**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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# REPLY BRIEF FOR APPELLANT

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## Introduction

Whether appellant Sue Smith pleaded facts sufficient to support a finding that she was constructively discharged is material to both her claim pursuant to the False Claims Act and her state law claim for wrongful discharge.

Smith addressed the issue of her constructive discharge in Point 1 of her Brief at pp. 13-20. Appellants have responded in Point II of their brief. Smith devotes Point 1 of this reply brief to the constructive discharge issue.

Point 2 of Smith's brief addressed the issue particular to her wrongful discharge claim – whether an element of the tort is that she must plead and prove that appellants explicitly directed her to violate a law in the course of her employment. Appellants responded in Point III of their brief. Smith replies in Point 2 of this brief.

## Argument

### Point 1

**Where Appellees Compelled Smith to "Get Along and Go Along" With Facilitation of Their Fraudulent** Scheme As a Term and Condition of Her Employment **and She "Quite Reasonably" Resigned**, She Adequately Pleaded a Constructive Discharge

The Supreme Court in *Pennsylvania State Police v. Suders,* 542 U.S. 129 (2004), examined the doctrine of constructive discharge and advised that "to establish "constructive discharge," the plaintiff must … show that … her resignation qualified as a fitting response" to the terms and conditions of her employment. *Id.* at 134. This is a high bar; one would think – as in fact they are -- the circumstances rare in which this bar would be cleared.

Smith pleaded facts that clear the bar. The court below acknowledged that Smith 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." (Opinion & Order, RE 13, Page ID #92). Resignation is not only a fitting but also a necessary response where the employer has established involvement with and facilitation of a fraudulent scheme as a term and condition of an employee's job.

It is important to understand how appellees' fraudulent scheme intersected with Smith's job duties. Smith was employed as appellees' Director of Nursing and part of her job duties included management, assignment and allocation of appellees' clinical staff, the individuals who provided, for instance, skilled nursing care and/or physical therapy services to appellees' patients. (Complaint ¶¶ 15-21, RE 1,

Page ID # 4-6). Appellees' fraudulent scheme caused patients to get enrolled, who should not have been enrolled. Smith was then in the position of facilitating this fraudulent scheme, as part of her regular job duties, by assigning and allocating the clinical staff persons to provide whatever services supposedly justified the patients' enrollment. In this context and put in the position of "go along and get along or quit" did Smith make the "quite reasonabl[e]" and necessary decision to resign.

Appellees' principal argument as to Smith's constructive discharge is that she failed to plead facts "that the employer took some negative action against [her] in retaliation for having" reported and attempted to get stopped appellees' wrongful actions." (Appellees' Brief at 11). According to appellees and the court below, Smith cannot establish a constructive discharge, because appellees' response to her report established as a term and condition of her employment her facilitation and/or aiding and abetting of their fraudulent scheme; she must plead and prove additionally that appellees took some further action such as assigning someone else to be her supervisor, presumably one that would assure her compliance

with and facilitation of appellees' wrongful scheme.[1] This cannot be correct.

Whether a constructive discharge has occurred "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." *E.g., Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1107 (6th Cir. 2008); *Smith v. Henderson*, 376 F.3d 529, 533 (6th Cir. 2004).

Smith's constructive discharge claim, of course, is dependent upon the facts particular and specific to her employment situation; those facts –her work duties – are what make appellees' response to her report – her protected activity – so important. Smith's job duties, as appellees' Director of Nursing, intersected with the scheme because she was required to fit the capabilities of appellees' clinical providers to the reported home healthcare needs of the patients. (Complaint ¶¶ 15-21, RE 1, Page ID ## 4-6). That Smith's ordinary job

[1] Reassignment to a different, younger supervisor was one of the nonexclusive examples of actions that could support a constructive discharge recited by this Court in *Logan v. Denny's Inc.*, 259 F.3d 558, 569 (6th Cir. 2001).

duties involved her in facilitating appellees' wrongful practices is the fact that makes appellees' response so damaging to her.

Appellees' response to Smith's reports that the wrongful practices would be continued established her facilitation of them, as part of performing her regular job duties, as a term and condition of her job; she would, as the court below phrased it aptly, "go along and get along or quit." It would seem indisputable that the reasonable response to this situation would be for Smith to resign her employment. If the ultimate question regarding a constructive discharge 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), Smith's pleadings meet this requirement.

Appellees argue erroneously that Smith offers "some sort of ill-defined 'foreseeability' standard" as relevant to the issue of her constructive discharge. (Appellees' Brief at 11). This is an attack on Smith's assertion that she "can show appellees' intent [to cause her to leave her employment] by demonstrating that quitting was a foreseeable consequence of the employer's actions.'" (Appellant's

Brief at 14, *quoting Moore v. KUKA Welding Sys. & Robot Corp.,* 171 F.3d 1073, 1080 (6th Cir. 1999)). It is error on several levels.

