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Does the False Claims Act Protect Whistleblowers Against Retaliation?

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The False Claims Act ("FCA") protects employees, contractors, and agents who engage in protected activity from retaliation in the form of their being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment." 31 U.S.C. § 3730(h)(1). It also authorizes substantial awards to qui tam relators (whistleblowers) for bringing and prosecuting cases concerning fraud on the government.

Who Is Protected Under the False Claims Act Whistleblower Protection Law?

False Claims Act whistleblower protection extends not only to employees and contractors, but also to partners. See *U.S. ex rel. Kraemer v. United Dairies, L.L.P.*, 2019 WL 2233053 (D. Minn. May 23, 2019); *Munson Hardisty, LLC v. Legacy Point Apartments,* LLC, 359 F. Supp. 3d 546, 558 (E.D. Tenn. 2019) (LLC that was general contractor on defendant's construction project was proper FCA plaintiff). In addition, the False Claims Act whistleblower protection law extends to physicians with staff privileges at a hospital. *Powers v. Peoples Community Hospital Authority*, 455 N.W.2d 371, 374 (Mich. Ct. App. 1990); *El-Khalil v. Oakwood Healthcare, Inc.*, No. 19-12822, E.D. Mich. April 20, 2020.

What Acts of Retaliation are Prohibited by the False Claims Act Anti-Retaliation Law?

The False Claims Act whistleblower protection law prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower. Prohibited retaliation includes:

- oral or written reprimands;
- reassignment of duties;
- constructive discharge; and
- retaliatory lawsuits against whistleblowers.

What Remedies or Damages Can a Whistleblower Recover Under the Anti-Retaliation Provision of the False Claims Act?

A whistleblower who prevails in a False Claims Act retaliation case under the FCA may recover:

- reinstatement;
- double back pay, plus interest;
- special damages, which include litigation costs, reasonable attorney's fees, emotional distress, and other non-economic harm from the retaliation. 31 U.S.C. § 3730(h)(2).

Recently, a jury awarded more than $2.5 million to a whistleblower in an FCA retaliation case. As there is no cap on compensatory damages, FCA retaliation plaintiffs can potentially recover substantial damages for the retaliation that they have suffered.

And in 2020, two cardiologists formerly employed by Tenet Healthcare Corporation recovered $11 million in compensatory damages in an arbitration of claims of FCA retaliation, tortious interference with business expectancies, false light, and breach of contract.

What Is Protected Whistleblowing or Protected Conduct Under the False Claims Act Retaliation Law?

The FCA protects:

1. "lawful acts . . . in furtherance of an action under [the FCA]"; and
2. "other efforts to stop 1 or more [FCA] violations." 31 U.S.C. § 3730(h)(1).

Recent cases have interpreted this protected activity to include:

- internal reporting of fraudulent activity to a supervisor;
- steps taken in furtherance of a potential or actual *qui tam* action; or
- efforts to remedy fraudulent activity or to stop an FCA violation.

FCA whistleblower protection attaches regardless of whether the whistleblower mentions the words "fraud" or "illegal." The employer need only be put on notice that litigation is a "reasonable possibility." A reasonableness standard is inherently flexible and dependent on the

circumstances; thus, "no magic words—such as illegal or unlawful—are necessary to place the employer on notice of protected activity." *Jamison v. Fluor Fed. Sols., LLC,* 2017 WL 3215289, at *9 (N.D. Tex. July 28, 2017).

An FCA retaliation claim does not require proof of a viable underlying FCA claim. The FCA anti-retaliation provisions "do[] not require the plaintiff to have developed a winning qui tam action"; they "only require [] that the plaintiff engage in acts [made] in furtherance of an [FCA] action." *Hutchins v. Wilentz, Goldman & Spitzer,* 253 F.3d 176, 187 (3d Cir. 2001).

