

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN GLOVER, : 05 Civ. 6522 (SHS)
 :
 Plaintiff, :
 :
 -against- : ORDER
 :
 FEDERATION OF PROTESTANT WELFARE :
 AGENCIES, INC., :
 :
 Defendant. :
-----X

SIDNEY H. STEIN, U.S. District Judge.

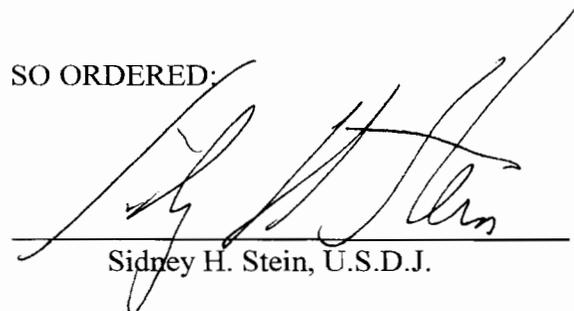
A pretrial conference having been held today, with counsel for all parties present,

IT IS HEREBY ORDERED that for the reasons set forth on the record:

1. Defendant's motion for summary judgment in its favor is granted in part and otherwise denied;
2. Plaintiff's cross motion for partial summary judgment [34] is denied;
3. Plaintiff's motion for Rule 11 sanctions [51] is denied; and
4. Defendant's cross motion for attorney's fees pursuant to 31 U.S.C. § 3730(d)(4) and New York Labor Law § 740(6) [57] is denied, and defendant's request for attorney's fees in conjunction with plaintiff's Rule 11 motion is denied.

Dated: New York, New York
December 5, 2008

SO ORDERED:



Sidney H. Stein, U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:
UNITED STATES OF AMERICA EX REL,	:
et al.,	:
	: 05-CV-6522
Plaintiff,	:
v.	: 500 Pearl Street
	: New York, New York
FEDERATION OF PROTESTANT WELFARE	:
AGENCIES, INC.,	:
	: December 5, 2008
Defendant.	:
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TRANSCRIPT OF CIVIL CAUSE FOR
MOTION FOR SUMMARY JUDGMENT DECISION
BEFORE THE HONORABLE SIDNEY H. STEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	DAVID RICH, ESQ. Lax & Neville LLP 1412 Broadway Suite 1407 New York, New York 10016
For the Defendant:	JOHN MARTIN O'CONNOR, ESQ. Anderson Kill & Olick, P.C. 1251 Avenue of the Americas New York, New York 10020
Court Transcriber:	SALLY REIDY TypeWrite Word Processing Service 211 N. Milton Road Saratoga Springs, NY 12866

1 THE CLERK: Glover v. Federation, 05-CV-6522.

2 Counsel, please state your names for the Court.

3 MR. RICH: I'm David Rich of Lax & Neville for the
4 plaintiff John Glover. Good morning, Your Honor.

5 THE COURT: Good morning, sir.

6 MR. O'CONNOR: John O'Connor, Anderson Kill & Olick,
7 representing the defendant Federal of Protestant Welfare
8 Agencies.

9 THE COURT: All right. Good morning, sir.

10 MR. O'CONNOR: Good morning, Your Honor.

11 THE COURT: Please be seated. I asked you both to
12 come in because I'm going to read into the record a decision
13 essentially denying the cross -- the motion, a cross motion for
14 summary judgment. This case will go to trial. There's one
15 area in regard to Campbell that I'm granting summary judgment
16 for Federation. The evidence actually, I think, is quite thin
17 in the terms of Mr. Glover's claims, but there's enough here in
18 terms of an issue of fact that it will get to a jury or, in any
19 event, it gets past summary judgment. This is being recorded
20 so there will be a record of the decision. My decision is as
21 follows.

22 The Federation of Protestant Welfare Agencies is an
23 umbrella organization that provides support to charitable
24 entities in New York City. John Glover, the plaintiff, worked
25 at Federation until December 2004, and this action alleges that

1 the Federation violated the False Claims Act, 31 USC 3729, and
2 that the Federation's decision to terminate his employment
3 constituted unlawful retaliation in violation of 31 USC 3730(h)
4 and New York Labor Law 740.

