



In the Matter of:

PEGGY OBERG,

COMPLAINANT,

v.

QUINAULT INDIAN NATION,

RESPONDENT.

ARB CASE NO. 2019-0036

ALJ CASE NO. 2017-ACA-00003

DATE: February 22, 2021

Appearances:

For the Complainant:

Kevin L. Johnson, Esq.; *Kevin L. Johnson, P.S.*; Olympia, Washington

For the Respondent:

Daniel S. Hasson, Esq. and Cassie L. Bow, Esq.; *Davis Rothwell Earle & Xóchihua PC*; Portland, Oregon

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,
Administrative Appeals Judges

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provision of the Patient Protection and Affordable Care Act (ACA).¹ Complainant Peggy Oberg filed a complaint against Respondent Quinault Indian Nation (QIN), alleging that QIN terminated her employment because she engaged in conduct protected by the ACA. On February 14, 2019, a Department of Labor Administrative Law Judge (ALJ)

¹ 29 U.S.C. § 218c (2010), as implemented by 29 C.F.R. Part 1984 (2021).

issued a Decision and Order (D. & O.) granting QIN's motion for summary decision, denying Oberg's cross-motion for summary decision, and dismissing Oberg's complaint. For the reasons set forth below, we affirm.

BACKGROUND²

QIN is a federally-recognized Indian Tribe.³ QIN operates the Roger Saux Health Clinic (the Clinic), where it employed Oberg as a nurse practitioner.⁴ QIN terminated Oberg's employment on October 24, 2016. QIN alleges that it received complaints about Oberg from patients and a paramedic.⁵ QIN asserts that it terminated Oberg's employment due to her poor performance, unacceptable behavior, and conduct infractions. QIN further asserts that it terminated Oberg's employment because the Clinic's patients were refusing to see her.⁶

Oberg counters that QIN terminated her employment because she raised a number of concerns about patient care, Clinic management, and various other misconduct issues. Oberg alleges that she spoke out against the Clinic's overuse and over-prescription of antibiotics and opioids, and the deaths, addiction, and other harm caused by prescribing these drugs when not medically appropriate.⁷ Oberg also alleges that she complained about a number of other issues at the Clinic, which include:

- ◆ Refilling medications without proper patient follow-up;
- ◆ Including deceased, non-existent, and inactive patients in the Clinic's patient database;
- ◆ Falling short of quality of care standards pursuant to which the Clinic received incentive payments;

² These facts are taken from the D. & O.'s statement of facts and the parties' briefs below and on appeal. In reciting this background, we make no findings of fact.

³ D. & O. at 3.

⁴ *Id.*

⁵ *Id.* at 3-4.

⁶ *Id.* at 4; *see also* Exhibit A to Respondent's Motion for Summary Decision at 156.

⁷ D. & O. at 5; *see also* Complainant's Declaration in Support of Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision (Comp. Decl.) at ¶¶ 1(a)–(b), 3, 13, 15-16.

- ◆ Not following requirements necessary for accreditation and federal designation as a clinic;
- ◆ Denying patient referrals when required;
- ◆ Mismanaging funds;
- ◆ Inadequately stocking medicines at the pharmacy;
- ◆ The lack of a team approach to pain management;
- ◆ Dismissing Oberg's ideas for addressing chronic health conditions;
- ◆ Insufficient training for the chemical dependence unit; and
- ◆ Leaving Oberg on-call despite her ADA-protected sleep disorder.⁸

Oberg contends that her complaints regarding each of these issues constitute protected activity under the ACA.

On April 9, 2017, Oberg filed a complaint with the Occupational Safety and Health Administration (OSHA). OSHA determined that Oberg's conduct was not protected by the ACA and dismissed her complaint. Oberg objected to OSHA's determination and requested a hearing before an ALJ.

Before the hearing, QIN moved for summary decision, arguing that Oberg's conduct was not protected by the ACA. Oberg filed an opposition and cross-motion for summary decision in response, arguing that her conduct was protected activity under the statute. She further argued that the undisputed facts demonstrated that judgment should be entered in her favor. On February 14, 2019, the ALJ granted QIN's motion for summary decision, denied Oberg's cross-motion, and dismissed Oberg's complaint. Oberg now appeals the ALJ's decision to the Administrative Review Board (the ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the ACA.⁹ The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.¹⁰ Summary decision

⁸ D. & O. at 5; *see also* Comp. Decl. at ¶ 1.