And because the Supreme Court has held that the FCA "is intended to reach all types of fraud, without qualification, that might result in financial loss to the Government" and "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money," the term "false or fraudulent claim" should be construed broadly. *U.S. ex rel. Drescher v. Highmark, Inc.*, 305 F. Supp. 2d 451, 457 (E.D. Pa. 2004).

Does the False Claims Act Anti-Retaliation Law Protect Efforts to Stop a Government Contractor From Defrauding the Government?

Yes: The False Claims Act anti-retaliation law protects whistleblowers who try to prevent one or more violations of the FCA, as long as they have an objectively reasonable belief that their employer is violating, or will soon violate, the FCA. This prong of FCA protected conduct requires facts that support a reasonable inference that the whistleblower believed that their employer was violating the FCA, that their belief was reasonable, that they registered their complaints based on that belief, and that their complaints were designed to stop one or more violations of the FCA.

Case law has clarified that efforts to stop an FCA violation are protected even if they are not meant to further a qui tam claim. For example, refusing to falsify documentation that will be submitted to Medicare is protected.

Similarly, a South Carolina district judge held that a relator engaged in protected conduct when she refused her employer›s directive to obtain patient signatures and back-date the signatures, which the relator perceived as an attempt to create fraudulent forms used to secure reimbursement from US health insurance programs.

The second prong ("other efforts to stop FCA violation") is subject to an "objective reasonableness" standard, which requires only that an employee's actions be "motivated by an objectively reasonable belief that the employer is violating, or soon will violate, the FCA." *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 200 (4th Cir. 2018).

Is False Claims Act Whistleblower Protection Limited to Disclosures About the Whistleblower's Employer?

As the fourth circuit held in *O'Hara v. Nika Technologies, Inc.,* 2017 WL 6542675 (4th Cir. Dec. 22, 2017), an FCA retaliation plaintiff need not demonstrate their protected disclosure concerns fraud committed by their employer:

> The plain language of § 3730(h) reveals that the statute does not condition protection on the employment relationship between a whistleblower and the subject of his disclosures. Section 3730(h) protects a whistleblower from retaliation for "lawful acts done … in furtherance of an action under this section." 31U.S.C. § 3730(h)(1). The phrase "an action under this section" refers to a lawsuit under §3730(b), which in turn states that "[a] person may bring a civil action for a violation of [the FCA]." *Id.* § 3730(b)(1). Therefore, § 3730(h) protects lawful acts in furtherance of an FCA action. This language indicates that protection under the statute depends on the type of conduct that the whistleblower discloses—*i.e.*, a violation of the FCA—rather than the whistleblower's relationship to the subject of his disclosures.

Does the False Claims Act Anti-Retaliation Law Protect Internal Reporting to a Government Contractor or Grantee?

Yes, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.

Does the False Claims Act Prohibit Retaliation Against an Employee for the Employee's Refusal to Participate in a Fraudulent Scheme?

Yes. As the second circuit held in *Fabula v. American Medical Response, Inc.*, an employee's refusal to sign fraudulent reimbursement documentation constitutes protected whistleblowing. There the court notes that "[t]here is, at best, a hair's-breadth distinction between complaining internally that a practice is illegal under the FCA and advising a supervisor of one's refusal to engage in that illegal practice."

What Types of Disclosures or Whistleblowing are Protected Under the False Claims Act Whistleblower Protection Law?

Examples of protected conduct under the False Claims Act include:

- Opposing double-billing of Medicare or Medicaid;
- Reporting the sale of defective products to the government;
- Filing or prosecuting a qui tam action;
- Refusing to follow an order to upcode;
- Assisting a qui tam relator, e.g., cooperating in an investigation;
- Reporting the payment of kickbacks to refer patients for services that will be reimbursed by Medicare;
- Oppose the fraudulent inducement of a contract;
- Disclosing bid-rigging;
- Reporting violations of good manufacturing practices; or
- Trying to stop a provider from billing Medicaid for unnecessary medical services.