5 There are several motions pending. Each side has
6 moved for summary judgment. Federation has moved for summary
7 judgment on all of Glover's claims, and Glover's cross motion
8 is for summary judgment on all of his claims except the state
9 law retaliation claim. There also have been motions for
10 attorneys fees and sanctions. Specifically Federation has
11 moved for attorneys fees pursuant to 31 USC 3730(d)(4) and New
12 York Labor Law 746. Glover in turn has moved for sanctions
13 pursuant to Rule 11, claiming that the motion for attorneys
14 fees by Federation is frivolous and, not to be outdone,
15 Federation then has moved to recover the attorneys fees it
16 incurred in opposing Glover's Rule 11 sanctions. I'm a bit
17 surprised there wasn't yet another sanction motion. I'm
18 denying all the sanction motions.

19 The background is as follows. Glover's allegations
20 revolve around two grants of federal funding that the
21 Federation at one time had received. One grant came from a
22 private nonprofit organization called The Medical and Health
23 Research Association of New York City, which I'll call MHRA.
24 MHRA had a contract with the New York City Department of Health
25 and Mental Hygiene to distribute federal funding that New York

1 City had received pursuant to the Ryan White Care Act
2 amendments of 2000. See plaintiff's Local Rule 56.1 statement,
3 paragraphs 10-11, and defendant's counter statement of same
4 paragraphs. In an agreement signed in 2001 and extended
5 contractually until 2006, the MHRA funded the Federation's
6 efforts to assist local organizations working in communities
7 with a high prevalence of HIV and AIDS. See the sources cited
8 at pages 3-4 of defendant's memorandum of law in support of
9 summary judgment. The other grant was awarded by the Public
10 Health Services Office of Minority Health, or OMH, which is
11 part of the U.S. Department of Health and Human Services. The
12 OMH grant lasted from 2003 to 2006 and, like the MHRA grant,
13 funded the Federation's HIV/AIDS-related initiatives. The task
14 that the Federation performed pursuant to the OHM grant
15 overlapped to some extent with tasks that the Federation
16 performed pursuant to the MHRA grant. See defendant's
17 memorandum of law, pages 4-5 for the sources for that
18 statement.

19 Glover worked on both of the grant-funded projects
20 while he was employed at Federation. He was dismissed in
21 December of 2004 and brought this action in July of 2005.
22 Pursuant to 31 USC 3730(b), the United States Attorney for this
23 District informed Glover by letter dated November 29, 2006,
24 that the United States was not going to intervene. Here the
25 complaint was unsealed and served, and the False Claims Act

1 section of this action now proceeds as a private qui tam
2 action. Glover is the relator for the United States. See 31
3 USC 3730(b) through (d).

4 Let me begin by addressing the motions for summary
5 judgment. First I'll talk about the False Claims Act
6 allegations and then move on to the allegations of retaliation.
7 I won't go through the standard for summary judgment. You
8 gentlemen know it quite well. Summary judgment is appropriate
9 if the evidence shows there's no genuine issue as to any
10 material fact and that the movant is entitled to judgment as a
11 matter of law. I must resolve all ambiguities and draw all
12 permissible factual inferences in favor of the party against
13 whom summary judgment is sought. And each party's motion is
14 examined on its own merits, and in each case all reasonable
15 inferences are drawn against the party whose motion is under
16 consideration.

17 All right. Let's go to the False Claims Act
18 allegations. Obviously Glover says the Federation committed
19 False Claims Act violation and Federation denies it. I'm going
20 to state what the allegations are and supporting evidence, and
21 then analyze those allegations. Then I'll go through
22 Federation's defenses.

23 1. Glover's allegations and supporting evidence.
24 Glover makes three principal False Claims Act allegations.
25 First, that the Federation submitted monthly expenditure

1 reports that misrepresented the number of hours that Federation
2 employees worked on the two grant-funded projects. Federation
3 only received money from the grants when it submitted monthly
4 reports to the grant-making agencies that catalogued the money
5 it spent on the grant-funded projects. Glover's allegation is
6 that some of those monthly expense reports were inaccurate. In
7 particular he maintains that the expense reports showed hours
8 that Federation employees never actually worked on either of
9 the projects. He also alleges that the expense reports
10 misallocated hours, incorrectly reporting to the MHRA hours
11 that Federation employees worked on the OHM-funded project and
12 incorrectly reporting to the OHM hours that Federation
13 employees worked on the MHRA-funded project. In support he
14 submits his own testimony and that of other Federation
15 employees stating that the amounts shown in the Federation
16 expense reports do not match the actual hours worked. See
17 deposition of Angela Chachere at 20-21, Exhibit 11 to the Lax
18 declaration dated June 5, 2008. One former Federation
19 employee, Gregory Campbell, states he never worked more than 15
20 to 20% of his time on OHM-funded projects even though the
21 Federation's expense reports listed him as working 60% of his
22 time on that project. Campbell declaration, paragraphs 8 and
23 12. Glover has adduced timesheets that were kept by
24 Federation's employees, Exhibit 28 to the Lax declaration.
25 Glover says that those timesheets show that Federation's

1 expense reports misstated the hours that Federation employees
2 worked on the two grant-funded projects.

