DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive, Brighton, CO, 80601	DATE FILED: January 11, 2013
Plaintiff(s) SOCORRO OLMOS et al. v. **Defendant(s)** PINNACLE HEALTH FACILITIES XVI LP	⚠ **COURT USE ONLY** ⚠
	Case Number: 2012CV110 Division: C Courtroom:

Order re Motions for Summary Judgment

SEE ATTACHED ORDER.

Issue Date: 1/11/2013

CHARLES SCOTT CRABTREE
District Court Judge

DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601 _____ **SOCORRO OLMOS, MARGARET HEYLMANN, TANYA MCDONALD, ANDREW CROWDER, DAKOTA MORGAN and TAMMY MCDONALD** Plaintiffs, v. **PINNACLE HEALTH FACILITIES XVI, L.P. d/b/a WOODRIDGE PARK NURSING & REHABILITATION CENTER** Defendant.	**COURT USE ONLY** _____ Case No. 12-CV-110 Division: C Courtroom: 506
ORDER	

Defendant Pinnacle Health Facilities (Pinnacle or defendant) filed separate Motions for Summary Judgment (Motions) regarding each plaintiff on November 8, 2012. Plaintiffs filed a collective Response on December 10, 2012.[1] Pinnacle filed a collective Reply on December 17, 2012. The Court, being fully advised, finds and orders as follows:

Nature of the Case

Plaintiffs' Complaint filed January 27, 2012 alleged, *inter alia*, that the plaintiffs had been employed by Pinnacle in various capacities at the Woodridge Park Nursing &Rehabilitation Center in Commerce City, Colorado. Plaintiffs asserted four claims for relief—Breach of Implied Contract regarding an implied

[1] Counsel for plaintiffs filed a motion to withdraw as counsel for plaintiff Andrew Crowder on December 7, 2012. The Motion was granted on December 28, 2012.

contract between plaintiffs and Pinnacle to be compensated; Quantum Meruit regarding the plaintiffs' expectation to be paid for their services; Wage Claim pursuant to CRS 8-4-104, *et. seq*. for non-payment of wages; and Wrongful Termination by two plaintiffs, Heylmann and Olmos, seeking economic and non-economic damages and exemplary and punitive damages.

Nature of the Motions

Pinnacle

Plaintiffs, Andrew Crowder (Crowder), Tanya McDonald (Tanya), Dakota Morgan (Morgan), Margaret Heylmann (Heylmann), Tammy McDonald (Tammy), and Socorro Olmos (Olmos) (collectively plaintiffs) were served with requests for admission on June 29, 2012. Plaintiffs never responded and the requests are deemed admitted.[2] Further, plaintiffs never responded to any of Pinnacle's written discovery. There is no written contract for employment and, according to the Employee Handbook, there was no express or implied contract of employment.[3] Plaintiffs were employees at-will. At no time did plaintiffs complain that they had not received adequate compensation for the hours for which they clocked in and worked for Pinnacle.[4] Pinnacle did not terminate any plaintiff because they refused to perform any illegal act.[5] Attached to each motion were the verified documents including the personnel file for each plaintiff; the Employee Handbook Acknowledgement; defendant's Employee Handbook; payroll records for each plaintiff; and documentation regarding termination.[6] The affidavit supplied the basis for those records to be admissible as business records of the defendant.

[2] According to the Response all plaintiffs, with the exception of Andrew Crowder, have provided, albeit belated, responses to defendant's Requests for Admission. Thus the Court will not rely upon those untimely answers to Requests for Admission in considering these Motions.
[3] Supported by Affidavit of Daniel Balli, Exh. C
[4] Supported by Affidavit of Daniel Balli, Exh. C
[5] Supported by Affidavit of Daniel Balli, Exh. C
[6] Supported by Affidavit of Daniel Balli, Exh. B