Does the False Claims Act Prohibit Harassing a Whistleblower?

A decision denying summary judgment in *Baldwin v. Corecivic of Tennessee,*

LLC, No. 18-2390-JWB, 2020 WL 1952521 (D. Kansas April 23, 2020) illustrates how harassment or a hostile work environment can be actionable retaliation under the FCA. The link between the alleged harassment and the whistleblower's complaint to a federal agency was made explicit in remarks addressed to the workforce by management that raise a reasonable inference of a retaliatory motive.

[S]oon after filing his DOL complaint, the Warden called him into his office, asked him what he thought he was doing, accused him of being like a litigious Walmart shopper, and told him he had "big balls" for making the complaint, and that nothing was going to change. The Warden then expressed his dissatisfaction with Plaintiff at a company-wide meeting, where he told Plaintiff's coworkers that the prison might be shut down if Plaintiff kept up his complaining. His coworkers began to call him names after this public dressing-down. Plaintiff was assigned to the allegedly undesirable position of patrolling the prison's exterior perimeter, with no breaks during his 12-hour shift and no relief. The prison's training manager, Sandra Elliott, instructed new employees to avoid Plaintiff because he was a trouble-maker and incorporated his photo into her introductory PowerPoint presentation. Plaintiff finds further evidence of intentional retaliation because Defendant's managers failed to refer his various grievances, most of which stated that the complained-of mistreatment was in retribution for his DOL complaint, up the management chain to the company's investigative team. Later, according to Plaintiff, his identity was leaked in connection with his confidential report of employee theft, resulting in a campaign of harassment presumably from his coworkers, who, among other things, let the air out of his car tires repeatedly, made prank phone calls to his home, threatened him, told him to stay away from the company holiday party for his own safety, put a dead mouse on his car windshield, and possibly even talked to an inmate about "shanking" him.

Is Constructive Discharge Prohibited by the False Claims Act Anti-Retaliation Law?

Yes. In *Smith v. LHC Group, Inc.*, 2018 WL 1136072 (March 2, 2018), the sixth circuit held that where an employer ignores an employee's disclosures about fraud on the government and the employee is reasonably concerned that he may be charged with fraud by the government if he remains in the job, the employee's resignation is an actionable constructive discharge. In other words, a jury could find that the employer's alleged fraudulent behavior plus the employee's moral conscience and reasonable fear of being accused of participating in the employer's fraud is enough to justify quitting. See also *Byrd v. Nat'l Health Corp.*, No. 3:18-CV-00123, 2019 WL 403964 (E.D. Tenn. Jan. 31, 2019) and *Bourne v. Provider Servs. Holdings, LLC*, No. 1:12-CV-935, 2019 WL 2010596, at *6 (S.D. Ohio May 7, 2019).

What Must a Whistleblower Prove to Prevail in a FCA Whistleblower Retaliation Case?

A whistleblower must prove that:

1. the whistleblower engaged in protected activity;
2. the whistleblower's employer took an adverse employment action against him or her; and
3. the adverse employment action was taken because of the whistleblower's protected activity. 31 U.S.C. § 3730(h)(1).

Recently the third circuit held that FCA retaliation claims require proof of 'but-for' causation. *DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018). Note, however, that "but for" caution is not tantamount to sole factor causation. See *Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014) (an act is a "but-for" cause "[even if it] combines with other factors to produce the result, so long as the other factors alone would not have done so – if, so to speak, it was the straw that broke the camel's back."). In *Bostock v. Clayton Cty*., the Supreme Court clarified the burden of proving "but for" causation:

> Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar, 570 U. S., at 346, 360, 133 S. Ct. 2517, 186 L. Ed. 2d 503*. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross, 557 U. S., at 176, 129 S. Ct. 2343, 174 L. Ed. 2d 119*. In other words, a but-for test directs us to change *one thing at a time* and see if the outcome changes. If it does, we have found a but-for cause.