3 The timesheets of Federation employees also form the
4 basis of Glover's second allegation. He claims that he and
5 three co-workers, after learning that Federation would be
6 audited by MHRA and OHM, changed their timesheets to match the
7 expense reports that had already been submitted. He asserts he
8 and his co-workers were directed to alter their timesheets by
9 Vonda Lee Cunningham, Federation's Director of Member Services.
10 In addition to his own testimony, that is his deposition at
11 177-79, Exhibit 10 to the Lax declaration, Glover has presented
12 the testimony of two co-workers. See Chachere deposition at
13 42-44 and the Deborah Reed [Ph.] deposition at 45-52, Exhibit
14 17 to the Lax declaration. Glover has also submitted two sets
15 of timesheets that he says show that alterations were made,
16 Exhibits 26 to 28 of Lax declaration. Apart from his own
17 statements Glover does not appear to have adduced corroborating
18 evidence for his claim that he and his co-workers were ordered
19 to alter their timesheets by Lee Cunningham.

20 His third allegation is that Federation employee
21 Gregory Campbell was assigned to work on the OHM-funded project
22 even though he was not qualified for that job. As you'll see,
23 that's the area in which I am granting Federation summary
24 judgment. In declaration Campbell has stated that he is a
25 "policy official," that he has had "no training or work

1 experience as a social worker or community organizer," and
2 therefore that he was "not qualified" to work on the OHM-funded
3 project. Campbell declaration paragraph 4. According to
4 Glover, Campbell was assigned duties he was not capable of
5 performing because the Federation had a budget shortfall and
6 needed part of Campbell's salary to be covered by the OHM
7 grant.

8 2. Fitting Glover's allegations into the elements of
9 a False Claims Act cause of action. Glover does not explain
10 how his allegations meet the elements of a False Claims Act
11 action. By my reckoning, however, Glover's allegations give
12 rise to one theory of relief pursuant to 31 USC 3729(a)(1) and
13 one theory of relief pursuant to 3729(a)(2). Glover's first
14 allegation is that the Federation submitted expense reports
15 that overstated or misallocated the number of the hours that
16 Federation employees worked on the two grant-funded projects.
17 Although he is unclear about it, it appears to be a theory for
18 Glover under 3729(a)(1), which provides civil liability for
19 "any person who knowingly presents or causes to be presented to
20 an officer or employee of the United States government a false
21 or fraudulent claim for payment or approval." To establish
22 liability pursuant to 3729(a)(1) a plaintiff must show that the
23 defendant "made a claim to the United States government that is
24 false or fraudulent knowing of its falsity and seeking payment
25 from the federal treasury." United States ex rel Mikes v.

1 Straus, 274 F.3d 687, 695 (2dCir. 2001). Here Glover's
2 allegations appear to be that because the Federation only
3 received grant money when it submitted expense reports, the
4 Federation's expense reports amounted to claims for payment
5 pursuant to 3729(a)(1). The claims were false, Glover
6 maintains, because they overstated or misallocated the hours
7 worked by Federation employees, and the Federation knew those
8 claims were false for two reasons. First, e-mails and
9 memoranda informed Federation executives that the expense
10 reports did not match the actual hours worked by Federation
11 employees. See plaintiff's 56.1 statement, paragraphs 23, 25,
12 50-55, 61, 62, and 65-71. Second, the timesheets of Federation
13 employees, Exhibit 28 to the Lax declaration, which were
14 approved by Federation executives, clearly showed that the
15 Federation's expense reports overstated and misallocated hours
16 according to Glover. Finally, he argues that the expense
17 reports sought claims for payment from the federal treasury
18 because the reports were requests for distributions of money
19 awarded in a grant of federal funding.