First, this Court, as noted above, has observed that the question of constructive discharge requires consideration of, among other things, "the reasonably foreseeable impact of the employer's conduct upon the employee." *Talley, supra; Smith v. Henderson, supra.* The Court in *Moore, supra,* observed that the employer's intent could be determined from the foreseeable impact of its action, a standard that it also applied in *Talley*. So what appellees disparage as "ill-defined," is a standard long utilized when considering whether a constructive discharge has been pleaded and/or proved.

Second, reasonable foreseeability is a standard by which a party's culpability is assessed by fact-finders in a variety of contexts. *E.g., Harrison v. Missouri Pac. R. Co.*, 372 U.S. 248, 249 (1963)(FELA case); *Grisham v. Wal-Mart Stores, Inc.*, 929 F. Supp. 1054, 1057 (E.D. Ky. 1995), *aff'd sub nom. Grisham v. Wal-Mart Properties, Inc.*, 89 F.3d 833 (6th Cir. 1996)(duty to protect a patron). "Reasonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." *Grant v. Nat'l Acme Co.,* 351 F.Supp.

972, 977 (W.D. Mich. 1972). Reasonable foreseeability is not, as appellees erroneously assert, some novel, ill-defined standard but one that has been utilized by juries to resolve factual questions for decades.

*United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699 (7th Cir. 2014), does not support appellees' position or affirmance of the court below, because it is factually distinguishable. The nurse who resigned, Absher, claimed she did so because "she could not bear to continue working at the facility in light of the poor care being provided." 764 F.3d at 716. There are no facts indicating that Absher was obliged, as a regular part of her work duties, to do anything that promoted or facilitated poor care for any of the patients. Smith, on the other hand and by contrast, was in the position of facilitating appellees' wrongful scheme by assigning clinical personnel in the regular course of performing her duties.

The constructive discharge that Smith pleads does not propose an "expansive" theory of the doctrine. Rather, Smith's factual context is unusual – one would expect the number of employees few put in a position like Smith's – but supports the conclusion that appellees' response to her reports made it reasonably foreseeable that she would

find it necessary to resign her employment. The court below's observations that Smith was put in a position "go along and get along or quit" and "quite reasonably" chose to quit acknowledges as much. Accordingly, the court below erred with respect to its ruling on the constructive discharge issue. This would require reversal of the dismissal of Count 1 of Smith's complaint.

## Point 2

### Where Appellees Put Smith In a Position to "Get Along and Go Along or Quit" and She Quit Rather Than Violate a Law In the Course of Her Employment, Smith Has Pleaded Facts Supporting Her Wrongful Discharge Claim

Appellees' response to Smith's complaints about the fraudulent scheme left her in the position of facilitating the scheme, because performing her regular job duties – managing and assigning clinical personnel – caused her to intersect with and promote the scheme. Doing so would have required her to violate in the course of her employment 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. This is the basis for her wrongful discharge claim she pleaded in Count 3 of her complaint.

Appellees' first argument is that appellees did not instruct Smith to violate any law. (Appellees' Brief at 14-15). In support of this position, appellees cite non-precedential rulings by Kentucky's intermediate appellate court and some district courts. (*Id.*). It does not appear that appellee disputes that no precedential opinion has held that proving a specific request or directive by the employer to violate a law is an element of the tort of wrongful discharge. (*See* Appellant's Brief at 22, *citing Foster v. Jennie Stuart Med. Ctr.,* 435 S.W.3d 629, 635 (Ky. App. 2013); *Cope v. Gateway Area Dev. Dist.,* 624 Fed.Appx. 398, 403 (6th Cir. 2015)). Nevertheless, appellees are partially correct on this argument: while Smith need not plead and prove that she was explicitly ordered to violate a law in the course of her employment, she is required to plead and prove that appellees intended or expected her to do so.

Appellees put Smith in a position where performing her regular job duties would cause her not only to facilitate the wrongful scheme but also to violate the two state statutes. Appellees' response to Smith was, in essence, "this is the way we do business, its making us a lot of money and you can get along and go along or quit." Smith refused to "go along" and violate the state statutes in the course of her

employment. Her resignation was her refusal, as there was no reasonable alternative.

Smith adequately pleaded facts supporting her wrongful discharge claim. She follows a path consistent with the tort's elements as identified by the Kentucky courts, and by this Court's decision and analysis in *Burton v. Zwicker & Assocs.*, 577 Fed.Appx. 555 (6th Cir. 2014). Employers rarely give employees explicit instructions to violate laws. Employers do, however, expect employees to perform their job duties. Where performing those job duties causes an employee to violate a law in the course of her employment, and she has complained without remedy to the employer, it is reasonable to infer that the employer intends her to do so. The employee's reasonable response, as was Smith's, in this type situation is to refuse to do so and resign.

## CONCLUSION

For all the foregoing reasons and for those set forth in the Brief for Appellant, this 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 30th day of October 2017, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
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## CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

1. This reply brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,049 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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