

Fourth Circuit Issues Ruling Interpreting False Claim Act Whistleblower Amendments

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The **Fourth Circuit** recently issued a [decision](#) interpreting the anti-retaliation provision of the **False Claims Act (FCA)**. The decision provides important clarification about how courts may interpret 2009 and 2010 amendments to the anti-retaliation provision. Specifically, it finds that courts may inquire whether the employee's underlying complaint of FCA fraud is objectively and subjectively reasonable. Congress first enacted the FCA during the Civil War to protect the government from fraudulent claims for payment. The FCA's two key provisions impose liability for any person (1) who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" or (2) who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(1)-(2). The FCA contains an anti-retaliation provision. 31 U.S.C. § 3730(h).

Prior to 2009, the anti-retaliation provision applied only to employee conduct "in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." Congress amended the statute in 2009 and 2010. The statute now applies to employee conduct "in furtherance of an action under this section or *other efforts to stop 1 or more violations of this subchapter*." Thus, an employee potentially can demonstrate protected activity either by showing steps taken (1) in furtherance of an FCA action or (2) to stop a violation of the FCA.

In **Carlson v. Dyncorp International, LLC**, the Fourth Circuit interpreted for the first time the "other efforts" language in the FCA anti-retaliation provision. Carlson claimed that the company terminated him for complaining about the indirect cost rate that the company used to bid for a project for the United States Agency for International Development (USAID). The district court granted the company's motion to dismiss, finding that Carlson's allegations did not establish that he engaged in protected activity under the FCA's anti-retaliation statute.

The Fourth Circuit affirmed the district court's decision, but concluded that the district court used a standard based on the pre-2009 FCA anti-retaliation provision. The district court concluded that the employee had to allege that he was investigating matters that reasonably could lead to a viable FCA action, also called the "distinct possibility" standard. The Fourth Circuit concluded that the district court's analysis applied only to the "furtherance" prong of the anti-retaliation statute.

To establish that he satisfied the “other efforts” prong, the Court found, the employee had to show that his efforts to stop a violation of the FCA were based upon an objectively and subjectively reasonable belief of an FCA violation. In other words, the appropriate inquiries, according to the Court, are “does [the employee] allege facts sufficient to show that he believed [the employer] was violating the FCA, that his belief was reasonable, that he took action based on that belief, and that his actions were designed to ‘stop 1 or more violations of’ the FCA.”

Applying this standard, the Fourth Circuit concluded that the employee failed to show that his belief was objectively reasonable. The employee’s theory amounted to a claim that the company was “under billing the government on existing contracts.” Under billing, however, does not constitute an FCA violation. The Fourth Circuit emphasized that the employee nowhere explained “how or which provisions” had been violated by the claimed under billing. As a result, the Fourth Circuit affirmed the district court’s grant of the employer’s motion to dismiss.

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National Law Review, Volume VI, Number 257

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