20 Glover's second principal allegation is that
21 Federation employees, including Glover, altered their
22 timesheets in preparation for audits by the MHRA and the OHM.
23 That appears to be a theory of relief pursuant to 3729(a)(2),
24 which provides civil liability for "any person who knowingly
25 makes uses or causes to be made or used a false record or

1 statement to get a false or fraudulent claim paid or approved
2 by the government." That is, Glover's allegation seem to be
3 that the altered timesheets were records pursuant to
4 3729(a)(2). Those records were false, he maintains, because
5 they were altered after the fact in order to misrepresent the
6 number of hours that Federation employees actually worked on
7 each grant-funded project. Finally, he contends that the time
8 records were made "to get a false claim paid by the government"
9 because the records were changed in order to match up with the
10 allegedly false expense reports submitted by the Federation.
11 In other words, he alleges that the timesheets were altered to
12 provide post hoc justification for the requests for payment
13 that the Federation had already made to the MHRA and the OHM.
14 Alternatively, his allegations regarding the altered timesheets
15 provide evidence for his theory of relief pursuant to
16 3729(a)(1). The fact that Federation employees were told to
17 alter their timesheets in anticipation of an audit suggests
18 that the Federation knew that there was a problem with the
19 expense reports. Thus the alleged altering of timesheets gives
20 rise to a theory of relief pursuant to (a)(2) and also provides
21 evidence for Glover's theory of relief pursuant to (a)(1).

22 His third principal allegation is that Gregory
23 Campbell was unqualified to work on the OHM project. This
24 doesn't seem to be a theory of relief under the False Claims
25 Act, and Glover cites no case showing that the claim violates

1 the False Claims Act and nor does he show how such a claim
2 might be false within the meaning of the Act. Therefore, I
3 conclude that he's making out two principal theories of how the
4 Federation violated the False Claims Act. First, the
5 Federation violated (a)(1) by submitting false expense reports
6 that overstated or misallocated the hours that employees worked
7 on the projects and, second, Federation violated (a)(2) by
8 creating false time records in aid of the false claims for
9 payment made with the expense reports.

10 3. Federation's defenses. I have now told you what
11 I believe his claims are. The claims are quite clear. How
12 they fit into the False Claims Act is a little less so, but
13 I've done my best with what I had. Now we'll talk about
14 Federation's defenses.

15 A. The proper interpretation of the contracts.
16 Federation contends that Glover's claims are meritless because
17 they rest on a misreading of the contracts. Neither contract,
18 Federation claims, required the Federation to report monthly
19 costs for employees based on the hours recorded on the
20 timesheets. Federation says the grant payments were based on a
21 budget explicitly set forth in the contract. The budget called
22 for each employee to work a certain percentage of his or her
23 time on the project. For example, the budget for the MHRA
24 grant called for Glover to work 80% of his time on that project
25 initially. See plaintiff's 56.1 statement at paragraph 21.

1 Therefore, on each month's expenditure report Federation
2 requested reimbursement for 80% of Glover's monthly salary
3 regardless of the number of hours Glover reported on his
4 timesheet for that month. Federation appears to be claiming in
5 terms of the False Claims Act that even if the expense reports
6 failed to reflect the number of hours that Federation employees
7 reported on their timesheets, the reports were nevertheless not
8 false because the grant contracts allowed the Federation to
9 submit the maximum budgeted amount for each employee without
10 adjusting that amount based on the hours reported on the
11 timesheet. The expense reports did not amount to false claims,
12 Federation argues, and instead were claims made pursuant to a
13 contract.

14 There are two problems with this theory. First,
15 Federation is misconstruing Glover's theory of relief because
16 the allegations pursuant to (a)(1) are about actual hours
17 worked, not about timesheets. Glover's allegation is not that
18 the expenditure reports failed to match up with the hours
19 recorded on the Federation employee's timesheets. The
20 allegation appears to be that the expenditure reports
21 overstated and misallocated the employee's actual hours worked.
22 The timesheets are relevant to the (a)(1) allegations but only
23 because they're evidence of the actual hours worked by
24 Federation employees. Similarly, Glover does not contend that
25 the grant contracts called for Federation to submit monthly

1 expenditure reports based on what was recorded on timesheets.
2 Instead, in Glover's view, the grant contracts called for the
3 Federation to submit monthly expenditure reports based on the
4 hours that Federation employees actually worked on the two
5 grant-funded projects.

