U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

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| **KITTY GALLAS,** | **ARB NOS.** | **16-012**<br>**15-076** |
| **COMPLAINANT,** | | |
| | **ALJ NOS.** | **2015-SOX-013**<br>**2015-ACA-005** |
| **v.** | | |
| **THE MEDICAL CENTER OF AURORA,** | **DATE:** | APR 2 8 2017 |
| **RESPONDENT.** | | |

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*
**Kitty Gallas, *pro se,* Evergreen, Colorado**

*For the Respondent:*
**Lisa Hogan, Esq.; *Brownstein Hyatt Farber Schreck*; Denver, Colorado**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Judge Brown, *concurring*.**

## DECISION AND ORDER

Kitty Gallas filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) against her former employer, The Medical Center of Aurora (The Medical Center). Pertinent to this case, Gallas claimed she had reported violations of the Sarbanes-Oxley Act of 2002 (SOX) and Title I of the Patient Protection and Affordable Care Act (ACA) and, in retaliation, The Medical Center had fired her, in violation of the employee protection provisions of these Acts.[1] A Labor Department Administrative Law Judge

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[1] Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Ac of 2002, as amended (SOX), 18 U.S.C.A. § 1514A (Thomson Reuters 2017) and its implementing regulations, 29 C.F.R § 1980 (2016); Title I, Patient Protection and Affordable

(ALJ) dismissed these claims.[2] Gallas's appealled the ALJ's dismissals to the Administrative Review Board (ARB or Board), and we consolidated these cases for purposes decision. On review, the Board affirms the ALJ's order in ALJ Case No. 2015-SOX-013 dismissing the SOX claim on summary decision (ARB No. 16-012). The Board vacates the ALJ's order in ALJ Case No. 2015-ACA-005 dismissing the ACA claim (ARB 15-076), and remands the ACA claim for further consideration consistent with this opinion.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions for the Labor Department in cases brought under the SOX and the ACA.[3] The ARB reviews de novo an ALJ's orders on motions to dismiss and for summary decision.[4] In considering the ALJ's dismissal for failure to state a claim, the ARB must accept Gallas's factual allegations as true and draw all reasonable inferences in her favor.[5] Likewise, for purposes of reviewing the ALJ's ruling on motion summary decision, we view the allegations and evidentiary submissions in the light most favorable to Gallas, the non-moving party.[6]

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Care Act (ACA), 29 U.S.C.A. § 218c (Thomson Reuters 2017) and its implementing regulations, 29 C.F.R. § 1984 (2016).

2 *Gallas v. The Med. Ctr. of Aurora*, ALJ No. 2015-ACA-005 (July 15, 2015) (D. & O. ACA); *Gallas v. The Med. Ctr. of Aurora*, ALJ No. 2015-SOX-013 (Oct. 19, 2015)(D. & O. SOX).

3 *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1980.110; 29 C.F.R. § 1984.110.

4 *Johnson v. The Wellpoint Cos., Inc.,* ARB No. 11-035, ALJ No. 2010-SOX-028 (ARB Feb. 25, 2013).

5 *Tyndall v. U.S. EPA*, ARB No. 96-195, ALJ Nos. 1993-CAA-006, 1995-CAA-005; slip op. at 2 (ARB June 14, 1996).

6 *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 11 (ARB Dec. 28, 2012).

## BACKGROUND

### A. Facts[7]

In April 2000, The Medical Center employed Gallas, a registered nurse, as a psychiatric evaluator.. Gallas's job duties included traveling to company hospitals to perform psychiatric assessments of emergency room patients. In March 2013, The Medical Center implemented a "TeleMental Health" program that involved conducting emergency psychiatric assessments through telecommunications technology so that the assessments could be performed remotely rather than in person. As early as August 2013, Gallas complained that the program violated medical standards. In October 2013, The Medical Center directed Gallas to conduct psychiatric evaluations via a video conference system under the program.

Gallas refused to perform these remote evaluations because she was concerned about the legality of and standard of care associated with her employer's TeleMental Health program. Gallas continued to complain until her July 24, 2014 discharge. Gallas complained internally to her supervisor, other managers, and company officers, and to outside federal and state agencies. The gravamen of Gallas's complaints was that the Telemental Health was a substandard service, that the service violated the Emergency Medical Treatment and Labor Act (EMTALA), the Health Insurance Portability and Accountability Act (HIPAA), state laws, and ethics rules, and could jeopardize her license as a registered nurse.

