



Courts Narrow Liability for Retaliation Claims

■ Over the past year, several courts have limited the circumstances under which an employee may recover for violation of the federal False Claims Act's anti-retaliation provision, which prohibits an employer from disciplining an employee who reports an FCA violation.

Courts held that for the employer to be liable: the person making the disciplinary decision for the employer must have actual knowledge of the employee's False Claims Act complaint (at least where the decision-maker has made a good faith inquiry into the reasons for the discipline); the alleged retaliation must have occurred during the employee's course of employment and not afterwards; the employee must show that their complaint was the main reason for the discipline as opposed to just one contributing factor; and the employer's executives, including a CEO and sole owner, cannot be held liable in their individual capacities.

In *Armstrong v. Arcanum Group*, the Tenth Circuit Court of Appeal, which covers Colorado, Kansas, Oklahoma, Utah and Wyoming, dismissed the plaintiff's (*Armstrong's*) retaliation claim against the defendant (*Arcanum*), a staffing agency, because there was no proof that her supervisor at *Arcanum* knew about her FCA complaint when he terminated her.

Arcanum had placed *Armstrong* with the Bureau of Land Management. Thereafter, she complained to the bureau that its employees were doctoring records. The bureau demanded that *Arcanum* remove *Armstrong*. Her supervisor asked the government agency for an explanation, but received an email stating only, "[she] is not working out and we would like to terminate her effective immediately."

Shortly thereafter, *Armstrong* was terminated. The court explained that a deliberate ignorance theory (i.e., sticking your head in the sand) could not be used to impute knowledge of *Armstrong's* complaint to her supervisor, as is required for a retaliation claim, because he tried to learn why the Bureau of Land Management was unhappy with her performance and was rebuffed.

In *Potts v. Center for Excellence*, the Tenth Circuit drew additional lines around the False Claims Act's anti-retaliation provision when it dismissed a claim because the alleged retaliation occurred after the employee had already been terminated. The plaintiff (*Potts*) resigned her position with the defendant (the Center for Excellence), an operator of nonprofit colleges, because she believed that organization lied to maintain its accreditation. Importantly, accreditation was required for receipt of federal student aid money.

After *Potts's* resignation, the Center for Excellence agreed to pay her \$7,000 and support her unemployment claim in exchange for her not "contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance."

Notwithstanding the agreement, *Potts* submitted a complaint to the accreditation agency. The Center for Excellence sued her for breach of contract and she countered with her retaliation claim.

The court acknowledged that a company could be liable for harassment of a former employee just as it could a current employee. Nonetheless, the court explained that the term "employee" as used in the False Claims Act "[i]ncludes only persons who were current employees when their employers retaliated against them."

The Third and Fourth Circuit Courts of Appeal, which together cover the Carolinas, Delaware, Maryland, New Jersey, Pennsylvania and Virginia, have joined a growing consensus of courts holding that plaintiffs in FCA retaliation cases must demonstrate what is referred to as "but for" causation (i.e., the plaintiff must prove that the discipline would not have occurred had it not been for their complaint).

Previously, there was some concern that courts would opt for a lesser standard that could be met by the plaintiff proving that their complaint was merely one of many other possible motivators for the discipline. Moving forward, however, the trend seems to favor the more demanding "but for" standard.

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Just before the New Year, in *U.S. ex rel. Brumfield v. Narco Freedom*, a Southern District of New York court dismissed the plaintiffs' FCA retaliation claims filed against the CEO and sole owner of a nonprofit organization in his individual capacity. The court explained that the overwhelming majority of courts have held that the law's anti-retaliation provision generally does not create a claim against supervisors in their individual capacities and that this principle extends to a CEO and sole owner of an organization.

The court, however, did not reach a decision on the plaintiffs' controversial alter ego theory of liability for the CEO and sole owner. The court explained that the viability of such a theory is unclear, but then declined to answer the specific question because the plaintiffs failed to show that the CEO was so dominant over the nonprofit organization that disregarding corporate formalities and piercing the corporate veil was warranted.

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