6 Second, while the Federation's interpretation of the
7 grant contracts is plausible, it's not compelled by the
8 evidence, and Glover's interpretation of the contracts is
9 plausible as well. It's not for me on summary judgment to come
10 down one way or the other. Federation maintains that the
11 contracts called for it to submit monthly expenditure reports
12 based on the hours budgeted for each employee regardless of the
13 number of hours actually worked, and Federation has several
14 pieces of evidence in support of that position. Testimony from
15 a former fiscal analyst at the MHRA suggests that the MHRA
16 agreed with the Federation's interpretation of the contracts.
17 Declaration of Donald Smith, paragraph 5. Federation indeed
18 appears to have submitted expense reports in accordance with
19 its interpretation of the contract by claiming the maximum
20 budgeted amount for each employee each month. Lewis
21 declaration, 9 and 10. Though that approach was apparent to
22 MHRA and OHM, neither organization complained about the
23 Federation's expense reports, even after Glover's allegations
24 here became public. Lewis declaration, paragraphs 9 and 10.

25 So that supports Federation's approach. There's also

1 evidence in the plain language of the contract that supports
2 Glover's interpretation. Both contracts allocated maximum
3 amounts of money to be spent on different aspects of the funded
4 projects -- personnel, travel, equipment, supplies, and so
5 forth -- and the contracts explicitly refer to those
6 allocations as a budget. Schedule B of Exhibit 3 to the Lax
7 declaration, Exhibit 9 to the Lax declaration. The contracts
8 provided, furthermore, that the Federation would receive grant
9 money only when the Federation submitted expense reports in
10 accordance with those budgets. Exhibit 3 to the Lax
11 declaration, MHRA contract, Section 3.2(d).

12 The payment structure of the contracts, therefore,
13 suggest that Federation was meant to report only those expenses
14 actually incurred. For example, the budget for the OHM project
15 called for the Federation to spend a maximum of \$6,000 for
16 supplies. Lax declaration, Exhibit 9. If Federation purchased
17 \$2,000 of supplies, it was meant to submit expense reports that
18 requested reimbursement for 2,000, not the 6,000 budgeted.
19 Similarly if the budget called for a Federation employee such
20 as Campbell to work 60% of his time on the grant-funded project
21 and yet Campbell in fact worked only 20% of his time on that
22 project, the plain language of the contract suggests that
23 Federation was to submit expense reports requesting
24 reimbursement for 20%, not 60% of Campbell's salary. Language
25 from the MHRA contract also supports Glover's interpretation.

1 Section 3.2(d) provides that "MHRA shall pay the Federation for
2 actual expenses that the Federation incurred in accordance with
3 the budget." And 3.2(d) states "that Federation shall remit to
4 MHRA any funds received that exceed incurred expenses." Lax
5 declaration, Exhibit 3. Those provisions straightforwardly
6 suggest that Federation was required to submit expense reports
7 based on actual expenses, not budgetary maximums.

8 3.3 of the MHRA contract also provides that in
9 reviewing Federation's monthly expense reports "the MHRA may
10 disallow reimbursement for services or expenditures that were
11 not provided." Again that supports Glover's reading of the
12 contract. It suggests Federation was not meant to be
13 reimbursed for work that its employees did not perform. Glover
14 has also submitted deposition testimony from Rachel Miller,
15 Director of HIV Care Services at MHRA, suggesting that MHRA
16 expected Federation to submit expenditure reports based on
17 actual hours worked, not budgetary maximums. Rachel Miller
18 deposition, 80-81, Exhibit 14 to the Lax declaration. That
19 testimony does contradict the testimony of other MHRA
20 executives who agreed with Federation's interpretation of the
21 contract.

22 Last, though the expense reports mostly support the
23 Federation's interpretation of the contracts, they also provide
24 some support for Glover's interpretation. As the Federation
25 points out, the expense reports largely request reimbursement

1 in a constant rate for each Federation employee each month.
2 That supports the Federation's interpretation of the contract
3 insofar as it suggests that the Federation actually adhered to
4 its purported interpretation and reported personnel costs based
5 on budgetary maximums, not actual hours worked. There are,
6 however, sporadic variations in the expense report personnel
7 figures. Lax declaration, Exhibits 32 to 33. This suggests
8 that Federation did at times deviate from the budgetary
9 maximums, which in turn supports Glover's interpretation.
10 Thus, there's evidence supporting both sides' interpretation,
11 and both sides' interpretation is plausible and summary
12 judgment is therefore not appropriate. The proper
13 interpretation of the grant contracts is an issue of fact that
14 will be tried at trial

15 B. The reasonableness of the Federation's
16 interpretation of the grant contracts. Federation argues that
17 even if its interpretation of the contract is wrong, it was
18 nonetheless a reasonable interpretation, and, therefore, even
19 if it submitted false claims, as a matter of law did not do so
20 with a mental state required to violate the False Claims Act,
21 and that is it did not submit a false claim knowingly. Summary
22 judgment on whether the Federation knowingly submitted false
23 claims is not appropriate at this time because there's a
24 genuine issue of fact about whether the Federation knew that
25 its expense reports were erroneous. Here Glover has evidence

1 that could lead a trier of fact to conclude that Federation
2 knowingly submitted false claims. I interject. I think in the
3 whole context that evidence is rather weak but it does get past
4 summary judgment.

