefits, items or services.'" *United States v. Persaud,* 866 F.3d 371, 380 (6th Cir. 2017), *quoting* 18 U.S.C. § 1347. Intent to defraud is required, of course, but a jury may find this from "circumstantial evidence [such as] efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits." *Persaud, supra, quoting United States v. Abgebiyi,* 575 Fed.Appx. 624, 634 (6th Cir. 2014).

Smith with knowledge of appellees' wrongful practices could not reasonably be expected to continue employment in these circumstances. The price of going along and getting along would have been perilously high for Smith and "[q]uite reasonably [she] felt like she had to quit her job." Smith has pleaded sufficient and plausible facts to establish that she was constructively discharged from her employment with appellees. The court below erred in ruling otherwise.

## Point 2

### Smith Has Pleaded Facts Establishing a Claim of Wrongful Discharge

The court below erred in dismissing the wrongful discharge claim pleaded in Count 3 of Smith's complaint because "Smith does not allege that Defendants requested that she violate the law[.]" However, Smith does allege that appellees established her participation and facilitation of the healthcare fraud scheme as a term and condition of her continued employment, putting her in the position, as the court below observed, "to go along and get along or quit." The court below's requirement that an explicit and direct request or order to violate a law be pleaded and proved is not established by any precedential ruling of any court. Furthermore, it

confuses evidence of an employer's intent sustaining the claim with an element of the claim. Finally, it is contrary to this Court's analysis of the issue in *Burton v. Zwicker & Assocs., PSC,* 577 Fed.Appx. 555 (6th Cir. 2014).

Wrongful discharge, a tort under Kentucky law, occurs where an employee's employment is terminated for reasons contrary to public policy as defined and recognized by constitutional or statutory law. *Grzyb v. Evans,* 700 S.W.2d 399, 401 (Ky. 1985). One circumstance in which a wrongful discharge can arise is where the discharge is based on the employee's failure or refusal to violate the law in the course of her employment. *Id.* at 402. Smith pleads that the terms and conditions of her employment – her participation and/or facilitation of the wrongful practices – would cause her to violate KRS 314.091(1)(d), which makes it unlawful for a nurse to act in a manner inconsistent with the practice of nursing, and/or KRS 314.091(1)(h), which makes it unlawful for a nurse to falsify an essential record in the course of her employment. She was constructively discharged from her employment, because she refused to violate these laws in the course of her employment.

The court below asserted that "in order to state a claim under the refusal-to-violate [a law theory of wrongful discharge], an employer must specifically ask a plaintiff to violate the law." (Opinion and Order, Pg.ID 97). As an initial matter, proving a specific request or directive by the employer to violate a law has not been recognized as an element of the tort of wrongful discharge. *See Foster v. Jennie Stuart Med. Ctr.,* 435 S.W.3d 629, 635 (Ky. App. 2013)(reciting elements of wrongful discharge and not including any mention of a specific request to violate the law); *Cope v. Gateway Area Dev. Dist.,* 624 Fed.Appx. 398, 403 (6th Cir. 2015)(same). Nevertheless, although the district court's demand for a specific request to violate a law is error, the court below does touch upon something that the tort does require: proof that the employer expected or intended the employee to violate the law. This Court's analysis in *Burton, supra,* illustrates the point.

In *Burton,* the plaintiff, a collector for a debt collection law firm, was identified as a potential witness in a discrimination lawsuit filed by others and was interviewed several times by his employer's law firm. Apparently, Burton disclosed information in these interviews helpful to the discrimination plaintiffs. However, "Burton's

supervisors never specifically asked him to commit perjury and Burton never made [or was asked by anyone to make] a statement under oath." 577 Fed.Appx. at 557. In any event, Burton's employment was terminated, and he filed suit claiming, among other things, wrongful discharge based on his refusal to commit perjury with respect to the discrimination case filed against his employer. A jury found in his favor and awarded Burton substantial compensatory and punitive damages.