Gallas also complained that the TeleMental Health Program violated the SOX. Gallas asserted that the Centers for Medicare and Medicaid Services (CMS), a federal agency that administers these programs, among others, limits reimbursement for telehealth services to those rendered in rural areas and thus any billing by The Medical Center for these services would be fraudulent and illegal. She alleged that as an investor in The Medical Center, The Medical Center was committing illegal acts and defrauding her and other investors. Gallas alleged violations of Securities and Exchange Commission regulations and shareholder fraud.

Gallas further complained that emergency room physicians had, on specific occasions violated HIPAA and EMTALA by requiring insurance pre-authorization before admitting a patient to the hospital and by initially refusing to treat a patient who was pregnant and involved in a domestic abuse situation.

In November 2013, concurrent with Gallas's complaints regarding the TeleMental Health program, her supervisor, Jennifer Mehan, informed Gallas that certain physicians had complained about Gallas's performance. During Gallas's performance appraisal on November 15, 2014, Mehan raised several issues with Gallas's performance, including not knowing how to conduct three-way conference calls, using outdated forms or not completing forms, failing to respond to e-mails, conducting evaluations that were too long, not properly admitting patients, and not following the dress code. Gallas wrote a response to which Mehan replied. Mehan

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[7] For the factual background, we rely on Gallas's allegations and exhibits in the record, along with reasonable inferences granted in her favor, as set out in the ALJ's decisions. We do not suggest that any of these facts have been decided on the merits.

informed Gallas that she would implement a weekly formal supervision of Gallas. Thereafter, Meehan took away Gallas's patient intake duties until she completed retraining and directed Gallas to complete an EMTALA "competency." Meehan told Gallas that Scott Williams, the vice president of "Behavioral Health," would address her EMTALA concerns and that she could not respond to Gallas's concerns about the legality of the TeleMental Health program. Later in November, Meehan conducted weekly meetings with Gallas.

Gallas expressed her concern that Respondent was mishandling her EMTALA violation allegations. Gallas also alleged that The Medical Center retaliated against her by creating a hostile work environment because of her complaints. Following an investigation initiated in response to her complaints, Paul Burgeson of Human Resources informed Gallas on January 9, 2014, that there was insufficient evidence to support her allegations, that no corrective action was on file, and that Meehan and Williams had stated that no action was taken against Gallas.

On June 22, 2014, Gallas had a performance review with Brent Longtin, her interim supervisor. Gallas had written in her self-evaluation that she would not perform TeleMental Health evaluations as, she asserted, they did not conform to accepted standards of practice. Longtin warned Gallas that such a refusal would result in performance management action up to and including employment termination.

On July 17, 2014, Gallas volunteered to start her shift early. However, the next evaluation to be performed was a TeleMental Health evaluation of a patient located at another hospital; Gallas refused to perform the evaluation. As a result, The Medical Center suspended Gallas and put her on administrative leave, but ultimately paid her as she was not yet on duty at the time of her refusal.

On July 22, 2014, Longtin and Burgeson met with Gallas to discuss her performance evaluation. Lontin informed Gallas that if she refused to perform TeleMental Health evaluations, her employment would be terminated.

On July 23, 2014, Gallas refused to perform a TeleMental Health evaluation. Gallas stated that she would perform a face-to-face evaluation, but none were needed. Because there was no other clinician available to perform the TeleMental Health evaluation, Gallas was allowed to perform it face-to-face. Respondent discharged Gallas effective the next day, July 24, 2014, for failure to follow management's instructions concerning the performance of her job duties.

**B. The Medical Center's Actions**

In a February 2014 staff meeting, some of Gallas's complaints were discussed, including the need for informed consent for TeleMental Health evaluations. The Medical Center informed staff that the Colorado Department of Human Services, Office of Behavioral Health, had conducted a site review and concluded that the facility was in full compliance with applicable rules and regulations.

In April 2014, The Medical Center reported to staff that the Colorado Department of Regulatory Services had stated that the only state standard relating to telemental health is that the initial contact be in person; that there was no state standard that would prevent the practice of telemental health. The Medical Center also reported that company hospitals do not bill Medicare, Medicaid, or any health insurance provider for telemental health or face-to-face evaluations. The Medical Center also implemented a requirement for informed consent for its TeleMental Health program, and directed staff to complete training on telemental health and other services.