5 First, there are e-mails and memoranda that alerted
6 Federation executives to the fact that the expense reports did
7 not match the actual hours worked by Federation employees;
8 second, Glover testified that he and his co-workers were
9 ordered to alter their timesheets; and, third, he points to the
10 expense reports themselves to show that the Federation
11 occasionally varied the amount of money that it claimed for
12 personnel expenses. Plaintiff's 56.1, paragraphs 23, 25, 50-
13 55, 61, 62, 65-71; Lax declaration, Exhibits 32 and 33.
14 Glover's evidence in support of the mental state element here
15 is not sufficient to warrant summary judgment in his favor.
16 Federation, of course, is free to argue at trial that it did
17 not have the requisite mental state because its interpretation
18 of the contract was reasonable. But, as I say, I'm not
19 granting summary judgment to either party on that.

20 C. The MHRA's relationship to the federal
21 government. OHM is a part of the federal government because
22 it's part of the Department of Health and Human Services. MHRA
23 is not part of the federal government, it's a private nonprofit
24 organization, and thus Federation states that it cannot be held
25 liable for false claims or false records submitted to MHRA.

1 The analysis here differs for each of the two theories of
2 relief, that is, pursuant to (a)(1) and (a)(2).

3 All right. Let's first handle the (a)(1) theory.
4 Under (a)(1) a plaintiff has to show that the defendant
5 "knowingly presented or caused to be presented to an officer or
6 an employee of the United States government a false or
7 fraudulent claim for payment or approval." The statutory
8 definition of claim is broad and includes claims made to
9 entities under contract with the government. The claim
10 includes "any request or demand for money which is made to a
11 contractor, grantee, or other recipient if the United States
12 government provides any portion of the money or property which
13 is requested or demanded or if the government will reimburse
14 such contractor, grantee, or other recipient for any portion of
15 the money or property which is requested or demanded." 31 USC
16 3729(c). The monthly expense reports that the Federation
17 submitted to the MHRA appear to have been claims, therefore, as
18 the funds the MHRA distributed to the Federation were
19 reimbursed by the federal government.

20 While the False Claims Act's definition of claim
21 includes requests for payment made to a broad range of
22 nongovernmental entities, (a)(1) contains a narrow presentment
23 element that requires a plaintiff to show that the false claims
24 were eventually presented to the federal government for payment
25 or approval. United States ex rel. Sterling v. Health

1 Insurance Plan of Greater New York, Inc., 2008 U.S. Dist. LEXIS
2 76874 at *18, citing Allison Engine Company v. U.S. ex rel.
3 Sanders, 128 S.Ct. 2123 at 2128 (2008). Thus, Glover must do
4 more than show that the Federation submitted requests for
5 payment that met the statutory definition of claims. It must
6 also show that the Federation either presented those claims or
7 caused those claims to be presented to an officer or employee
8 of the United States government. 3729(a)(1).

9 Here also, just as with the prior question, there is
10 evidence on both sides. Federation says it submitted its
11 expense reports only to the MHRA, which is a private
12 organization, and did not present any claims to the government.
13 However, parts of the MHRA contract state that the money paid
14 to the Federation would come directly from the federal
15 government. The background section of the contract says that
16 MHRA is a nonprofit entity under contract with the New York
17 City Department of Health to award, administer, and monitor
18 contracts to deliver HIV-related services required under the
19 Ryan White Care Act amendments of 2000. Lax declaration,
20 Exhibit 3. 3.1(a) of the contract says that under no
21 circumstances will MHRA or the New York City Department of
22 Health incur any reimbursement liability beyond the amount of
23 the monies appropriated by the federal government for this
24 agreement. Those provisions show that the money the MHRA used
25 to pay Federation was dollar-for-dollar given to it by the

1 federal government. That fact certainly suggests that
2 Federation's claims were at some point submitted to the federal
3 government. Compare United States ex rel. Hunt v. Merck Medco
4 Managed Care LLC, 336 F.Supp.2d 430, 438 (E.D. Pa. 2004).