⁹ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

¹⁰ *Neff v. Keybank Nat'l Assoc.*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip op. at 3 (ARB Feb. 5, 2020).

should be entered where “there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”¹¹ The ARB views the record on the whole in the light most favorable to the non-moving party.¹²

APPLICABLE LAW

The ACA’s employee protection provision prohibits an employer from discharging or otherwise discriminating against an employee because the employee has engaged in conduct protected by the statute.¹³ To prevail on her ACA claim, Oberg must demonstrate that: (1) she engaged in activity that the ACA protects; (2) QIN took adverse action against her; and (3) the protected activity was a contributing factor in the adverse action.¹⁴

An employee is protected by the ACA if she provides information or complains to her employer about, or refuses to participate in, conduct that she reasonably believes violates any provision of Title I of the ACA.¹⁵ As we have explained in analogous contexts,¹⁶ to be protected, the employee must show that she actually believed, in good faith, that the conduct about which she complained constituted a violation of the pertinent law, and that her belief was objectively reasonable.¹⁷ The employee’s belief is objectively reasonable if a reasonable person in the same factual circumstances and with the same training and experience would

¹¹ 29 C.F.R. § 18.72(a).

¹² *Neff*, ARB No. 2019-0035, slip op. at 3 (citing *Micallef v. Harrah’s Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018)).

¹³ 29 U.S.C. § 218c(a).

¹⁴ *See* 29 C.F.R. § 1984.109(a).

¹⁵ 29 U.S.C. § 218c(a)(2), (5); 29 C.F.R. § 1984.102(b)(2), (5).

¹⁶ Although the Board has not had many opportunities to consider cases brought under the ACA’s employee protection provision, we can draw from principles and precedent from analogous statutes, including the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. *See* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. 70,607, 70,611-15 (Oct. 13, 2016) (Final Rule) (referring to standards and precedent under “analogous” provisions in the Sarbanes-Oxley Act).

¹⁷ *Wong v. Sumitomo Mitsui Banking Corp.*, ARB No. 2018-0073, ALJ No. 2016-SOX-00005, slip op. at 4 (ARB Oct. 26, 2020); *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. at 70,611-12.

have also believed that the conduct about which she complained constituted a violation of the pertinent law.¹⁸

ALJ DECISION

The ALJ issued a written decision dismissing the Complaint. The ALJ concluded that Oberg did not engage in protected activity, or have a reasonable belief that her asserted concerns, related to the health insurance reforms set forth in Title I of the Act.

1. The ALJ Concluded That Oberg Did Not Engage in Protected Activity Under Title I of the ACA.

The ALJ concluded that “as a matter of law [Oberg] did not engage in protected activity because she did not raise concerns about or refuse to participate in an activity related to the health insurance reforms found in Title I of the ACA.”¹⁹ The ALJ explained that Title I provides that certain health insurance reforms are attained, in part, through ensuring that health insurance issuers and group health plans embrace standards relating to quality of care.²⁰ However, the ALJ determined “this does not mean that concerns about quality of care in general are related to the type of quality of care provisions in Title I of the ACA.”²¹ The ALJ found “there is no dispute that [Oberg]’s alleged concerns did not concern the requirements imposed on health insurers and group health plans by Title I of the ACA.”²² The ALJ found that Oberg’s predominant concerns were about what she perceived to be quality of care issues practiced by the Clinic as a health care provider, rather than about practices by health insurers and group health plans. Therefore, the ALJ concluded

¹⁸ *Wong*, ARB No. 2018-0073, slip op. at 4; *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. at 70,612.

¹⁹ D. & O. at 18.

²⁰ *Id.* at 16.

²¹ *Id.*

²² *Id.*

Oberg did not engage in any protected activity related to the health insurance reforms found in Title I of the ACA.²³

2. Alternatively, the ALJ Concluded Oberg Did Not Have a Reasonable Belief That Her Concerns Were Related to the Health Insurance Reforms Found in Title I of the ACA.

Alternatively, the ALJ concluded Oberg did not have a reasonable belief that the conduct she complained about, and the activity she refused to participate in, related to the health insurance reforms found in Title I of the ACA.²⁴ Significantly, the ALJ found Oberg conceded that she never complained about health insurance violations, and that her concerns did not have anything to do with health insurers or group plans. Instead, as the ALJ previously noted, Oberg's concerns related to the general quality of care provided by the Clinic, as well as various requirements imposed on the Clinic as a health provider, not as a health care insurer or group plan.²⁵ Therefore, the ALJ concluded that Oberg also did not engage in protected activity because she did not have a reasonable belief that her assertions were related to the health insurance reforms found in Title I of the ACA.²⁶

DISCUSSION

Upon review of the ALJ's order, the record, and the parties' arguments, we conclude that the ALJ reached a well-reasoned decision based on undisputed facts and the applicable law. Viewing the record in the light most favorable to Oberg, we agree with the ALJ that Oberg did not engage in protected activity because she did not raise concerns about, or refuse to participate in, an activity related to the health insurance reform provisions in Title I of the ACA. As the ALJ correctly explained, Title I includes a number of health insurance and healthcare coverage reforms. Among other things, Title I prohibits lifetime and annual dollar limits on essential health benefits, prohibits pre-existing condition exclusions, provides for the creation of health benefit exchanges, imposes insurance coverage requirements for

²³ *Id.* at 16, 18.