Also in April 2014, The Medical Center discussed with staff individual changes to the TeleMental Health program; Gallas signed an acknowledgement of these changes as well as a new job description and other employment-related documents.

In July 2014, The Medical Center concluded, after an investigation, that Gallas's complaints to its ethics hotline that had started in January were unsubstantiated. In an addendum report in August 2014, The Medical Center also found to be unsubstantiated Gallas's assertions to the ethics hotline that her employment termination and negative evaluation were in retaliation for her complaints.

**C. Proceedings Below**

Gallas filed a complaint with OSHA on January, 14, 2015. Gallas claimed retaliation, suspension, termination, limitation of duties, threatening to fire, negative performance appraisal, violations of privacy, and humiliation, due to her HIPAA and EMTALA complaints in objecting to performing emergency psychiatric evaluations via telemental health. Gallas claimed that these evaluations violated Title 1 of the ACA's medical screening evaluation requirement and the SOX as they amount to a fraudulent and deceitful practice or representation causing intimidation and putting the patient under duress.

Following an investigation, OSHA determined that Gallas had not engaged in protected activity under the SOX or ACA. OSHA dismissed both claims. Gallas objected to OSHA's findings and requested a formal evidentiary hearing.

Prior to the scheduled hearing before the ALJ, The Medical Center filed a Motion to Dismiss Gallas's complaints under both SOX and the ACA. The ALJ held a telephonic conference call on May 18, 2015, and, in light of Gallas's pro se status, allowed her to file an amended complaint. The ALJ treated Gallas's "Response to Respondent's Motion to Dismiss" as her amended complaint. The Medical Center filed a "Renewed Motion to Dismiss" on June 3, 2015.

Considering the amended complaint, the ALJ decided the SOX and ACA claims in separate decisions both issued on July 15, 2015. In the SOX case (2015-SOX-013), the ALJ denied The Medical Center's Motion to Dismiss in light of the low threshold for surviving a

motion to dismiss in Department of Labor (DOL) whistleblower actions.[8] The ALJ cited *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 9 (ARB July 31, 2012), in which the ARB explained why "fair notice" is the proper legal standard for any administrative whistleblower complaint filed with the DOL.

Despite citing the same controlling law in connection with Gallas's ACA complaint, the ALJ nevertheless granted The Medical Center's Motion to Dismiss for failure to state a claim based on the finding that Gallas failed to allege any activity protected by the ACA. Order Granting Respondent's Motion to Dismiss (July 15, 2015).

On October 19, 2015, the ALJ also granted The Medical Center's Motion for Summary Decision in the SOX case, finding that Gallas did not provide evidence sufficient to generate a genuine issue of material fact regarding whether Gallas reasonably believed that The Medical Center had violated the provisions of the SOX. The ALJ thus concluded that The Medical Center sustained its motion for summary decision by showing that there is no genuine issue of material fact as to whether Gallas engaged in protected activity. The ALJ dismissed Gallas's SOX claim with prejudice. Order Granting Respondent's Motion for Summary Decision (Oct. 19, 2015).

Gallas appealed the dismissal of both her ACA claim and her SOX claim.

## DISCUSSION

### A. In the SOX case, the ALJ properly granted summary decision in favor of The Medical Center (ARB No. 16-012).

Summary decision is appropriate if the affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[9] The first step of this analysis is to determine whether there is any genuine issue of a material fact. If the pleadings and documents submitted by the parties demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense. As we have explained:

> Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the

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[8] Because whistleblower complaints involve inherently factual issues such as reasonable belief and motive, such "claims are rarely suited for Rule 12 dismissals." *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 13 (ARB May 25, 2011).

[9] 29 C.F.R. § 18.41 (2014).

> arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.
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> In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor . . . . If the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact. In reviewing an ALJ's summary decision, we do not weigh the evidence or determine the truth of the matters asserted.[10]

SOX section 806 protects employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that he: (1) "engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . him; and (3) the protected activity was a contributing factor in the adverse personnel action."[11] If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the [protected] behavior."[12]

The ALJ determined, based on Gallas's amended complaint, the pleadings, and the documentary evidence, that there were no genuine issues of material fact with respect to Gallas's

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10 *Williams*, ARB No. 12-024, slip op. at 6 (quoting *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op at 4-5 (ARB July 28, 2011) (citations omitted); *see also Williams v. National R.R. Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op at 2 (ARB Dec. 19, 2013).

11 *Sylvester*, ARB No. 07-123, slip op. at 9.

12 29 C.F.R. § 1980.104(c); *Poli v. Jacobs Eng'g Grp., Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012).

purported protected activity. On review, we find no reason to disturb the ALJ's conclusion. The ALJ properly granted summary decision based in part on his finding that Gallas's complaints about The Medical Center's TeleMental Health Program, including substandard care and violations of EMTALA, HIPAA, Colorado law, and ethical rules, did not implicate any of the six enumerated categories of protected activity under the SOX. This finding is consistent with the evidence. The ALJ further rationally rejected Gallas's argument, in opposing summary judgment, that The Medical Center's use of Telemental Health violates other statutes and thus violates the SOX because it had the effect of defrauding shareholders. The ALJ correctly explained that an assertion that violations of other statutes could adversely affect the employer's financial condition is insufficient to trigger protection under the SOX.[13] The ALJ further determined that Gallas's assertions that The Medical Center improperly billed for the TeleMental Health Program and filed a false form 10K with the Securities and Exchange Commission, were not objectively reasonable beliefs because they were contradicted by evidence The Medical Center provided to her and thus were speculative and lacked factual foundations.[14] The ALJ concluded that Gallas had offered insufficient evidence to generate a genuine issue of material fact that her complaints were protected under the SOX whistleblower provisions.

Based on the foregoing, we affirm the ALJ's order granting The Medical Center's motion for summary decision on the SOX claim. We next turn to Gallas's appeal of the ALJ's grant of The Medical Center's motion to dismiss for failure to establish a claim upon which relief can be granted on Gallas's ACA claim.

### B. In the ACA claim, the ALJ erred in granting The Medical Center's motion to dismiss for failure to establish a claim upon which relief can be granted (ARB No. 15-076).

Federal Rule of Civil Procedure 12(b)(6) and 29 C.F.R. Part 18, allow a party to move for dismissal of a case for failure to state a claim upon which relief can be granted. However, because "federal litigation materially differs from administrative whistleblower litigation within the Department of Labor . . . a different legal standard for stating a claim" is afforded in cases pending before the agency.[15] To survive a motion to dismiss in this administrative proceeding, Gallas's ACA complaint is reviewed to determine whether it provides "fair notice of [her] claim."[16] In *Evans*, the Board explained that "fair notice" for purposes of surviving a motion to dismiss requires a showing that the complaint contains: "(1) some facts about the protected

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13 *See, e.g., Allen v. Stewart Enters., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060,-061,-062; slip op. at 10 (ARB July 27, 2006)("the mere possibility that an act or omission could adversely affect [the respondent's] financial condition and thus affect shareholders is not enough to bring the Complainants' concerns under the SOX's protection.").

14 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

15 *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB July 31, 2012) (citing *Sylvester*, ARB No. 07-123, slip op. at 12-13).

16 *Evans*, ARB No. 08-059, slip op. at 9.

activity and alleging that the facts relate to the laws and regulations of one of the statues in the [DOL's] jurisdiction; (2) some facts about the adverse action; (3) an assertion of causation, and (4) a description of the relief that is sought."[17]

The whistleblower protection provisions of the ACA provide:

> (a) No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has—
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> (1) received a credit under Section 36B of title 26 or a subsidy under section 18071 of title 42;
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> (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee *reasonably believes* to be a violation of, any provision of this title (or an amendment of this title);
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> (3) testified or is about to testify in a proceeding concerning such violation;
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> (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
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> (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) *reasonably believed* to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard or ban under this title (or amendment).[18]

The ALJ granted The Medical Center's Motion to Dismiss for failure to state a claim based on her determination that Gallas did not allege any activity that the ACA protects.[19] Contrary to the ALJ's conclusion, Gallas's complaint clearly satisfies the low threshold for stating a claim that she engaged in ACA-protected activity.

