

APR 30 2020

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK ALLEN, in his official capacity  
as DIRECTOR OF OREGON HEALTH  
AUTHORITY, an agency of the State of  
Oregon,

Plaintiff-Appellant,

v.

FAMILYCARE, INC., an Oregon non-  
profit corporation,

Defendant-Appellee.

No. 18-35593

D.C. No. 3:18-cv-00212-MO

MEMORANDUM\*

FAMILYCARE, INC., an Oregon non-  
profit corporation,

Plaintiff-Appellant,

v.

OREGON HEALTH AUTHORITY, an  
agency of the State of Oregon; PATRICK  
ALLEN, in his official capacity as Director  
of Oregon Health Authority,

Defendants-Appellees,

Nos. 19-35103

D.C. No. 6:18-cv-00296-MO

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

and

LYNNE SAXTON,

Defendant.

FAMILYCARE, INC., an Oregon non-profit corporation,

Plaintiff-Appellee,

v.

PATRICK ALLEN, in his individual capacity,

Defendant-Appellant,

and

OREGON HEALTH AUTHORITY, an agency of the State of Oregon; LYNNE SAXTON,

Defendants.

No. 18-35891

D.C. No. 6:18-cv-00296-MO

FAMILYCARE, INC., an Oregon non-profit corporation,

Plaintiff-Appellee,

v.

LYNNE SAXTON,

No. 18-36009

D.C. No. 6:18-cv-00296-MO

Defendant-Appellant,

and

PATRICK ALLEN, in his individual  
capacity; OREGON HEALTH  
AUTHORITY, an agency of the State of  
Oregon,

Defendants.

FAMILYCARE, INC., an Oregon non-  
profit corporation,

Plaintiff-Appellant,

v.

LYNNE SAXTON,

Defendant-Appellee,

and

PATRICK ALLEN, in his individual  
capacity; OREGON HEALTH  
AUTHORITY, an agency of the State of  
Oregon,

Defendants.

No. 18-36048

D.C. No. 6:18-cv-00296-MO

Appeal from the United States District Court  
for the District of Oregon  
Michael W. Mosman, District Judge, Presiding

Argued and Submitted March 2, 2020  
Portland, Oregon

Before: WOLLMAN,<sup>\*\*</sup> FERNANDEZ, and PAEZ, Circuit Judges.

These appeals arise out of a 2014 contract between FamilyCare, Inc. (FamilyCare) and the Oregon Health Authority (OHA). FamilyCare was a Coordinated Care Organization (CCO)<sup>1</sup> and participated in Oregon’s Medicaid<sup>2</sup> program. The contract was subject to federal oversight by the Centers for Medicare & Medicaid Services (CMS), which must “review[] and approve[] all of Oregon[’s] contracts with [CCOs] and requires that capitation rates . . . be actuarially sound.” *Oregon v. Campbell*, 438 P.3d 448, 456 (Or. Ct. App. 2019).

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<sup>\*\*</sup> The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

<sup>1</sup> See Or. Rev. Stat. §§ 414.620(1), 414.625(1). Oregon received a demonstration waiver from the federal government for its Medicaid program, pursuant to which Oregon’s CCOs meet the requirements of managed care organizations (MCOs) under federal law. See 42 U.S.C. §§ 1315(a), 1396b(m)(1)(A); see also 42 C.F.R. § 438.2 (defining “[m]anaged care organization (MCO)”).

<sup>2</sup> See *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); see also 42 U.S.C. § 1315(a); Or. Rev. Stat. § 413.032(1)(i).

The district court dismissed certain claims and granted or denied summary judgment on others. We have jurisdiction pursuant to 28 U.S.C. § 1291,<sup>3</sup> the collateral order doctrine,<sup>4</sup> and the doctrine of pendent jurisdiction.<sup>5</sup> We affirm in part, reverse in part, and vacate in part.

No. 19-35103

The district court properly granted summary judgment to OHA on FamilyCare’s Oregon Administrative Procedure Act (APA)<sup>6</sup> claims that OHA failed to set actuarially sound capitation rates in 2017 and 2018. The parties agree that Oregon law requires OHA to comply with federal Medicaid law. *See, e.g.*, Or. Rev. Stat. § 413.071; Or. Admin. R. 410-141-3010(7); *see also Adamson v. Or. Health Auth.*, 412 P.3d 1193, 1194, 1196 (Or. Ct. App. 2017). As relevant to the contract at issue here,<sup>7</sup> federal law explicitly requires CMS to “review[] and approve[]” capitation rates “as actuarially sound,” describes the standards rates

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<sup>3</sup> *See* Fed. R. Civ. P. 54(b).

<sup>4</sup> *Isayeva v. Sacramento Sheriff’s Dep’t*, 872 F.3d 938, 944–45 (9th Cir. 2017).

<sup>5</sup> *Cunningham v. Gates*, 229 F.3d 1271, 1284–85 (9th Cir. 2000).

<sup>6</sup> Or. Rev. Stat. § 183.484(5)(a)–(c).

