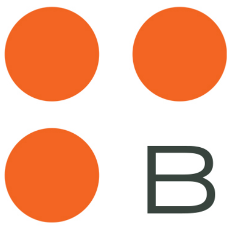

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False Claims Retaliatory Discharge Claims

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An often overlooked and under publicized provision of the False Claims Act ("FCA") is the retaliatory discharge prohibition. This is probably because retaliatory discharge claims do not grab headlines by winning multimillion dollar verdicts or settlements.

While a former employee may have legitimate arguments that he was retaliated against, a retaliatory discharge claim is filed as a routine part of a qui tam action in almost every qui tam lawsuit if the relator is a former employee. Accordingly, it is important to understand the basics about retaliatory discharge claims.

While most people in the health care industry understand that the FCA prohibits individuals and companies from submitting claims for payment that involve some type of error that causes the claim to be false, many are unaware that an employee is protected from retaliation for trying to bring false claims to light. More particularly, the anti-retaliation provision of the False Claims Act protects employees, contractors or other agents of a company from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee, contractor, or agent investigated, reported or sought to stop a company from engaging in practices which defraud the United States government.

Specifically, to prove that a company retaliated against an employee, in violation of 31 U.S.C. §3730(h), an individual must prove that: (1) the employee engaged in protected activity; and (2) the employee was discriminated against because of the protected activity. The amendments to the 2009 Fraud Enforcement and Recovery Act ("FERA") expanded the scope of the FCA's retaliation protections. FERA clarified that not only are efforts to stop violations of the FCA protected so are actions taken in furtherance of a qui tam action itself. An employee has up to three years after the date of the retaliation to initiate litigation.

For purposes of FCA retaliation, "protected activity" occurs when the employee opposes the company's attempt to get a false or fraudulent claim paid or approved by the government, and where that opposition to fraud "reasonably could lead to a viable FCA action," or when litigation is a reasonable possibility. An employee's efforts to investigate potential fraud may also constitute protected activity. To demonstrate that he/she was discriminated against "because of" conduct in furtherance of a False Claims Act suit, an employee must show that the employer had knowledge of the protected activity and that its retaliation was motivated, at least in part, by the individual's engaging in the protected activity.

The damages available to a successful relator are generally designed to "make the employee whole." Possible damages include: (1) reinstatement with the same seniority status the employee would have had but for the discrimination; (2) two times the amount of back pay plus interest on the back pay; and (3) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

Notwithstanding the expanded rights of a relator, the federal courts still limit retaliatory discharge claims. One such limitation comes in the form of a reasonable belief that the relator's employer was committing fraud against the government. This issue was recently addressed by the Seventh Circuit Court of Appeals, which upheld a lower court's dismissal of a relator's retaliatory discharge claim in a FCA action where the government had declined to intervene. The Court noted that the determination of whether an employee's conduct was protected turned in part on whether "a reasonable employee in the same or similar circumstances might believe that the employer is committing fraud against the government." Citing the fact that the relator did not have "any firsthand knowledge of the obligations to the government," the Court held the relator had no reasonable basis for such a belief.

Although the reasonable belief requirement is not a new standard, the Seventh Circuit's holding is useful guidance for analyzing the "reasonableness" of a belief. The court noted that there are two prongs to the reasonable belief standard. First, the employee must have a good faith belief the employer is committing fraud. Second, a "reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." In the recent Seventh Circuit Court case, the Court commented that while the relator might have subjectively believed the employer was committing fraud, the Court determined the relator's claim did not meet the second part of the test.

The Court focused on "the facts known to the employee at the time of the alleged protected activity." According to the Court, the relator failed to prove that a reasonable employee would have believed the employer was defrauding the government because the relator admitted he did not read the contract with the government and thus did not know the underlying basis for what made the claims false at the time his employment was terminated. Accordingly, the relator lacked firsthand knowledge of the employer's contractual obligations with the government.

The takeaway for health care employers from this case is that even if a relator subjectively believes a defendant is committing fraud, court's may not recognize "protected activity" if there is no reasonable basis for the belief the employer is committing fraud.

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