Crowder received a verbal warning for working off the clock and another written warning for failing to abide by Pinnacle's policies. Crowder was terminated on June 11, 2010 because he made an inappropriate statement to a visitor. Pinnacle issued a verbal warning to Tanya on or around September 22, 2009 for being in the facility while she was not on the clock. Tanya was terminated on or around January 12, 2010 because she engaged in conduct that was perceived as verbally and physically threatening and violated Pinnacle's workplace violence policy. Morgan was issued a verbal warning on or around February 26, 2009 for using improper language in the facility. A written warning was issued to Morgan on or around June 10, 2009 for improper conduct, negative attitude/behavior and unacceptable personal conduct. A final warning was issued to Morgan on or around July 21, 2009 for unsatisfactory job performance. Morgan was terminated on August 4, 2009 for unsatisfactory job performance, negative attitude, improper conduct, failure to perform satisfactorily, violation of statute and insubordination. Heylmann was issued a written warning on or around September 18, 2009 for reaching confidentiality. Heylmann was terminated because it was believed she engaged in unauthorized disclosure of confidential information and/or a breach of confidentiality. Tammy resigned her employment with defendant on February 16, 2010 and received her final paycheck on January 27, 2010. Olmos was terminated because it was believed she took meat or food from defendant's kitchen.

Under Colorado law, "implied contracts arise from conduct of the parties which evidences a mutual intention to contract with each other; however, there must be a meeting of the minds before any contract will be implied." *A.R.A. Mfg. Co. v. Cohe*n, 654 P.2d 857, 859 (Colo. App. 1982).

To recover under Quantum Meruit a plaintiff must demonstrate that (1) at the plaintiff's expense; (2) the defendant received a benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit

without paying for it.

Colorado law requires that employees be compensated for all hours worked, receive overtime pay for any hours over 12 worked in a day or 40 worked in a workweek, and receive a half-hour, unpaid lunch if the employee works a shift more than 5 consecutive hours.

Wrongful termination requires a plaintiff to prove that (1) the employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; (2) the action directed by the employer would violate a specific statute related to public health, safety, or welfare, or would undermine a clearly expressed policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker; (3) the employee was terminated as the result of refusing to perform the act directed by the employer; and (4) the employer was aware that the employee's refusal to perform the act was based on the employee's reasonable belief that the directed act was unlawful. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100,109 (Colo. 1992). The wrongful termination claim is asserted by Heylmann and Olmos. These plaintiffs cannot establish any of the elements of a claim of wrongful termination.

Plaintiffs

Plaintiffs note that the trial date in this case is not until July 17, 2013 and that discovery must be completed 49 days before trial, or June 3, 2013. Defendant has prematurely filed its Motions seven months prior to the trial date and seeks to take advantage of a technical application of CRCP 56 (a), ignoring plaintiffs' responses and their right to amend, supplement or withdraw certain responses, pleadings and disclosures before June 17, 2013. Plaintiffs have yet to fully formulate discovery requests, conduct depositions or propound requests for

admission that may lead to discoverable and admissible evidence from payroll records, inter-office memoranda, employee file notes or other information relevant to plaintiffs' claims. The untimely responses to the requests for admission should not be the basis for granting the Motions.

Plaintiffs argued that defendant's behavior fell short of its own handbook in several areas namely, 1) payment of vacation time; 2) payment of on-call hours; 3) payment for breaks and granting breaking; and 4) proper payment for overtime hours.

Plaintiffs Heylmann, Olmos and Morgan have alleged that defendant created false scenarios to punish them as a subterfuge to prevent them from expressing concerns over the facility operation.

At this stage genuine issues of material fact exist as to whether defendant's termination of Heylmann, Olmos and Morgan was pretextual. Until plaintiffs have been afforded the full opportunity to shed light on defendant's treatment of plaintiffs, defendant's efforts to keep its activities under the cover of darkness should be denied.

Plaintiffs have asserted alternative relief under express [sic] contract and quantum meruit claims which is permissible.

Plaintiffs have not propounded discovery related to the defendant's pay records and other documents to verify that defendant failed to comply with the Colorado Wage Act. It remains disputed and plaintiffs have alleged that they worked for defendant and did not receive the compensation they were entitled to. No affidavits or verified documents were provided in support of the Response.

Issues

1. Should the Court hold any ruling on the Motions in abeyance pending additional discovery to be conducted by Plaintiffs?
2. Are there disputed issues of material fact which preclude the grant of

summary judgment as to plaintiffs' four claims for relief?

3. May plaintiffs assert a claim for punitive damages in the initial complaint?

Principles of Law

"Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Schultz v. Wells*, 13 P.3d 846, 848 (Colo. App. 2000). The moving party has the burden to establish that no genuine issue of material fact exists, and any doubt should be resolved in favor of the non-moving party. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo.1995).