<sup>7</sup> *See* 42 C.F.R. § 438.3(a).

must satisfy to qualify for approval,<sup>8</sup> and defines “[a]ctuarially sound capitation rates” to include both CMS approval and the criteria CMS uses to bestow that approval.<sup>9</sup> Because capitation rates cannot be approved by CMS unless they are actuarially sound,<sup>10</sup> CMS could not approve them if they were not.<sup>11</sup> In light of that truism, in these circumstances neither Oregon nor federal law required OHA to do more than seek and obtain CMS approval of the 2017 and 2018 rates. Thus, the district court did not err in granting summary judgment to OHA as to FamilyCare’s Oregon APA claims.<sup>12</sup>

However, the district court erred in dismissing FamilyCare’s contract claim against OHA, in which FamilyCare alleged that OHA had breached the implied covenant of good faith and fair dealing in their 2014 contract, as amended and extended, by presenting FamilyCare with unreasonable capitation rates in 2017 and

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<sup>8</sup> 42 C.F.R. § 438.4(b)(1)–(9); *see also id.* at (a).

<sup>9</sup> *Id.* at (a).

<sup>10</sup> *Id.* at (a)–(b).

<sup>11</sup> Of course, this does not mean that CMS could not approve a later adjustment. Nor would it preclude a proper attack on a CMS determination pursuant to the provisions of federal law. *See* 5 U.S.C. § 706; *see also Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 614, 132 S. Ct. 1204, 1210, 182 L. Ed. 2d 101 (2012).

<sup>12</sup> The district court properly entered judgment on all of FamilyCare’s Oregon APA claims, because all shared a common factual basis: OHA’s purported failure to set rates that were actuarially sound.

2018. The district court determined that the implied covenant of good faith and fair dealing was inapplicable because each annual rate-setting amendment was essentially a new contract. The district court failed to properly apply Oregon law<sup>13</sup> to interpret the 2014 contract. It did not identify the contractual provision it perceived to be disputed,<sup>14</sup> nor did it examine extrinsic evidence of the parties' intent, or apply maxims of construction to resolve the perceived ambiguity. The district court also erred in failing to interpret the contract alleged in the operative complaint—the 2014 contract, as amended and extended—as a whole. Thus, we vacate the dismissal of FamilyCare's contract claim and remand to allow the district court to consider the contract to which FamilyCare's claim applies.

No. 18-35593

The district court did not err in dismissing OHA's declaratory judgment action, which claimed that federal law preempted FamilyCare's state law claims. OHA argues that because the federal regulatory scheme governing actuarial soundness is so extensive and specific, Congress intended to foreclose all state

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<sup>13</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989); *see also* *Yogman v. Parrott*, 937 P.2d 1019, 1021–22 (Or. 1997); *Riverside Homes, Inc. v. Murray*, 214 P.3d 835, 841 (Or. Ct. App. 2009).

<sup>14</sup> Oregon law requires contracts of this type have a five-year term. *See* Or. Rev. Stat. § 414.652(2)(a). That itself indicates that the yearly rate changes were not new contracts at all.

action in that field. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015). We disagree. Congress purposefully structured Medicaid as a cooperative endeavor between the federal government and the governments of individual states,<sup>15</sup> and that structure plainly requires state regulation; thus, Congress plainly did not intend to foreclose state action in the Medicaid field. *See N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 411 n.9, 93 S. Ct. 2507, 2512 n.9, 27 L. Ed. 2d 688 (1973); *id.* at 421, 93 S. Ct. at 2517. We also reject OHA’s attempt to infer preemption from the comprehensive nature of the federal regulatory scheme, which is “virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.” *Hillsborough Ctv. Automated Med. Labs., Inc.*, 471 U.S. 707, 717, 105 S. Ct. 2371, 2377, 85 L. Ed. 2d 714 (1985); *Dublino*, 413 U.S. at 415, 93 S. Ct. at 2514. Moreover, the Supreme Court’s determination in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323–24, 328, 135 S. Ct. 1378, 1382, 1385, 191 L. Ed. 2d 471 (2015), that the Medicaid Act had no private enforcement mechanism says nothing about a Congressional intent to preclude a state from imposing its own sanctions for violating federal requirements. *See Bates v. Dow Agrosciences*

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<sup>15</sup> *Planned Parenthood*, 727 F.3d at 963.



*LLC*, 544 U.S. 431, 441–42, 125 S. Ct. 1788, 1797, 161 L. Ed. 2d 687 (2005). The district court properly dismissed OHA’s declaratory relief action.

Nos. 18-36009, 18-35891, and 18-36048

Patrick Allen and Lynne Saxton each appeal the district court’s denial of qualified immunity from FamilyCare’s 42 U.S.C. § 1983 claim that they retaliated against it for its constitutionally-protected speech. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672, 129 S. Ct. 1937, 1946, 173 L. Ed. 2d 868 (2009); *Isayeva*, 872 F.3d at 944–45; *see also Howard v. City of Coos Bay*, 871 F.3d 1032, 1044 (9th Cir. 2017). FamilyCare cross-appeals the district court’s partial grant of qualified immunity to Saxton. *See Woodward v. City of Tucson*, 870 F.3d 1154, 1159 (9th Cir. 2017). The district court erred in denying Allen qualified immunity, and it erred in granting Saxton qualified immunity in part.

