



**User Name:** Stephen KOHN

**Date and Time:** Saturday, May 30, 2020 11:09:00 AM EDT

**Job Number:** 117937464

## Document (1)

1. [Johannaber v. Emory Univ., 2009 U.S. Dist. LEXIS 138359](#)

**Client/Matter:** -None-

**Search Terms:** Kohn, Kohn and Colapinto

**Search Type:** Terms and Connectors

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**  
-None-

## Johannaber v. Emory Univ.

United States District Court for the Northern District of Georgia, Atlanta Division

December 14, 2009, Decided; December 14, 2009, Filed

CIVIL ACTION FILE NO. 1:08-CV-2201-TWT

### Reporter

2009 U.S. Dist. LEXIS 138359 \*

BARBARA L. JOHANNABER, et al., Plaintiffs, v.  
EMORY UNIVERSITY, et al., Defendants.

Attorney at Law, Atlanta, GA.

For State of Georgia, Movant: Doris Williams-McNeely,  
LEAD ATTORNEY, Office of the [\*2] Attorney General-  
GA, Atlanta, GA.

## Core Terms

false claim, fraudulent, alleges, billing, schemes, qui  
tam, reliability, formula, motion to dismiss, retaliation,  
heightened

**Judges:** THOMAS W. THRASH, JR., United States  
District Judge.

**Opinion by:** THOMAS W. THRASH, JR.

**Counsel:** [\*1] For Barbara L. Johannaber, Plaintiff:  
Adam J. Conti, LEAD ATTORNEY, Adam J. Conti, LLC,  
Atlanta, GA; Anthony C. Munter, LEAD ATTORNEY,  
PRO HAC VICE, Kohn Kohn & Colapinto,  
Washington, DC; David K. Colapinto, Michael D. Kohn,  
LEAD ATTORNEYS, Kohn Kohn & Colapinto,  
Washington, DC; Dean Zerbe, LEAD ATTORNEY, PRO  
HAC VICE, Zerbe, Fingeret, Frank and Jadav,  
Washington, DC; Jeremy M. Fingeret, LEAD  
ATTORNEY, PRO HAC VICE, Zerbe, Fingeret, Frank  
and Jadav, P.C., Houston, TX.

For United States of America ex rel., Plaintiff: Daniel A.  
Caldwell, III, LEAD ATTORNEY, Daniel A. Caldwell,  
Attorney at Law, Atlanta, GA; Michael F. Hertz, LEAD  
ATTORNEY, U.S. Department of Justice, Washington,  
DC.

For Emory University, Emory University Department of  
Human Genetics, Division of Medical Genetics, Nutrition  
Services of Emory University School of Medicine, Emory  
Children's Center (ECC), Defendants: Stephen J.  
Immelt, LEAD ATTORNEY, PRO HAC VICE, Hogan &  
Hartson, Baltimore, MD; Matthew T. Ballenger, PRO  
HAC VICE, Hogan Lovells, US LLP-DC, Washington,  
DC; Nicolette Susan Templer, Nicolette Templer,

## Opinion

### ORDER

This is a qui tam action alleging fraud in connection with  
Medicaid and WIC claims. It is before the Court on the  
Defendants' Motion to Dismiss [Doc. 42], which is  
DENIED.

### I. Background

Relator Barbara Johannaber was a Formula  
Coordinator, Accounts Receivable Manager, and  
Medical Secretary for the Emory University Department  
of Human Genetics. (First Am. Compl. ¶ 11.) Defendant  
Emory Nutrition Services fills prescriptions for metabolic  
formula to treat genetic disorders in infants and adults.  
(First Am. Compl. ¶ 24.) Johannaber alleges that Emory  
Nutrition Services often did not ship the prescribed  
amount of formula to patients. (First Am. Compl. ¶ 29.)  
She further alleges that Emory Nutrition Services  
charged Medicaid and the Georgia Women Infants and  
Children program the full value of the prescribed formula

on such occasions. (First Am. Compl. ¶ 29.) According to Johannaber, she attempted to file a grievance upon learning of the practice and was harassed and fired as a result. (First Am. Compl. ¶¶ 35-37.) She then filed this qui tam action under the False Claims Act, [31 U.S.C. § 3729 et seq.](#) The [\*3] Defendants now move to dismiss the complaint under [Federal Rules of Civil Procedure 9\(b\)](#) and [12\(b\)\(6\)](#).