590 U. S. __ (2020), slip op at *6.

At the pleading stage, the showing necessary to demonstrate the causal-link part of the *prima facie* case is not onerous; the plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated. *United States ex rel. Dyson v. Amerigroup Tex., Inc.*, 2005 WL 2467689, at *3 (S.D. Tex. Oct. 6, 2005).

Arguably, "but-for" causation is not significantly more onerous than "motivating factor" causation. For example, the second circuit held in a post-*Nassar* Title VII retaliation case that the "but-for causation standard does not alter the plaintiff's ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity." *Zann Kwan v. Andalex Group*, 737 F.3d 834 (2d Cir. 2013) (a three-week period from Kwan's protected activity to the termination of her employment is sufficiently short to make a prima facie showing of causation indirectly through temporal proximity).

"But for" causation requires a plaintiff to prove the adverse employment action would not have occurred but for the defendant's consideration of a protected activity and "sole factor" causation requires a plaintiff to prove that the defendant's consideration of a protected activity was the only cause of an adverse employment action. See *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 282 n. 10 (1976).

How Can an FCA Whistleblower Retaliation Plaintiff Prove Notice of Protected Conduct?

"Notice may be provided in a number of ways: for example, by informing the employer of `illegal activities' that would constitute fraud on the United States, . . . by warning the employer of regulatory noncompliance and false reporting of information to a government agency, . . . or

by explicitly informing the employer of an FCA violation." *McBride v. Peak Wellness Center,* Inc., 688 F.3d 698, 704 (10th Cir. 2012).

Where an employee is hired to track compliance with regulatory requirements, some courts apply a presumption that he was merely acting in accordance with his employment obligations. In other words, a compliance employee must plead that he was not just doing his job. Some of the factors that courts consider in assessing notice include: whether the plaintiff's complaints led to internal or external investigations; whether the plaintiff used the words, "illegal," "unlawful," "qui tam," "fraud" or "fraudulent" in characterizing his concerns regarding the charges; whether the plaintiff's "regular job duties" involved "investigating and reporting fraud" or, similarly, whether the plaintiff uncovered the alleged fraud through his performance of specifically "assigned task[s]"; and whether the plaintiff can rebut evidence that his supervisors had no knowledge of the protected activity. *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 189-92 (3d Cir. 2001).

Is There a Heightened Notice Requirement for a False Claims Act Whistleblower to Prove That She Went Beyond Her Job Duties When She Blew the Whistle?

Some courts reject a heightened notice requirement. "[T]he FCA no longer requires that conduct be in furtherance of an action under this section to be protected. Rather, the FCA protects any effort to stop 1 or more violations of this subsection. 31 U.S.C. 3730(h)(1). . . . If an employee does not need to take steps clearly in furtherance of a potential or actual qui tam action to engage in protected activity, the employee, even if charged with investigating potential fraud, also does not need to make clear their intentions of bringing or assisting in an FCA action, Yuhasz, 341 F.3d at 568, to satisfy the notice requirement. . . . By reporting [his/] her concerns directly to [his/her supervisor], [a] Plaintiff satisfie[s] the notice element of [his/]her . . . case." *Mikhaeil v. Walgreens Inc.,* No. 2:13-CV-14107, 2015 WL 778179, at *9 (E.D. Mich. Feb. 24, 2015) (italics and emphasis added). See *also* *Are "duty speech" disclosures protected under the False Claims Act?*

What is the statute of limitations for a False Claims Act Whistleblower Retaliation Claim?

The statute of limitations for False Claims Act retaliation claims is three years from the date on which the retaliation occurred. FCA retaliation claims can be brought directly in federal court; there is no administrative exhaustion requirement.

The sixth circuit held in *El-Khalil v. Oakwood Healthcare, Inc.*, 2022 WL 92565 (6th Cir. Jan 10, 2022) that the statute of limitations period for a False Claims Act whistleblower retaliation case commences when the whistleblower is first informed of the retaliatory adverse employment action. For more information about that decision, see *Sixth Circuit Clarifies When Statute of Limitations Commences in False Claims Act Whistleblower Retaliation Cases.*

Does the False Claims Act Whistleblower Retaliation Law Authorize Individual Liability?

