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4th Circuit Broadens Grounds for Whistleblower Retaliation Suits Under the FCA

By

A new decision from the U.S. Court of Appeals for the Fourth Circuit seems to confirm that recent amendments to the whistleblower retaliation provision of the False Claims Act have substantially broadened the grounds under which a claim can be maintained.

In an unpublished decision in *Carlson v. Dyncorp Int'l*, LLC, Case No. 14-1281 (4th Cir. Aug. 22, 2016), a three-judge panel of the Fourth Circuit – whose jurisdiction covers Maryland, Virginia, West Virginia, and the Carolinas – held that protected activity includes not only employee conduct "in furtherance of an [FCA] action" but *also* conduct involving "other efforts to stop 1 or more violations" of the FCA.

As the court explained, the Act originally protected only conduct "in furtherance of an action," which courts had interpreted to mean conduct which "reasonably could lead to a viable FCA action," also known as the "distinct possibility" standard. But in 2009, an amendment to the retaliation provision actually removed this language and replaced it with a grammatically awkward standard to protect an employee's "lawful acts done…in furtherance of other efforts to stop 1 or more violations" of the FCA (it was awkward because the word "other" seemed to be extraneous). Then in 2010, 31 U.S.C. § 3730(h) was amended again as part of the Dodd-Frank legislation – this time including *both* the old and the new standards for protected activity, now defined as conduct "in furtherance of an action under this section ***or*** other efforts to stop 1 or more violations" of the FCA.

In light of this legislative history, the court concluded that the "other efforts to stop 1 or more violations" standard could not be limited to the previously accepted "distinct possibility" standard in effect before the 2009 amendment. Instead, the amended Act protects a broader set of employee activities than the pre-2009 version of the Act did.

As the attorney who successfully litigated the appeal in *Glynn v. EDO Corp.*, 710 F.3d 209 (4th Cir. 2013), in which the Fourth Circuit affirmed a Maryland District Court's dismissal of an FCA retaliation claim under the standard that "a plaintiff must be investigating matters that reasonably could lead to a viable FCA action," I was particularly interested in this new decision in *Carlson*. The appellee employer had relied on the holding in *Glynn* to argue that Carlson's activities were not protected conduct because he was not "investigating matters that reasonably could lead to a viable FCA action." But the court concluded that his actions could still be protected conduct under the "other efforts to stop 1 or more violations" standard. In doing so, the court assumed, without deciding, that such efforts amount to protected activity if they "are motivated by an *objectively reasonable belief* that the employee's employer is violating, or soon will violate, the FCA." *Carlson* at 10 (emphasis added).

While *Glynn* was correctly decided under the previous version of the FCA applicable to that case, the amended FCA applied in *Carlson*. In the end, the court in *Carlson* still affirmed the dismissal of the retaliation claim, but on different grounds – that Carlson only suggested under-billing, not overbilling, and offered no concrete evidence of even a plausible case for fraud. While this decision was unpublished, it still underscores that in jurisdictions covered by the Fourth Circuit, employees can now rely on a broader set of standards to maintain whistleblower retaliation claims and survive pretrial motions by employers seeking to dismiss those claims.