5 Therefore, the appropriate course of action is to
6 deny summary judgment and let's take a look at this at trial.
7 The jury will determine whether the Federation presented its
8 claims or caused its claims to be presented to the federal
9 government. And if Glover's evidence at trial is such that no
10 reasonable jury could conclude that the Federation's claims
11 were ever presented to the federal government, then the
12 Federation should move for a directed verdict on this part.
13 But I don't know at this point what the evidence is going to
14 show.

15 Now let's turn now to (a)(2). A recent Supreme Court
16 opinion states that to establish liability pursuant to (a)(2)
17 plaintiff must show that "the defendant made a false record or
18 statement for the purpose of getting a false or fraudulent
19 claim paid or approved by the government." Allison Engine
20 Company v. United States ex rel. Sanders, 128 S.Ct. 2123, 2130
21 (2008). When false records are submitted to an entity under
22 contract with the federal government the plaintiff has to show
23 that the government "intended for the statement to be used by
24 the contractor to get the government to pay its claim." That's
25 from Allison Engine also. If the defendant "makes a false

1 statement to a private entity and does not intend the
2 government to rely on that false statement as a condition of
3 payment, the statement is not made with the purpose of inducing
4 payment of a false claim by the government." The (a)(2)
5 allegations of Glover's is that Federation employees, including
6 Glover himself, altered time records to support the allegedly
7 false expense reports that Federation gave to MHRA. According
8 to Allison Engine, Glover has to demonstrate that the time
9 records were altered with the specific intention of having the
10 MHRA pass those records on to the federal government. It's
11 unclear whether there's any evidence to that effect as Glover
12 did not deal with this in his briefing, perhaps because Allison
13 Engine was decided after the briefing was done in this matter.

14 Once again the appropriate course of action now is to
15 deny summary judgment and let this (a)(2) allegation regarding
16 the MHRA grant go to trial. Glover will have to present
17 evidence for a jury to conclude that Federation employees
18 altered their time records with the specific intention that
19 those records would end up in the hands of the government. If
20 there's no such evidence, once again Federation can move for a
21 directed verdict.

22 D. The effect of the allegedly false claims on the
23 U.S. treasury. Federation claims that Glover's allegations,
24 even if true, did not cause the treasury to pay out more than
25 it would have if the Federation had not made the false claims.

1 Federation believes Glover's allegations amount to claims that
2 the federal government was underbilled, not overbilled, for
3 hours that Federation employees worked. This is one view of
4 the evidence but it's not the only one. Federation can argue
5 to the jury that the federal government suffered no damage.

6 4. The aspects of Glover's False Claims Act
7 allegations that remain for trial. I've indicated that there
8 are too many evidentiary disputes here to conclude that
9 Federation is entitled to judgment as a matter of law, and so
10 too in regard to Glover's motion for partial summary judgment.
11 But in terms of the allegation by Glover that Campbell was not
12 qualified to work on the OHM-funded grant, there's no
13 explanation by Glover of how Campbell's alleged lack of
14 qualifications violated the False Claims Act, and I'm granting
15 summary judgment to Federation on that aspect of Glover's case.
16 Everything else will go to trial.

17 All right. Now, let's turn to Glover's allegations
18 of retaliation. He maintains that he was unlawfully retaliated
19 against when Federation terminated his employee (sic) after he
20 had complained about the billing practices. He brings this
21 claim pursuant to New York Labor Law Section 740 and 31 USC
22 3730(h).

23 1. The retaliation law. Glover's allegation of
24 retaliation pursuant to New York Labor Law Section 740, there's
25 absolutely no merit. I was very close to granting sanctions on

1 that one because there's nothing in the record to support it,
2 it never should have been brought, but, by and large, I didn't
3 think that sanctions were appropriate. The New York statute
4 makes it unlawful to retaliate against an employee who
5 threatens to disclose a violation of law that creates a
6 specific danger to the public health or safety or which
7 constitutes health care fraud. There's no allegation here that
8 the false expense reports constituted health care fraud, and a
9 rather simple look at the case law would show that New York
10 courts hold that "fraudulent billing is not the type of
11 violation which creates a substantial and specific danger to
12 the public health or safety." Remba v. Federation Employment
13 and Guidance Service, 76 N.Y.2d 801, 802 (N.Y. 1990), Lamagna
14 v. New York State Association for Help With Retarded Children,
15 Inc., 158 A.D.2d 588, 589 (Ap.Div.2d 1990). And therefore I'm
16 granting Federation summary judgment on Glover's state law
17 retaliation claim.