With some exceptions, *e.g.*, *Weihua Huang v. Rector and Visitors of University of Virginia,* 896 F. Supp. 2d 524, 548 n.16 (W.D. Va. 2012), most courts addressing this issue have held that § 3730(h) does not create a cause of action against supervisors sued in their individual capacities." *Brach v. Conflict Kinetics Corp.,* 221 F. Supp. 3d 743, 748 (E.D. Va. 2016) (footnotes omitted) (citing *Howell v. Town of Ball,* 827 F.3d 515, 529-30 (5th Cir. 2016)). But arguably a False Claims Act retaliation claim can be brought against an individual as an alter ego of an employer corporation. *United States ex rel. Brumfield v. Narco Freedom, Inc.,* No. 12 Civ. 3674 (JGK), 2018 WL 5817379, at *3 (S.D.N.Y. 2018) (citing cases).

Is a Disclosure About Fraudulent Inducement of a Contract Protected Under the FCA Retaliation Law?

Yes. FCA protected conduct (protected whistleblowing) includes "efforts to stop 1 or more violations' of the Act," which goes beyond disclosures concerning an actual exchange of money or property. See *U.S. ex rel. Bahrani v. Conagra*, 465 F.3d 1189, 1194 (10th Cir. 2006) (noting that the United States Supreme Court has given the FCA "an expansive reading, observing that it covers all fraudulent attempts to cause the government to pay out sums of money") (internal citation omitted and quotation marks omitted). A company that provides false information in the course of competing for or seeking a government contract or grant arguably violates the FCA where the false statement has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Does the False Claims Act Prohibit the Waiver or Release of False Claims Act Retaliation Claims?

The FCA does not preclude the waiver of a retaliation claim. See *Brown v. City of S. Burlington*, 393 F.3d 337, 346 (2d Cir. 2004). In contrast, a qui tam action cannot be dismissed without the written consent of the court and the Attorney General. Under the FCA, a relator may not unilaterally enter into an enforceable settlement agreement or release after filing an FCA action. 31 U.S.C. § 3730(b)(1).

Courts generally enforce a pre-filing release of a relator's right to bring a qui tam action so long as the relator's allegations of fraud were sufficiently disclosed to the government prior to the release, and the government had the opportunity to fully investigate the allegations. In most circuits, a prefiling release is unenforceable as a matter of public policy where the government did not have sufficient knowledge of the fraud allegations at the time the release was executed. Judge Mazzant's recent decision in *Mitchell v. CIT Bank*, No. 4:14-CV-00833, 2021 WL 3634012 (E.D. Tex. Aug 17, 2021) surveys the key cases on this topic.

Does the NDAA Whistleblower Protection Law Provide Additional Protection for Whistleblowers at Government Contractors and Grantees?

Yes, the NDAA whistleblower protection provisions provide a private right of action to an employee who suffers retaliation for disclosing information that the employee reasonably believes is evidence of:

- gross mismanagement of a Federal contract or grant;
- a gross waste of Federal funds;
- an abuse of authority relating to a Federal contract or grant; or
- a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract.

To learn more about NDAA whistleblower protection, see our Practical Law Practice Note: Whistleblower Protections Under the National Defense Authorization Act.

Note that a recent district court ruling in *Reed v. Keypoint Government Solutions,* which might be erroneous, holds that an NDAA whistleblower retaliation claim must be brought in court within 2 years of the 210th day after the filing of the claim at the OIG.

Can a Government Contractor Bring a False Claims Act Whistleblower Retaliation Claim?