Although the ALJ properly recognized that Gallas need only allege a "reasonable belief" that a violation occurred under 29 U.S.C.A. § 218c(a)(2) and (5), the ALJ failed to appreciate the significance of this statutory language. As we have repeatedly explained in connection with the

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17 *Id.*

18 29 U.S.C.A. § 218c(a)(italics added).

19 Order Granting Respondent's Motion to Dismiss (July 15, 2015).

very similar wording contained in the SOX whistleblower provisions, "[b]ecause a determination regarding the reasonableness of [a complainant's] alleged protected activities requires an examination of facts," it is rarely appropriate for ALJs to dismiss complaints at the pleading stage on that basis.[20]

Further, as we stated in *Evans*, ARB No. 08-059, slip op. at 9, Gallas need only allege "some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction." This is not a demanding standard. A disclosure is protected by the ACA if it "relate[s] to a general subject that was not clearly outside the realm covered by the [statute]."[21] The ALJ correctly applied the liberal pleading standard when she declined to dismiss Gallas's SOX complaint at the pleading stage. However, she misapplied the same standard in dismissing Gallas's ACA claims.

In particular, the ALJ erred by applying pleading standards that are not applicable to these administrative whistleblower complaints. As we explained in *Evans,* "[a]dministrative complaints filed with DOL are informal documents that initiate an investigation into allegations of unlawful retaliation."[22] The ALJ specifically stated, "Gallas has failed to identify any specific provisions of the ACA which she reasonably believed the Respondent violated."[23] The ALJ mistakenly indicated that a complainant must cite to a specific section of the ACA to support her claim and that before there can be a valid whistleblower complaint under ACA, there must first be an ACA violation. Established precedent holds otherwise. In *Sylvester*, ARB No. 07-123, slip op. at 16, we explained that a SOX whistleblower complainant need not identify a specific provision of law, nor even an actual violation at the pleading stage. The rationale for the liberal pleadings standards reflected in *Sylvester* turned largely on the informal nature of administrative filing requirements for complaints filed under the whistleblower provisions, including those of the SOX, which the Department of Labor administers.[24].

Thus, to state a whistleblower claim under the ACA, Gallas need only allege activity or disclosures "related" to ACA's subject matter. In her OSHA complaint, Gallas plainly states that

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[20] *Sylvester*, ARB No. 07-123, slip op. at 13, 16. *See also Weist v. Lynch,* 710 F.3d 121, 133 (3d Cir. 2013)("whether an employee has an objectively reasonable belief may not always be decided as a matter of law").

[21] *Klopfenstein v. v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 17 (ARB May 31, 2006); *see also Williams*, ARB No. 12-024 (a complainant must have a "reasonable good faith belief that his conduct was in furtherance of the purposes of the act under which he seeks protection[]").

[22] *Evans*, ARB No. 08-059, slip op. at 7.

[23] D. & O. ACA at 5.

[24] In *Evans*, the Board applied the *Sylvester* pleading standard to other DOL-administered whistleblower statutes and further articulated features of the standard. *Evans,* ARB No. 08-059, slip op. at 6-9.

she "informed" her employer that she "refuse[d] to perform emergency psychiatric evaluations via Telemental health, substandard level of care" and that "TELEMENTAL HEALTH violates EMTALA." In her Amended Complaint, Gallas further alleged that "she voiced her objections, concerns and refusal based on her reasonably [sic] belief this process violated several Federal statues, HIPPA [sic], EMTALA, and [put] her professional license at risk." Gallas also alleged that she complained that the Respondent was improperly "requiring a Pre-Authorization for Insurance before Admittance."

The ALJ erred when she dismissed Gallas's claims relating to EMTALA, HIPAA, and improper pre-authorization, for not invoking the ACA's employee protection provisions. While the ALJ correctly noted that ACA Title I does not explicitly incorporate either EMTALA or HIPPA, the subject matter of each of these statutes is not merely referenced in the ACA but explicitly addressed as we set forth below. Indeed, HIPAA access to coverage reforms provided both the ACA's legislative precedent, as well as its federal/state enforcement framework.[25] And the ACA either extended or rendered moot many of HIPPA's portability rules, which require outright elimination of preexisting condition exclusions.[26] In addition to the more publicized reforms that the ALJ noted, the ACA includes many other general reforms, including the use of best clinical practices and quality care reporting,[27] patient protections related to emergency care,[28] and ten specified coverage categories known as "essential health benefits" that include emergency services and mental health and substance use disorder services and behavioral health treatment.[29] Gallas alleged protected activity related to all of these reforms.