## II. Motion to Dismiss Standard in False Claims Act Case

A complaint should be dismissed under [Rule 12\(b\)\(6\)](#) only where it appears that the facts alleged fail to state a "plausible" claim for relief. [Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 \(2009\); Fed. R. Civ. P. 12\(b\)\(6\)](#). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. [See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 \(11th Cir. 1983\)](#); see also [Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 \(7th Cir. 1994\)](#) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination").

Complaints that allege fraud must satisfy [Rule 9\(b\)](#)'s heightened pleading standard. Under [Rule 9\(b\)](#), a complaint must "state[] with particularity ... the circumstances constituting fraud or mistake." [Fed. R. Civ. P. 9\(b\)](#). "To state a claim under the [False Claims Act](#) that complies with [Rule 9\(b\)](#), the complaint must allege . . . the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them." [U.S. ex rel Shurick v. Boeing Co., 330 Fed. Appx. 781, 783 \(11th Cir. 2009\)](#). The complaint must also contain "some indicia of reliability . . . to support the allegation of an actual false claim for payment being made to the Government." [United States ex rel. Clausen v. Laboratory Corp. of Am., Inc., 290 F.3d 1301, 1311 \(11th Cir. 2002\)](#) "[P]leadings generally cannot be based on information and belief." [Id. at 1310](#). However, "[Rule 9\(b\)](#)'s heightened pleading standard may be applied less stringently . . . [\*4] . . . when specific factual information [about the fraud] is peculiarly within the defendant's knowledge or control." [Hill v. Morehouse Med. Assocs., No. 02-14429, 2003 U.S. App. LEXIS 27956, 2003 WL 22019936, at \\*3 \(11th Cir. Aug. 15, 2003\)](#) (unpublished).

## III. Discussion

### A. Fraud Claims

The [False Claims Act](#) creates liability for any person

who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the federal government. [31 U.S.C. § 3729\(a\)\(1\)\(A\)](#). A private person may bring a qui tam action for a violation of [§ 3729](#) on behalf of the government. [31 U.S.C. § 3730\(b\)](#). The Eleventh Circuit has applied [Rule 9\(b\)](#) to qui tam complaints on several occasions. In [United States ex rel. Clausen v. Laboratory Corp. of America, Inc., 290 F.3d 1301 \(11th Cir. 2002\)](#), the relator alleged that the defendant, a medical testing company, "engaged in six schemes that led it to submit false claims, either electronically or manually, to the Government through a fiscal intermediary that processe[d] health insurance claims on its behalf." [Id. at 1303](#). The relator described the schemes in detail but did not "state[] with particularity [any allegation] of a false claim actually being submitted to the Government." [Id. at 1312](#). Accordingly, the court held that the complaint did not satisfy [Rule 9\(b\)](#)'s heightened pleading standard. [Id.](#); see also [United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1358-59 \(11th Cir. 2006\)](#) (holding qui tam insufficient "for want of sufficient indicia of reliability to support the assertion that the defendants submitted false claims"); [\*5] [Corsello v. Lincare, Inc., 428 F.3d 1008, 1013-14 \(11th Cir. 2005\)](#) (holding qui tam complaint insufficient because "[the relator] failed to provide an underlying basis for [his] assertions").

The Eleventh Circuit reached the opposite result in [Hill v. Morehouse Med. Assocs., No. 02-14429, 2003 U.S. App. LEXIS 27956, 2003 WL 22019936 \(11th Cir. Aug. 15, 2003\)](#) (unpublished). There, the relator alleged that the defendant, a healthcare provider, violated the False Claims Act by routinely submitting claims for payment to Medicare for services that were not performed. According to the complaint, the relator worked in the department where she alleged the fraudulent billing schemes occurred and had firsthand knowledge of the defendant's internal billing practices. [2003 U.S. App. LEXIS 27956, \[WL\] at \\*4](#). She described the schemes in detail but did not identify patient names or the exact dates on which the fraudulent billing occurred. [2003 U.S. App. LEXIS 27956, \[WL\] at \\*4 n.8](#). The court held that the complaint was nonetheless sufficient because its factual allegations "provide[d] the indicia of reliability that is necessary in a complaint alleging a fraudulent billing scheme." [2003 U.S. App. LEXIS 27956, \[WL\] at \\*5](#). The court explained:

[Rule 9\(b\)](#)'s heightened pleading standard may be applied less stringently . . . when specific factual information about the fraud is peculiarly within the

defendant's knowledge or control. In that instance, the plaintiff may plead based on information and belief, provided that [\*6] she accompanies her legal theory with factual allegations that make her theoretically viable claim plausible.