An official should receive qualified immunity “unless the official’s conduct violated a clearly established constitutional right.” *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565 (2009). In order for FamilyCare to establish that its First Amendment rights were violated, “[it] must prove that (1) [it] engaged in protected speech; (2) the defendants took an adverse . . . action against [it]; and (3) [its] speech was a substantial or motivating factor for the adverse . . . action.” *Howard*, 871 F.3d at 1044 (internal quotation marks omitted);

*Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1101, 1102–03 (9th Cir. 2011) (applying that test to an independent contractor). In order to show that its right was clearly established, FamilyCare must demonstrate “that every reasonable official would have understood that what he is doing violates that right.” *Mullenix v. Luna*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (per curiam).

**(1) Allen**

FamilyCare argues that Allen retaliated against it. We disagree. Assuming for present purposes that an independent contractor should be treated as a public employee in the context presented here,<sup>16</sup> Allen was entitled to summary judgment as to the 2018 rate-setting because there was no genuine dispute of material fact regarding whether FamilyCare’s speech was a substantial or motivating factor for Allen’s commissioning the independent reports and retaining the rate methodology. *See Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1056, 1062 (9th Cir. 2013). FamilyCare’s speculation about Allen’s motive is insufficient to show a genuine dispute of material fact. *See Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Nat’l Indus., Inc. v.*

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<sup>16</sup> *See Clairmont*, 632 F.3d at 1101

*Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1267 (9th Cir. 1982). Because FamilyCare failed to adduce sufficient evidence that Allen acted with a retaliatory motive, Allen was entitled to qualified immunity as to his rate-setting conduct. See *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 752–53 (9th Cir. 2001); *Pratt*, 65 F.3d at 808; see also *Howard*, 871 F.3d at 1045 (proximity in time must be such “that a ‘jury logically could infer’” a retaliatory motive); *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003).

Allen was likewise entitled to summary judgment as to his conduct in issuing the purported ultimatum and failing to timely provide the 2018 rates to FamilyCare. FamilyCare presented no evidence that Allen’s issuing of essentially empty threats during a negotiation, even if done in retaliation for protected activity, rises to the level of a constitutional violation. Cf. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923, 928 (9th Cir. 2004) (government agency workers “tampered with files, altered bidding sheets, manipulated the department’s computer database, and engaged in other schemes” to divert work from a contractor who had engaged in protected speech). And even if Allen’s negotiation tactics could amount to a constitutional violation in certain contexts, FamilyCare points to no authority that clearly established a violation in the particular circumstances presented here: an agency head making empty threats, or taking

obdurate and intransigent (or even bad faith) positions in contract amendment negotiations with a sophisticated contractor that was ready and able to aggressively assert and protect its rights. *See Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1073–74 (9th Cir. 2012). Thus, the district court should have granted Allen qualified immunity from FamilyCare’s § 1983 claim.

**(2) Saxton**

FamilyCare also brought a § 1983 claim against Saxton for speech retaliation, alleging that she retaliated against it by cutting its 2017 contract rates and disparaging it in a public relations campaign.

As to the 2017 retaliatory rate-setting, we decline to consider Saxton’s argument that she was entitled to qualified immunity because she failed to present that argument to the district court. *See Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019); *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996). Moreover, we lack jurisdiction to review the district court’s denial of Saxton’s motion for summary judgment arising from the 2017 rate-setting, and to consider any of her arguments on appeal that fail to view the facts in the light most favorable to FamilyCare. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972–73 (9th Cir. 2009).

As to the public relations campaign, we hold that the district court erred in partially granting Saxton qualified immunity because, taking the facts in the light most favorable to FamilyCare,<sup>17</sup> it was clearly established that Saxton’s conduct violated the Constitution. At the time Saxton acted, a reasonable official would have been on notice that retaliating against a contractor’s protected speech with a campaign that improperly disparaged it, while simultaneously reducing the contractor’s compensation, violated the contractor’s First Amendment rights. *See Greisen*, 925 F.3d at 1113–14; *Allen v. Scribner*, 812 F.2d 426, 434 & n.17 (9th Cir.), *amended by* 828 F.2d 1445 (9th Cir. 1987). FamilyCare presented sufficient evidence suggesting that Saxton retaliated against its protected speech by implementing the campaign. On this record, whether Saxton’s statements were accurate or she had a benign motive were quintessential disputes of fact that could not be resolved at the summary judgment stage. *See Allen*, 812 F.2d at 435; *see also O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016). Thus, the district court should have denied her motion for summary judgment in full.

**AFFIRMED in part and VACATED in part in No. 19-35103;**  
**AFFIRMED in Nos. 18-35593 and 18-35891; REVERSED in Nos. 18-36009**  
**and 18-36048.** The parties shall bear their own costs in No. 19-35103.

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<sup>17</sup> *See Isayeva*, 872 F.3d at 945.