For example, Title I Section 2719A of the ACA entitled "Patient Protections" addresses coverage of emergency services and pre-authorization. That section provides in relevant part:

> SEC. 2719A. PATIENT PROTECTIONS.
>
> ...
>
> (b) COVERAGE OF EMERGENCY SERVICES.—

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[25] Alexander B. Blum, Sara Rosenbaum, Amanda Giordano, M. Jane Park and Claire D. Brindis, *Implementing Health Reform in an Era of Semi-Cooperative Federalism: Lessons from the Age 26 Expansion,* 10 J. HEALTH & BIOMED. L. 327, 340-41 (2015).

[26] Sara Rosenbaum, *Can This Marriage Be Saved? Federalism and the Future of U.S. Health Policy Under the Affordable Care Act*, 15 MINN. J.L. SCI. & TECH. 167, 174 (2014).

[27] 42 U.S.C. § 2717, ENSURING THE QUALITY OF CARE.

[28] 42 U.S.C. § 2719A, PATIENT PROTECTIONS.

[29] 42 U.S.C. § 1302, ESSENTIAL HEALTH BENEFITS REQUIREMENTS. Because mental health is considered a requisite "essential benefit" of health plans and Medicaid under the ACA, its passage broadly expanded access to mental health services. *See* Barbara L. Atwell, *Rethinking The Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 24 (2015).

(1) IN GENERAL.—If a group health plan, or a health insurance issuer offering group or individual health insurance issuer, provides or covers any benefits with respect to services in an emergency department of a hospital, the plan or issuer shall cover emergency services (as defined in paragraph (2)(B))—

(A) without the need for any prior authorization determination;

(B) whether the health care provider furnishing such services is a participating provider with respect to such services;

(C) in a manner so that, if such services are provided to a participant, beneficiary, or enrollee—

(i) by a nonparticipating health care provider with or without prior authorization; or

(ii)(I) such services will be provided without imposing any requirement under the plan for prior authorization of services or any limitation on coverage where the provider of services does not have a contractual relationship with the plan for the providing of services that is more restrictive than the requirements or limitations that apply to emergency department services received from providers who do have such a contractual relationship with the plan; and

. . .

(2) DEFINITIONS.—In this subsection:

(A) EMERGENCY MEDICAL CONDITION.—The term 'emergency medical condition' means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in a condition described in clause (i), (ii), or (iii) of section 1867(e)(1)(A) of the Social Security Act.

(B) EMERGENCY SERVICES.—The term 'emergency services' means, with respect to an emergency medical condition—

(i) a medical screening examination (as required under section 1867 of the Social Security Act) that is within the capability of the emergency department of a hospital, including ancillary services routinely available to the emergency department to evaluate such emergency medical condition, and

(ii) within the capabilities of the staff and facilities available at the hospital, such further medical examination and treatment as are required under section 1867 of such Act to stabilize the patient.

Additionally, 42 U.S.C. § 1302, titled "Essential Health Benefits Requirements" requires that qualified health plans provide, among other things, "coverage for emergency department services . . . without imposing any requirement under the plan for prior authorization of services or any limitation on [emergency department services] coverage" more restrictive than that coverage received from providers on contract with the plan.[30]

Gallas's alleged protected activity relating to EMTALA, HIPAA, and pre-authorization (by insurer of services) are sufficiently related to matters contained in ACA to invoke protection under the ACA's whistleblower provisions and to satisfy the threshold requirements to survive a motion to dismiss under the *Evans* standard. Accordingly, we reject the ALJ's contrary conclusion, and remand Gallas's ACA clam for further consideration.

## CONCLUSION

For the foregoing reasons, the ALJ's Order Granting Summary Decision in ALJ No. 2015-SOX-013 is **AFFIRMED** in ARB No. 16-012 and the ALJ's Order Granting Respondent's Motion to Dismiss in ALJ No. 2015-ACA-005 is **VACATED** in ARB No. 15-076, and Gallas's ACA claim is **REMANDED** to the ALJ for further consideration.