Yes, in certain circumstances. Recently a Tennessee federal judge held in *Munson Hardisty LLC v. Legacy Pointe Apartments* that the False Claims Act's anti-retaliation provision protects a general contractor on a construction project funded by the U.S. Department of Housing and Urban Development (HUD) from retaliation for opposing fraudulent misrepresentations to HUD. Read more about the decision here.

Can a Government Contractor Obtain Dismissal of a False Claims Act Claim to Maintain the Confidential Nature of Classified Information?

A False Claims Act qui tam complaint should not include classified information and any relator in the possession of classified information should seek guidance to avoid disclosing such information. But where a qui tam action might implicate sensitive information, the contractor is not entitled to step into the shoes of the Government to assert the Government's interest in maintaining the confidential nature of the information. *Johnson et al v. Raytheon Company*, No. 3:17-CV-1098-D, 2019 WL 6914967 N.D. Texas (Dec. 19, 2019).

Does the Layoff of a Whistleblower Immunize a Company from Liability Under the False Claims Act Retaliation Law?

A judge denied summary in an FCA retaliation case where the whistleblower was included in a layoff just one month after the FBI executed its search warrant with the whistleblower's assistance and the employer knew about the whistleblower's participation in the FBI's investigation. *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC,* No. 2:12-cv-381-DB (D. Utah 2020). In particular, the employer knew that the whistleblower provided documents to the FBI and the whistleblower refused to participate in an interview with the company without his attorney present.

Does the False Claims Act Whistleblower Protection Law Preempt Common Law Wrongful Discharge Claims?

A number of courts have rejected the argument that state wrongful discharge claims are preempted by the False Claims Act. See, *e.g., Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 277 F.3d 936, 945 (7th Cir. 2002) ("There is nothing in § 3730(h) to lead us to believe that Congress intended to preempt all state law retaliatory discharge claims based on allegations of fraud on the government."); *Boone v. MountainMade Foundation*, 857 F.Supp.2d 111, 113 n.2 (D.D.C. 2012); *Glynn v. EDO Corp.*, 536 F.Supp.2d 595, 608-09 (D.Md. 2008); *Hoefer v. Fluor Daniel, Inc.*, 92 F.Supp.2d 1055, 1059 (C.D.Cal. 2000); *Palladino ex rel. United States v. VNA of S.N.J.*, Inc., 68 F.Supp.2d 455, 465-74 (D.N.J. 1999). See also *False Claims Act Retaliation Law Does Not Preempt State Wrongful Discharge Claims*.

Is an Employee Required to Invoke the FCA or Reference Fraud on the Government in Order to Engage in Protected Conduct?

Generally no. For example, in *Mason v. Netcom Technologies*, Judge Grimm held that an employee's inquiry to management about the employer's failure to pay the prevailing wage for government contract work and his complaint to the Department of Labor constituted FCA-protected conduct. *Netcom Technologies* argued that Mason asking his employer about the prevailing wage rate requirement and complaining to the DOL were not protected activities because he did not raise any issue of fraud or illegality. In other words, generalized concerns about perceived contract or regulatory violations are not protected under the FCA. Judge Grimm held that Mason has pleaded sufficient facts to suggest that Netcom "knew or should have known that FCA litigation was a reasonable possibility," once it became aware of the DOL complaint/investigation and Mr. Mason's involvement. Once Netcom was subject to a DOL investigation that it was underpaying employees as part of a government contract, it should have been on notice of possible FCA litigation with respect to the Netcom's potential alleged fraud in connection with that underpayment. ■

Described by the National Law Journal as a "leading whistleblower attorney," Jason Zuckerman litigates whistleblower retaliation, whistleblower rewards, wrongful discharge, and other employment-related claims. His practice focuses on representing senior executives and senior professionals in high-stakes whistleblower retaliation cases, including SOX retaliation claims, and representing whistleblowers before the SEC, CFTC and IRS. Zuckerman's broad experience includes practicing employment law at a national law firm and serving as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel, the federal agency charged with protecting whistleblowers in the federal government.