[2003 U.S. App. LEXIS 27956, \[WL\] at \\*3](#) (internal quotation marks and citations omitted).

The most important distinction in these cases seems to be whether the complaint alleges a reliable basis for the relator's assertions. See [2003 U.S. App. LEXIS 27956, \[WL\] at \\*4](#) ("Unlike the plaintiff in [Clausen], however, Hill worked in the very department where she alleged the fraudulent billing schemes occurred . . . and has firsthand information about [the defendant's] internal billing practices and the manner in which the fraudulent billing schemes were implemented."). Here, the Defendants contend that the complaint is insufficient under [Clausen](#), [Corsello](#), and [Atkins](#). However, Johannaber, like the relator in [Hill](#), alleges reliable firsthand knowledge about the Defendants' fraudulent billing practices. According to the complaint, Johannaber directly observed the fraudulent billing scheme. She calculated the amount and cost of formula for shipments based on patient diet guides. (First Am. Compl. ¶ 77.) After Dr. Singh and Dr. Fernhoff approved her calculations, she mailed the required forms to the Medicaid billing organization for approval. (First Am. Compl. [\*7] ¶¶ 78-80.) She then entered the amount approved by Medicaid into a spreadsheet and either shipped or did not ship the designated amount based on Dr. Singh's verbal instructions. (First Am. Compl. ¶ 83.) Similarly, Johannaber alleges that she directly observed patients exchange full WIC vouchers for partial formula shipments. (First Am. Compl. ¶ 156.) She does not allege the exact dates on which the fraudulent billing occurred or the full extent of fraudulent charges, but, like the relator in [Hill](#), she identifies the documents that contain such information and offers specific examples and amounts from the months in which she had access to the records. (First Am. Compl. ¶ 77.) Accordingly, the Court finds that the complaint satisfies [Rule 9\(b\)](#) because Johannaber alleges a reliable basis for her assertions and describes the schemes with sufficient particularity to meet the relaxed standard applied by the Eleventh Circuit in [Hill](#).

#### B. Retaliation Claim

The [False Claims Act](#) protects any employee acting "in furtherance of" a [False Claims Act](#) action from retaliation by her employer. To state a claim for retaliation under §

[3730\(h\)](#), the relator must show that a False Claims Act action was a "distinct possibility" [\*8] at the time of the alleged retaliation. See [Childree v. UAP/GA CHEM, Inc., 92 F.3d 1140, 1146 \(11th Cir. 1996\)](#). Here, Johannaber alleges that she "complained about the practice of altering shipments," "attempted to bring a grievance," and "attempted to stop the practice." (First Am. Compl. ¶¶ 34, 36.) She contends that "as a result she was harassed and ultimately fired." (First Am. Compl. ¶ 37.) Unlike Johannaber's fraud claim, her retaliation claim is not subject to [Rule 9\(b\)](#)'s heightened pleading standard. Instead, she need only plead "a short and plain statement of the claim showing that [she] is entitled to relief." [Fed. R. Civ. P. 8](#). Under this standard, Johannaber's allegations are sufficient to state a plausible claim for relief. See [Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 \(2009\); Fed. R. Civ. P. 12\(b\)\(6\)](#). Certainly, it is plausible that acts alleged in the complaint were taken "in furtherance of" her [False Claims Act](#) claim and created "a distinct possibility" that she would file an action under the [False Claims Act](#).

#### IV. Conclusion

For the reasons stated above, the Defendants' Motion to Dismiss [Doc. 42] is DENIED.

SO ORDERED, this 14th day of December, 2009.

/s/ Thomas W. Thrash

THOMAS W. THRASH, JR.

United States District Judge

---

End of Document