**SO ORDERED.**

[redacted]

**JOANNE ROYCE**
**Administrative Appeals Judge**

[redacted]

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**E. Cooper Brown, Administrative Appeals Judge, *concurring*.**

I concur in the majority's decision in ARB No. 16-012 affirming the ALJ's Order Granting Summary Decision in ALJ Case No. 2015-SOX-013, and in the majority's decision in ARB No. 15-076 vacating the ALJ's Order Granting Respondent's Motion to Dismiss in ALJ Case No. 2015-ACA-005 and remanding that case for further consideration. I write separately because I disagree with the majority's interpretation of the "fair notice" legal standard for resolving a motion seeking dismissal of a whistleblower complaint for failure to state a claim upon which relief can be granted.

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30 42 U.S.C. § 1302(b)(4)(E)(i).

As noted in *Evans v. E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-003 (ARB July 31, 2012), the "fair notice" pleading standard applied by the ALJ, and embraced by the majority in this case on appeal, is a derivation of the federal pleading standard that existed under F.R.C.P. 8(a) prior to the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Evans*, ARB No. 08-059, slip op. at 9. That standard, as articulated by the majority in *Evans*, focuses solely on the allegations contained in the whistleblower complainant's complaint (or amended complaint). *Evans* referred to a motion to dismiss for failure to state a claim as "a facial challenge to a complaint focuse[d] *solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised." A "facial challenge," the majority in *Evans* explained, "points to a missing essential element . . . or a legal bar to the claim . . . [and] tests the sufficiency of the complaint." Consistent with federal court practice under F.R.C.P. 12(b)(6), the majority in *Evans* further explained, it is the complaint that "must be reviewed to determine whether it provides fair notice" of the complainant's claim. *Id.* at 11. The focus is on the allegations of the complaint or, if allowed by the ALJ, the allegations of an amended complaint. *Id.* at 12-13.

Consistent with *Evans*, the ALJ in the present case focused exclusively on the allegations contained in Gallas's OSHA complaint and the amended complaint that she subsequently filed with the ALJ. See D. & O. ACA at 2-3, 5-6. Before the ARB on appeal, the majority likewise focuses on the allegations of Gallas's complaint and amended complaint, and whether the allegations contained therein provide "fair notice" of her claim.

I do not necessarily disagree with the requirement of "fair notice" of a complainant's claim when it is challenged, as in the present case, by a motion to dismiss. In response to such a motion, I agree that the complainant should be required to set forth the basic elements of his or her claim, *i.e.*, that (1) he or she engaged in activity or conduct protected by the whistleblower protection statute; (2) the respondent took unfavorable personnel action against the complainant; and (3) an assertion that the protected activity was in some way a contributing factor in the adverse personnel action. However, I am of the opinion that in ruling upon a motion to dismiss for failure to state a claim, the federal court pleading requirements that both the ALJ in this case and the majority on appeal effectively embrace are inapplicable to ACA whistleblower claims, for the reasons I've previously articulated in my separate opinions in *Sylvester v. Parexel Int'l*, ARB No 07-123, ALJ No. 2007-SOX-039, slip op. at 28-33 (ARB May 25, 2011), and *Evans v. E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 19-24 (ARB July 31, 2012).[31]

When presented with a motion to dismiss for failure to state a claim, I would not limit the "fair notice" standard to only a review of the allegations of a complainant's complaint (or amended complaint). As I discussed in *Evans*, ARB No. 08-059, slip op. at 24, in response to a motion to dismiss a whistleblower action for failure to state a claim for relief, the complainant should be afforded the opportunity to supplement the record before the ALJ with such relevant

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[31] Indeed, as I stated in *Evans*, I am of the opinion that federal pleading standards do not apply to any of the whistleblower protection statutes implemented by OSHA over which the ARB has agency appellate jurisdiction. *Evans,* ARB No. 08-059, slip op. at 23, n.79.

pleadings, legal memorandum, and evidence (documentary or otherwise) as the complainant considers necessary in order to defend against the motion to dismiss.

Nevertheless, applying what I consider the appropriate legal standard for motions to dismiss to the present case, the result reached by the majority with respect to Ms. Gallas's ACA claim would be the same, thus warranting remand.

[redacted]

**E. COOPER BROWN**
**Administrative Appeals Judge**