Once the moving party has affirmatively shown specific facts, through affidavit or otherwise, that no genuine issues of material fact remain, the burden shifts to the opposing party to demonstrate by relevant and specific facts that there is a genuine issue for trial. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). If the non-movant fails to demonstrate the existence of facts from which a reasonable jury could find in his favor, summary judgment is proper. *Davis v. Regis College, Inc.*, 830 P.2d 1098, 1101 (Colo. App. 1992).

Analysis

1. Should the Court hold any ruling on the Motions in abeyance pending additional discovery to be conducted by Plaintiffs?

C.R.C.P. 56

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The decision to grant a request for discovery under C.R.C.P. 56(f) rests within the discretion of the trial court. *Bailey v. Airgas-Intermountain, Inc.*, 250

P.3d 746, 751 (Colo. App. 2010). The movant is required to demonstrate that the proposed discovery is necessary and could produce facts to preclude summary judgment. *Id.* at 751. A request under C.R.C.P. 56(f) should (1) explain why facts precluding summary judgment cannot be presented; (2) identify the probable facts not available and what steps have been taken to obtain these facts, and (3) how additional time will enable him to rebut the movants allegations of no genuine material fact. *Id.* (citing *Comm. for First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992)). It is appropriate for a trial court to deny a C.R.C.P. 56(f) request "if the movant has failed to demonstrate that the proposed discovery could produce material facts." *Id.*; *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 604 (Colo. App. 2004).

"'In order to avoid the precipitous and premature grant of judgment against the opposing party, C.R.C.P. 56(f) affords an extension of time to utilize discovery procedures to seek additional evidence before the trial court rules on a motion for summary judgment.' *Sundheim v. Board of County Comm'rs,* 904 P.2d 1337, 1352 (Colo.App.1995), *aff'd,* 926 P.2d 545 (Colo.1996). Nevertheless, a trial court may deny a C.R.C.P. 56(f) request if the movant has failed to demonstrate that the proposed discovery could produce material facts. *A–1 Auto Repair & Detail, Inc.,* 93 P.3d at 604." *Bailey,* 250 P.3d at 751. Plaintiffs' counsel did not comply with CRCP 56(f) by filing an affidavit as required. The most plaintiffs stated was that plaintiffs have yet to fully formulate discovery requests, conduct depositions or propound requests for admission that may lead to discoverable and admissible evidence from payroll records, inter-office memoranda, employee file notes or other information relevant to plaintiffs' claims. The complaint was filed almost one year ago on January 27, 2012. Contrary to plaintiffs' assertion, there was nothing "precipitous" about the filing of a motion for summary judgment nearly

eleven months later. Plaintiffs have failed to demonstrate that the proposed discovery could produce material facts. "In their response to the motion for summary judgment, plaintiffs requested further time to engage in discovery as an alternative to a merits ruling on the motion for summary judgment. However, because plaintiffs did not submit an affidavit as required by C.R.C.P. 56(f), we cannot conclude that the court erred in failing to defer ruling on defendant's motion for summary judgment. *See Raygor v. Board of County Commissioners*, 21 P.3d 432, 436 (Colo.App.2000); *Card v. Blakeslee,* 937 P.2d 846, 849 (Colo.App.1996)." *In re Estate of Heckman,* 39 P.3d 1228, 1231 (Colo. App. 2001). The Court will not hold its ruling in abeyance pending discovery.

2. Are there disputed issues of material fact which preclude the grant of summary judgment as to plaintiffs' four claims for relief?

