
**RECENT CASES ON RETALIATION CLAIMS
UNDER SECTION 3730(h) OF THE FALSE CLAIMS ACT**

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SECTION 3730 (h) RETALIATION CLAIMS

Supreme Court Decision

Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, **125 S.Ct. 2444 (U.S. June 20, 2005)**

In a split decision, the United States Supreme Court directed Section 3730(h) plaintiffs to use the “most closely analogous” state statute of limitations (which are listed in a footnote), rather than the six-year limitations provision of False Claims Act (FCA) Section 3731(b)(1). In some states, the limitations period can run in as short a time as 180 days.

The Court found some ambiguity over whether a Section 3730(h) retaliation action is “a civil action under section 3730,” as required by the FCA limitations provision. Instead, the Court championed another “reasonable reading” - that it applies only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions. Doubting that Congress could have possibly intended a Section 3730(h) time limit to begin on the date the defendant submitted a false claim for payment, the Court reviewed the rest of Act, without consulting the applicable legislative history.

The Court also invented a hypothetical relator who has never existed in the history of the Act. Specifically, the Court expressed concern for the employee whose retaliation action is time barred before the retaliation ever accrued—for example, where the employer retaliated against a relator more than six years after the Section 3729 violation.

Thus, based on its unease with the Act’s “textual anomaly” and concern for this hypothetical relator, the Supreme Court held that the FCA limitations period does not apply to Section 3730(h) actions.

Circuit Court Decisions

Shekoyan v. Sibley International, 409 F.3d 414 (D.C. Cir. June 3, 2005)

The D.C. Circuit affirmed a dismissal of the plaintiff’s FCA retaliation allegations, holding that the employee must show: (1) that he engaged in protected activity (*i.e.*, acts done in furtherance of an action under this section); and (2) that he experienced discrimination “because of” his protected activity. Furthermore, the court stressed that

to establish the second element, the employee must demonstrate that the employer had knowledge of the employee's protected activity and that the retaliation was motivated by the protected activity.

While the employee "must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir.1996), it is not necessary for a plaintiff "to 'know' that the investigation . . . could lead to a False Claims Act suit." *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 741 (D.C. Cir. 1998). However, "[m]ere dissatisfaction with one's treatment on the job is not . . . enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Id.* at 740. The court also stressed that an employee does not engage in protected conduct if he "merely inform[s] a supervisor of the problem." *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997).

Here, the relator admitted that he never concluded or reported that the employer was corrupt. Rather, he thought that there were some issues "that need to be kind of addressed or corrected or fixed or . . . worked out." Thus, the D.C. Circuit concluded that the relator's own statement manifested that he did no more than "inform[] a supervisor of [a] problem," and thus did not engage in "protected activity" under the FCA.

***Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840 (7th Cir. May 31, 2005)**

The Seventh Circuit, in affirming a lower court decision, held that a showing of irreparable harm is required for preliminary injunctive relief under the FCA, because the statutory language of Section 3730(h) supports the position that customary equitable considerations should be made. The court ruled that the plaintiff failed to establish irreparable harm from being terminated – even if he lost income, suffered from a damaged reputation, and was unable to find another job.

The Seventh Circuit observed that an injunction is an equitable remedy that courts may grant at their discretion in the extraordinary situations where legal remedies such as monetary damages are inadequate. To obtain an injunction, the type of injury would have to be a real departure from the harms common to most discharged employees.

After statutory review, the court concluded that the FCA does not clearly mandate injunctive relief for a particular set of circumstances. Thus, the court was bound to employ traditional equitable considerations (including irreparable harm) in deciding whether to grant such relief. In fact, the Seventh Circuit ruled that rather than disposing of the irreparable harm requirement, the FCA actually supports the position that the customary equitable considerations should be made. The court took special note that

there is no mention of preliminary relief, and that the statute specifically discusses monetary damages and reinstatement as remedies that can make a plaintiff whole.

Schuhardt v. Washington University, 390 F.3d 563 (8th Cir. Dec. 3, 2004)

The Eighth Circuit ruled that, while the relator failed to provide sufficient evidence of an False Claims Act (FCA) violation, a genuine issue of material fact precluded summary judgment in the Section 3730(h) retaliation action.

According to her complaint, Schuhardt complained to her employer that the University's billing practices were illegal and fraudulent. The district court determined that Schuhardt merely fulfilled her regular job responsibilities, so her actions were not protected "in furtherance" of a *qui tam* action. The Eighth Circuit reversed, finding the district court "ignored the fact that Schuhardt copied files and took them home to substantiate the existence of fraud" – actions not included in her job description. Thus, there was sufficient evidence that her activity was in furtherance of a *qui tam* action.

The Eighth Circuit also ruled that Schuhardt's statements to her supervisor were sufficient to provide notice that she was engaged in protected activity. She told her employer that she thought the billing practices were "illegal" and "fraudulent" and that "if the OIG would come in they would frown upon us and they'd pretty much wipe us out." Subsequently, Schuhardt was discharged from her position.

U.S. ex rel. Williams v. Martin-Baker Aircraft Company, Ltd., 389 F.3d 1251 (D.C. Cir. Nov. 26, 2004)

The D.C. Circuit upheld dismissal of the FCA claim for failing to plead with particularity, while reversing dismissal of the Section 3730(h) retaliation claims, under the more liberal pleading rules that govern those claims.

The lower court had ruled that the relator could not have been engaged in "protected activity," for he was fired eighteen months before he filed his complaint. Rejecting this, the court of appeals stressed, "it is sufficient that a plaintiff be investigating matters that reasonably could lead to a viable False Claims Act case." 389 F.3d at 1260.