²⁴ *Id.* at 17-18.

²⁵ *Id.* at 17.

²⁶ *Id.* at 18.

individuals, provides tax-credits for insurance premiums, and sets requirements for employers to provide health benefits to employees in certain circumstances.²⁷

Whereas Title I reforms how health insurance, health plans, and the health insurance market are operated, regulated, and incentivized, Oberg's complaints concerned patient care and management issues for a health care provider.²⁸ Oberg has not identified any provision of Title I that regulates a health care provider, such as the Clinic. Nor has Oberg explained how the Clinic's alleged over-prescription of drugs, departure from quality or accreditation standards, and other issues involving the operation of the Clinic and services provided to patients violated any of the health insurance reforms found in Title I of the ACA.²⁹

Oberg attempts to link her concerns about the Clinic's management and treatment of patients to certain provisions of Title I that refer to "quality of care." Oberg cited Section 2717 of the ACA, titled "Ensuring Quality of Care," which requires the U.S. Department of Health and Human Services (HHS) to develop requirements for group health plans and health insurance issuers to report on plan or coverage benefits and reimbursement structures that promote quality healthcare.³⁰ Oberg also cited Section 1311 of the ACA, titled "Affordable Choices of Health Benefit Plans," which requires HHS to establish criteria for the certification

²⁷ Title I of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. at 70,608.

²⁸ Complainant's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision (Comp. Opp.) at 16 ("[T]he 13 reported examples that Claimant whistle blew and brought to Respondent's attention DID concern quality of patient care as well as general mismanagement of the clinic . . .").

²⁹ In the D. & O., the ALJ discussed the Board's decision in *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-ACA-00005, 2015-SOX-00013 (ARB Apr. 28, 2017). D. & O. at 13-14, 16-17. In *Gallas*, the Board held that a complainant bringing a claim under the ACA's employee protection provision need only show some relatedness between her alleged protected activity and the general subject matter of Title I of the ACA to meet the low threshold required to defeat a motion to dismiss. *Gallas*, ARB Nos. 2015-0076, 2016-0012, slip op. at 10. As the ALJ in the present case correctly recognized, *Gallas* was decided in the context of a motion to dismiss, not a motion for summary decision. Different reviewing standards apply at different procedural stages of the process. *Evans v. Envtl. Prot. Agency*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 10-11 (ARB July 31, 2012).

³⁰ 42 U.S.C. § 300gg-17(a).

of “qualified health plans.”³¹ One requirement for certification is for the health plan to “implement a quality improvement strategy” that “[r]eward[s] quality through market-based incentives.”³²

Although both sections cited by Oberg refer to “quality” healthcare, neither section requires that health care providers or health professionals maintain a certain quality standard. As summarized by the U.S. Centers for Medicare and Medicaid Services, the ACA’s health insurance reforms appearing in Title I “don’t include the Medicare or Medicaid reforms, and **don’t relate to quality of patient care.**”³³ Instead, as explained by the ALJ, the provisions Oberg cited are directed towards ensuring that health insurers and plans embrace and promote quality care through reimbursement and pay incentives and plan structures.³⁴ We agree with the ALJ that the employee protection provision of Title I of the ACA, as presented here, applies to allegations concerning the Act’s reforms related to health care insurers and group plans, and not to quality of care or mismanagement by health care providers.

In the present case, Oberg predominantly raised concerns about her refusal to overprescribe opioids and antibiotics and mismanagement by the Clinic. She also raised various other issues about the Clinic, all of which generally fall within the category about the quality of services that the Clinic had been providing. Oberg asserts that by raising these concerns, she engaged in protected activity under the employee protection provision of Title I of the ACA.

Oberg also contends that she raised concerns about Title I of the ACA when she complained about the Clinic’s alleged fraudulent receipt of federal funds.³⁵

³¹ 42 U.S.C. § 18031(c)(1).

³² 42 U.S.C. § 18031(c)(1)(E), (g)(1).

³³ *Protection from Employer Retaliation*, HEALTHCARE.GOV, <https://www.healthcare.gov/health-care-law-protections/protection-from-retaliation/> (last visited Feb. 4, 2021) (emphasis added).

³⁴ *See* D. & O. at 16.

³⁵ Oberg also suggests that “[m]ost of [her] whistleblowing was covered in Title II [of the ACA] under fraud and retaliation . . .” Complainant’s Brief in Support of Petition for Review (Comp. Br.) at 19. Oberg does not develop this argument, identify what provision of Title II she believes QIN violated, or explain how Title II is relevant to her raised concerns that she believes would be protected under the ACA’s employee protection provision.