A. Breach of Implied Contract[7]

"A contract implied in fact arises from the parties' conduct which evidences a mutual intention to enter into a contract. In both cases, a contract is created by the meeting of the minds to contract with each other. *See Tuttle v. ANR Freight System, Inc.*, 797 P.2d 825 (Colo.App.1990)." *Osband v. United Airlines, Inc.*, 981 P.2d 616, 621 (Colo. App. 1998). Plaintiffs' complaint, at paragraphs 14 and 15, recited that defendant "implicitly contracted with Plaintiffs to perform services on behalf of Defendant" and "In return and as consideration for Defendant's contractual promise, Plaintiffs were to be compensated as an employee." In paragraph 16 the complaint alleges "Defendant breached its implied contractual promises." No further detail was provided regarding how this implied contract was breached. Defendant has not disagreed that plaintiffs were, at various times,

[7] Despite pleading an implied contract in the complaint, plaintiffs' Response appeared to argue an express contract. In the affidavit of Daniel Balli, Exhibit C, it was stated that, "Plaintiff's personnel file does not contain a written contract for employment, nor does it contain any memorandum, notation, or other written information indicating that any managerial employee for Defendant told Plaintiff that Plaintiff had a written contract with Defendant."

employees of defendant. Defendant also attached verified payroll records indicating that the plaintiffs were paid in full for their services. Plaintiffs have not supplied any affidavits or verified documents which reflect that plaintiffs were not fully paid for their services. "It is fundamental that this court—or any court—does not settle legal questions on the naked factual assertions of counsel." *Casias v. People*, 160 Colo. 152, 162, 415 P.2d 344, 349 (1966). With nothing more than counsel's argument and reference to the complaint and disclosures, there are no genuine issues of material fact in dispute regarding the first claim for relief. The Court grants summary judgment in defendant's favor on the claim for breach of implied contract.

B. Quantum Meruit

In plaintiffs' second claim for relief—quantum meruit—plaintiffs alleged that each plaintiff rendered services in good faith which benefited defendant; defendant accepted plaintiffs' services; plaintiffs reasonably expected to be compensated for their services; and equity demands that plaintiffs be compensated for the reasonable value of their services. "Quantum meruit 'is a theory of contract recovery that invokes an implied contract when the parties either have no express contract or have abrogated it.' *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo.2000)." *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, No. 009CA0788, 2011 WL 724742 (Colo. App. Mar. 3, 2011*) cert. granted in part*, 11SC265, 2011 WL 3855738 (Colo. Aug. 29, 2011) and *aff'd sub nom. Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, 287 P.3d 842 (Colo. 2012). (Emphasis supplied). Plaintiffs alleged no other facts than those underlying their breach of implied contract claim. The Court has already found that there were no disputed issues of material fact precluding a grant of summary judgment regarding the breach of implied contract claim. The Court

finds that summary judgment is also appropriate regarding the quantum meruit claim.

C. Wage Claim pursuant to CRS 8-4-104, *et. seq*.

Paragraph 28 of the complaint states that, "The conduct of Defendant in failing to pay each of the Plaintiffs all of their earned salary and overtime, when applicable, during their employment constitutes a violation of CRS 8-4-104, *et. seq."*

For each of the six plaintiffs an affidavit by Daniel Balli, (Exhibit C) custodian of the defendant's records, stated:

> Defendant paid Plaintiff an hourly rate for each hour the employee was clocked in and performing work for Defendant.
>
> At no time during Plaintiff's employment with Defendant, did Plaintiff complain to her/his supervisor, to any payroll manager or coordinator, or to any managerial employee of Defendant that Plaintiff did not receive adequate compensation for the hours Plaintiff was clocked in and performing work for Defendant.

In their Response, plaintiffs stated, *inter alia*, "It remains disputed and Plaintiffs have alleged that they worked for Defendant and did not receive the compensation they were entitled too [sic]." "When a motion for summary judgment is submitted and supported by affidavit, the party opposing the motion for summary judgment cannot rely on the mere allegations of that party's pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth specific facts showing a genuine issue of material fact. C.R.C.P. 56(e); *GTM Invs. v. Depot, Inc.*, 694 P.2d 379, 381 (Colo.App.1984); *Meuser v. Rocky Mountain*

Hosp., 685 P.2d 776, 779 (Colo.App.1984). A motion for summary judgment supported by an affidavit, to which no counteraffidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true. *Witcher v. Canon City,* 716 P.2d 445, 457 (Colo.1986)." *McDaniels v. Laub,* 186 P.3d 86, 87 (Colo. App. 2008). Plaintiffs have failed to demonstrate that there are disputed issues of material fact regarding the wage claim and the Court grants summary judgment on that claim.

D. Wrongful Termination

In paragraph 32 of the complaint, plaintiffs alleged:

The discharge of Plaintiff Heylmann for false allegations concerning the disclosure of protected information contravenes a well-defined and clear mandate of public policy, ethical considerations, regulatory provisions, and the common law.