On appeal the employer argued to this Court "that an employer must make an affirmative request that the employee [violate a law.]." This Court rejected the argument: "a request is still affirmative if both the employer and employee understand that the employer is asking the employee to commit a crime even if the employer asks in a roundabout way. It should not be surprising that an employer would not come right out and command an employee to 'commit perjury,' but rather would choose to make the request in a more subtle way." *Id.* at 560.

Here, Smith has pleaded facts that her employer established as a term and condition of her employment that she participate in a healthcare fraud scheme that endangered and harmed patients in the

process. This participation required Smith to violate both KRS 314.091(1)(d) and KRS 314.091(1)(h) in the course of her employment. Smith was, as the district court aptly observed, placed in a position where she could "go along and get along or quit." (Opinion and Order, Pg.ID 92). Where an employer establishes the violation of a law as a term and condition of an employee's job, the employee has protested to no avail, the employer has indicated its intent to continue and, as a practical matter, directed the employee to "go along and get along," the employee's refusal to "go along" and violate the law is both a constructive and a wrongful discharge.

The court below discussed but misread *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412 (Ky. 2010), to suggest that a wrongful discharge claim requires an employer to request specifically an employee to violate a law. This error also appears in a district court ruling, *Alexander v. Eagle Mfg., Inc.,* 2016 WL 5420573 (E.D. Ky. 2016), the court below cites. An examination of *Hill* is required.

In *Hill,* two employees, Robert and Kim Hill, claimed that Kim was pressured by the employer to testify falsely in a legal proceeding regarding a third employee's disability. 327 S.W.3d at 416. After Kim refused, both Hills were terminated and filed claims, among other

things, that the terminations (1) violated KRS 344,280, a statute that prohibits, among other things, retaliation against an employee that testifies in support of another individual's discrimination claim; and, (2) constituted a wrongful discharge because based on Kim's refusal to testify falsely with respect to the third employee's disability. *Id*. A jury awarded substantial compensatory and punitive damages.

The plaintiff in *Hill* prevailed for two reasons (1) on the retaliation claim because she testified in support of another's discrimination claim; and, (2) on the wrongful discharge claim because she refused to testify falsely. A jury could and did find that both reasons – testifying in support of a discrimination claimant *and* refusing to testify falsely as requested – were substantial factors in the employee's termination. The employer's request that Kim Hill testify falsely served not as an element of the wrongful discharge claim, but as proof of the employer's intent sustaining the claim. The jury's finding in her favor acknowledged that testifying falsely was a term and condition of Kim Hill's continued employment for which she was fired ultimately for noncompliance.

A wrongful discharge plaintiff must offer proof that her employer intended for her to violate a law in the course of her

employment. Smith pleaded facts that her employer established as a term and condition of her employment that she participate in a healthcare fraud scheme that endangered patients. Certainly, an employer intends an employee to comply with the terms and conditions of her employment. Accordingly, the court below erred in ruling that Smith had not pleaded facts in her complaint sufficient to sustain her tort claim for wrongful discharge.

## CONCLUSION

The court below erred in ruling that Smith had not pleaded in her complaint facts sufficient to sustain a finding that she was constructively discharged. The court below also erred in ruling that Smith was required to plead and prove that appellees specifically requested her to violate the law in the course of her employment. Smith did plead facts in her complaint sufficient to sustain a finding that appellees intended for Smith to violate the law in the course of her employment. Accordingly, the Court should reverse the court below and remand this case for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 5th day of September 2017, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
COUNSEL FOR APPELLANT

## CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5,237 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

/s/ Robert L. Abell
COUNSEL FOR APPELLANT

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DESIGNATION OF DISTRICT COURT DOCUMENTS
PURSUANT TO 6 CIR. R. 30

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## Counsel's Certification

I hereby certify that the foregoing documents are included in the district court's electronic record.

/s/ Robert L. Abell
Counsel for Appellant