The court of appeals reiterated the rule that the employer must have had notice of protected activity. Here, much of Williams' actions fell within his normal responsibilities as Chief Contract Negotiator. Relator acknowledged that he "did his job" by informing his employer about the subcontractor's faulty data. However the relator's advice "to continue to challenge" the subcontractor's cost or pricing data went beyond his job responsibilities, for he went outside the company and alerted the Government.

Fanslow v. Chicago Manufacturing Center, Inc., 384 F.3d 469 (7th Cir. Sept. 20, 2004)

The Seventh Circuit reversed and remanded for further development of the record a district court's dismissal of a section 3730(h) retaliation action.

The court set out the following elements of plaintiff's 3730(h) claim: (1) his actions were taken "in furtherance of" an FCA enforcement action and were therefore protected by the statute, (2) his employer had knowledge that he was engaged in this protected conduct, and (3) his discharge was motivated, at least in part, by the protected conduct.

In examining "protected activity," the Seventh Circuit chastised the district court for just focusing on the relator's conversation with the government official, and for ignoring the relator's numerous internal complaints. An employee's internal complaints within the corporation may be considered protected conduct; he did not need to raise his concerns directly to the Government.

In considering the "notice" element, the court of appeals distinguished *Brandon v. Anesthesia & Pain Mgmt. Assoc., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002), 26 TAF QR 21 (Apr. 2002). In *Brandon*, the court determined that the relator had not put the employer on notice of a possible FCA action by reporting unlawful billing practices because this type of monitoring was also part of his particular job description.

But in this case, the plaintiff did not have reporting duties, and thus the court did not require him to use any "magic words," such as "illegal, fraudulent, or false," to notify defendant. Plaintiff only had to show that defendant was aware of his investigation.

Finally, in considering the motivation element, the court pointed out that once the employee asserting a section 3730(h) claim shows a discharge motivated, at least in part, by protected conduct, the burden then shifts to the employer to prove that the same decision would have been made absent the protected activity.

District Court Decisions

U.S. ex rel. Scott v. Metropolitan Health Corporation, 2005 WL 1484507 (W.D. Mich. June 23, 2005)

A former corporate officer with assigned legal compliance responsibilities sued his former employer, alleging FCA retaliation violations. The district court held that the employee failed to establish that the reason for her termination was pretextual because the employee's status as a compliance officer required a heightened notice that she

intended to further a qui tam action, rather than merely intending to warn the corporation of the consequences of its conduct. In this case, the court determined that the relator did not satisfy this heightened notice requirement.

U.S. ex rel. Guadalupe v. The Goodyear Tire & Rubber Co., 2005 WL 1324977 (N.D. Ohio June 3, 2005)

An Ohio district court granted the defendant-employer's motion for summary judgment in an action alleging retaliation. The court ruled that the relator's Section 3730(h) claim was barred under the doctrine of *res judicata*, because the plaintiff failed raise his retaliation claim at an earlier full arbitration hearing. However, even if the court misapplied the doctrine of *res judicata*, the court maintained that the plaintiff failed to show that he was engaged in "protected activity," as defined by Section 3730(h) case law.

Mack v. Augusta-Richmond County, Georgia, 365 F. Supp. 2d 1362 (S.D. Georgia April 18, 2005)

A Georgia district court granted the employer-defendant's motion for summary judgment in an action alleging violations of the FCA whistleblower retaliation provision. The court ruled that there was no distinct possibility of an actionable FCA claim when the plaintiff reported alleged irregularities in a re-bid process to Department of Housing and Urban Development and, thus, the employer was not liable under Section 3730(h).

Elizondo v. University of Texas at San Antonio, 2005 WL 823353 (W.D. Tex. April 7, 2005)

A Texas district court held that a plaintiff cannot sue a state entity under Section 3730(h), because there is no "clear statement" in the FCA subjecting states to § 3730(h) liability. Likewise, the court held that because suits against state officials in their official capacity are treated as suits against the State itself, a private individual cannot sue a state official in his official capacity under Section 3730(h). However, the court ruled that a plaintiff's Section 3730(h) suit could proceed against a state official if he is suing him in his individual capacity.

U.S. ex. rel. Lang v. Northwestern University, 2005 WL 670612 (N.D. Ill. March 22, 2005)

Relator's FCA action was dismissed as it cannot be pursued *pro se*, but allowed Section 3730(h) claim to proceed because it was personal rather than governmental. The court also allowed the claim against her direct employer, even where her underlying

protected activity did not involve reporting a false claim made by that employer. In addition, the Court refused to dismiss her retaliation claim against a non-employer entity because it could not rule out her argument that it was her “de facto” employer.

U.S. ex. rel. Hinden v. UNC/Lear Services, Inc., 362 F.Supp.2d 1203 (D. Hawaii March 15, 2005)

Because Congress did not include a Statute of Limitations period for FCA retaliation claims, the court applied a 90 day period, derived from the most closely analogous statute, the Hawaii Whistleblowers’ Protection Act.

Maturi v. McLaughlin Research Corp., 326 F.Supp.2d 313 (D.R.I. July 22, 2004)

The Court held that actions within a relator’s employment obligations are not “protected conduct,” unless the relator clearly communicates that he is bringing or assisting in an FCA action. The relators, including the company’s President, had complete authority to determine whether or not to bill the government. When relators learned that the Chairman of the Board hired two family members, the relators informed him that he was violating government regulations. The relators were then fired. But since evaluating and submitting claims were the relators’ responsibility and duty, their actions were considered part of their job and were not protected activities -- absent clear notice that they were pursuing an FCA action.