18 Now let's look at the retaliation provision under 31
19 USC 3730(h), which gives a claim to any employee who is
20 discharged because of lawful acts done by the employee in
21 furtherance of a False Claims Act action. As an initial
22 matter, Federation claims that Glover is barred from bringing
23 the False Claims Act retaliation claim because he brought suit
24 under New York Labor Law 740, but that argument isn't
25 persuasive here. The state law waiver provision in that law

1 raises serious constitutional questions when applied to causes
2 of action created by federal statutes. See Reddington v.
3 Staten Island University Hospital, 373 F.Supp.2d 177, 187-188
4 (E.D.N.Y. 2005). In any event, the state law retaliation claim
5 is a small part of Glover's case, and he has essentially
6 abandoned that claim anyway. I cite his memorandum of law in
7 opposition to Federation's motion for summary judgment at page
8 34, footnote 20. So I'm not going to deem Glover to have
9 waived his retaliation claim on the merits. His allegation of
10 retaliation under the False Claims Act is that he investigated
11 the alleged practice of false expense reports, brought those
12 findings to the attention of his superiors, and was fired as a
13 result. Federation contends that Glover was fired for
14 nonretaliatory reasons. In fact, they say he had difficulty
15 getting along with other employees, and he was let go because
16 of the tensions he created in the workplace. See deposition of
17 Fatima Goldman at 61, Exhibit 25C to the O'Connor declaration.

18 There is indeed evidence supporting Glover's
19 allegations of retaliation. E-mails sent by Glover suggest he
20 did indeed complain about the billing practices. See Exhibit
21 54 to 55 of the Lax declaration and Exhibit 66 of the Lax
22 declaration. And Glover has also introduced the memo he sent
23 to his superiors expressing concerns about the work. See
24 Exhibit 58 of the Lax declaration. And he was fired only eight
25 days after submitting that memorandum. And he has also adduced

1 a number of positive performance evaluations received during
2 his tenure. See Exhibit 50. But there's evidence on the other
3 side as well. There is evidence that he frequently clashed
4 with other Federation employees. See Goldman deposition at 58,
5 Exhibit 8 to O'Connor declaration. And there's evidence that
6 Goldman, who is the person responsible for firing Glover, had
7 decided to fire Glover before receiving Glover's memorandum.
8 See Dana Hiscock [Ph.] deposition at 31-22, Exhibit 25D to the
9 O'Connor declaration. Thus there's evidence on both sides in
10 regard to the False Claims Act retaliation charge, and
11 therefore it's going to be up to the jury to determine whether
12 the decision to fire Glover was motivated by his interpersonal
13 difficulties or whether it was complaints about the billing
14 practices that led to his termination.

15 I essentially have already said what I have to say
16 about attorneys fees. False Claims Act provides that there can
17 be attorneys fees if defendant prevails and the Court finds
18 that the claim of the person bringing the action was clearly
19 frivolous, clearly vexatious, brought primarily for purposes of
20 harassment. On those claims for which the Federation has
21 prevailed in this cross motions, I'm not concluding that the
22 allegations were clearly frivolous, clearly vexatious, or
23 brought primarily for purposes of harassment. Also under the
24 state law I have discretion to award reasonable fees if an
25 action brought by an employee was without basis in law or in

1 fact. I decline to exercise my discretion to award attorneys
2 fees under that statute, and I'm denying the Rule 11 motion by
3 Glover. Federation's motion for fees did not violate any of
4 the conditions in Rule 11, and I deny Federation's request for
5 attorneys fees it incurred in defending the Rule 11 sanctions
6 motion. Attorneys fees are not warranted here.

7 I'm going to enter a minute order stating that for
8 the reasons I have set forth on the record today Federation's
9 motion for summary judgment in its favor is granted in part and
10 otherwise denied, that Glover's cross motion for partial
11 summary judgment in his favor is denied, that Federation's
12 motion for attorneys fees pursuant to 31 USC 3730(d)(4) and New
13 York Labor Law Section 740 Subdivision 6 is denied, that
14 Glover's motion for Rule 11 sanctions is denied, and that
15 Federation's request for attorneys fees in conjunction with
16 Glover's Rule 11 motion is denied.

17 All right. That is my decision.

18 Ms. Blakely you can cut the taping system.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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Sally Reidy

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Dated: December 12, 2008

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