In paragraph 33 of the complaint, plaintiffs alleged:

Plaintiff Olmos was discharged as a result of false allegations of theft, created solely as basis to justify her termination which was also motivated by racial animus in violation of her Federal Constitutional rights and contravenes a well-defined and clear mandate of public policy, ethical considerations, regulatory provisions, and the common law.

"The supreme court articulated the elements that constitute a wrongful termination in violation of public policy in *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo.1992). The factors a plaintiff must prove are (1) the employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; (2) the action directed by the employer would violate a specific statute related to public health, safety, or welfare, or would undermine a clearly expressed policy relating to the employee's

basic responsibility as a citizen or the employee's right or privilege as a worker; (3) the employee was terminated as the result of refusing to perform the act directed by the employer; and (4) the employer was aware that the employee's refusal to perform the act was based on the employee's reasonable belief that the directed act was unlawful. *Id.* at 109." *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 281 (Colo. App. 2010). Plaintiffs' complaint did not even allege the elements of wrongful termination for either Heylmann or Olmos.

Daniel Balli executed Exhibit C for each plaintiff, indicating that he was the Nursing Home Administrator for Pinnacle Heath Facilities IVI, L.P. d/b/a Woodbridge Park Nursing & Rehabilitation Center. In the affidavit pertaining to Heylmann it was stated at paragraph 9 that, "Nothing in Plaintiff's personnel file indicates Defendant directed Plaintiff to perform any illegal act during Plaintiff's employment with Defendant; that Defendant prohibited Plaintiff from engaging in any important job-related right or public duty; or that Defendant terminated Plaintiff's employment because she refused to perform any illegal act." In paragraph 10 of the affidavit it was stated, "Defendant terminated Plaintiff's employment because it believed she engaged in unauthorized disclosure of confidential information and/or a breach of confidentiality."

In the affidavit (Exhibit C) pertaining to Olmos it was stated at paragraph 9 that "Nothing in Plaintiff's personnel file indicates Defendant directed Plaintiff to perform any illegal act during Plaintiff's employment with Defendant; that Defendant prohibited Plaintiff from engaging in any important job-related right or public duty; or that Defendant terminated Plaintiff's employment because she refused to perform any illegal act." Paragraph 10 of the affidavit stated, "Nothing in Plaintiff's Personnel File indicates that she complained to her supervisor or any managerial employee of Defendant that Defendant was discriminating against her."

Not only were there no countervailing affidavits provided by plaintiffs Heylmann and Olmos, plaintiffs' Response did not even address the wrongful termination claim. The Court finds there are no disputed issues of material fact and defendant is entitled to summary judgment on plaintiffs' claim of wrongful termination.

3. May plaintiffs assert a claim for punitive damages in the initial complaint?

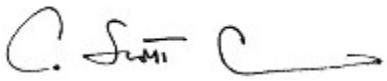
Although this issue was not raised in the Motions, the Court has *sua sponte* noted that in paragraph 35 of the complaint it was alleged that defendants' [sic] conduct was attended by circumstances of fraud, malice and/or willful and wanton misconduct entitling plaintiffs (presumably Heylmann and Olmos) to an award of exemplary and punitive damages. "Claims for exemplary damages may not be included in an initial complaint, but must be made by amendment at least sixty days after the exchange of initial disclosures and must establish 'prima facie proof of a triable issue' of exemplary damages…" *Stamp v. Vail Corp.*, 172 P.3d 437, 449 (Colo. 2007). Inasmuch as plaintiffs asserted the claim for exemplary damages in the initial complaint it was subject to being stricken. In light of the Court's findings and conclusions of law granting defendant summary judgment as to all of plaintiffs' claims, that issue is moot.

Order

Defendant's Motions for Summary Judgment are granted. All pretrial dates and the trial date of August 2, 2013 are vacated.

Dated this 11th day of January, 2013.

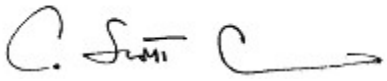
By the Court:



C. Scott Crabtree
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JPOD (e-file) to all counsel of record and to all *pro se* parties this 11th day of January, 2013.



Court