Oberg asserts she became concerned that QIN fraudulently received payments from the federal government based on inflated patient counts after she discovered that a Clinic database listed thousands of deceased, non-existent, and inactive patients.³⁶ However, Oberg did not cite any provision of Title I which she believed QIN violated by engaging in the alleged scheme or explain why that conduct was related to any of Title I's health insurance and market reforms. Oberg's general averments that her concerns about fraud implicated Title I are not sufficient to avoid summary decision.³⁷

Finally, Oberg argues that QIN is "subject to" Title I of the ACA because it received federal funds to administer its own health programs, provided health benefits to its tribe members, and effectively served as an "HMO type" insurer.³⁸ Even if QIN were subject to certain provisions of the ACA, Oberg has not explained how the concerns she expressed about the Clinic related to QIN acting in its capacity as a health care insurer for its members or to QIN fulfilling any obligations it may have under the ACA.³⁹ The undisputed evidence shows that Oberg expressed concerns about the services provided to patients and the management and operation

³⁶ *Id.* at 8-9, 19. Oberg proffers that QIN received capitated payments from the Indian Health Service, Medicare, and Medicaid. *Id.* at 4-5, 7-8.

³⁷ *See Ronnie v. Office Depot, Inc.*, ARB No. 2019-0020, 2018-SOX-00006, slip op. at 5 (ARB Sept. 29, 2020) ("Complainant failed to set forth any regulation, rule, or Federal law that an objectively reasonable person would think Respondent violated, and it is not the responsibility of the fact-finder to identify one."); *see also Denny v. MBDA, Inc.*, ARB No. 2018-0027, 2016-SOX-00032, slip op. at 11-12 (ARB Jan. 8, 2021).

³⁸ Comp. Br. at 4-5, 7-8. In support of this proposition, Oberg offered new documents on appeal which she did not supply to the ALJ. The Board will not consider any evidence that was not in the record before the ALJ. *Neff*, ARB No. 2019-0035, slip op. at 3 n.2. Additionally, other than an unsupported statement in her opposition to QIN's motion for summary decision that QIN is "self-insured" and manages a "Community Health Plan" that "pays for tribal members that receive services off tribal lands and have no insurance," (Comp. Opp. at 7-8), Oberg did not argue below that QIN's purported status as an insurer or health plan rendered Oberg's conduct protected under the ACA. Ordinarily, the Board does not consider an argument presented for the first time on appeal. *Phillips v. Norfolk S. Ry. Co.*, ARB No. 2015-0059, ALJ No. 2014-FRS-00133, slip op. at 3 n.5 (ARB Aug. 11, 2015). However, we have considered Oberg's argument for the sake of completeness.

³⁹ It is not necessary for this appeal to determine whether QIN was actually subject to any provision of the ACA as an insurer or health plan. Even if QIN was subject to one or more provisions of the ACA, we conclude that Oberg's conduct was not protected.

of the Clinic. The ACA does not protect Oberg merely because QIN may be subject to Title I in some fashion unrelated to the conduct about which she complained.

We recognize that Oberg adamantly believed that the Clinic was not providing the level of care required by the health profession, management had mismanaged various services provided by the Clinic, and the Clinic had engaged in other misconduct. However, her concerns about the quality of care and management concerns at the Clinic, which is a health care provider, are not related to the healthcare insurance reforms contained in Title I that apply to health care insurers and group plans.

Therefore, we affirm the ALJ's first conclusion that Oberg did not engage in protected activity because it is undisputed that she did not raise concerns about, or refuse to participate in, an activity relating to a health insurer or group plan that are within the scope of Title I of the ACA.⁴⁰

We also affirm the ALJ's alternative conclusion that Oberg did not engage in protected activity because it was not objectively reasonable for her to believe that the allegedly deficient level or quality of care provided by the Clinic violated these sections of Title I of the Act. Oberg failed to present any evidence that she had an objectively reasonable belief that this conduct violated any provision of Title I of the ACA. Oberg conceded that she never complained about health insurance violations, and that her concerns did not have anything to do with health insurers or group plans.⁴¹ Therefore, we agree with the ALJ's conclusion.

For the above stated reasons, the Board affirms the ALJ's entry of summary decision in QIN's favor.⁴² For the same reason, we also affirm the ALJ's decision to deny Oberg's cross-motion.

CONCLUSION

⁴⁰ D. & O. at 18.

⁴¹ *Id.*

⁴² On appeal, Oberg presented a number of other arguments concerning whether the justifications given by QIN for terminating her employment were legitimate, whether the concerns she raised were meritorious, and whether her claims were properly exhausted, among others. These arguments were not presented below, are irrelevant to the issues on appeal, or are moot based on our holding in this appeal, and are therefore rejected.

For the foregoing reasons, the ALJ's D. & O. is **AFFIRMED**, and the complaint is **DISMISSED**.

SO ORDERED.