

June 11, 2015

District Court Holds False Claims Act Applies to Employee Allegedly Terminated for Engaging in Protected Activity Against Unrelated Former Employer

BY GREGORY KEATING, EDWARD ELLIS, AND JOSEPH LAZAZZERO

In a matter of first impression, the U.S. District Court for the Western District of Pennsylvania in *Cestra v. Mylan Inc.* No. 15-0873 (E.D. Pa., May 22, 2015) held that the antiretaliation provision of the False Claims Act applies to an employer who terminates an employee for engaging in protected conduct against an unrelated entity. Although the plaintiff conceded his prior *qui tam* action against a former employer was wholly unrelated to the immediate defendant, the district court held that a plaintiff does not need to engage in protected activity against the actual defendant, just that the defendant retaliated against him as a result. The district court also recognized, however, that it was the first court to construe the False Claims Act's ("FCA" or the "Act") antiretaliation provisions in such a way, and therefore granted immediate interlocutory review of its order before the U.S. Court of Appeals for the Third Circuit.

The Complaint and District Court Decision

In 2010, the plaintiff filed a FCA claim against his then employer, Cephalon, Inc. ("Cephalon"). The original complaint was filed under seal and the realtor only identified in subsequent pleadings as "John Doe." In 2011, the plaintiff began working for defendant Mylan Pharmaceuticals, Inc. ("Mylan" or the "Company"), which is entirely unrelated to Cephalon.

On July 10, 2013, the United States unsealed the pleadings in the plaintiff's case against Cephalon, and the plaintiff's identity as the realtor in the case became public knowledge. Approximately seven months later, the web page of Café Pharma, an informational website for the pharmaceutical industry, posted a link to an article regarding the Cephalon case that identified the plaintiff as a "whistleblower." The plaintiff alleges that upon seeing the article he immediately emailed his supervisors at Mylan, assuring them that he was not engaged in any form of whistleblowing against the Company. The plaintiff also alleges that his repeated requests to meet with his supervisors to discuss his case against Cephalon were ignored and he soon became ostracized by the Company. In May 2014, Mylan terminated the plaintiff's employment citing performance issues.

On June 24, 2014, the plaintiff filed a FCA claim against Mylan in a Pennsylvania district court, alleging that Mylan violated the antiretaliation provisions of the FCA when it terminated him for bringing a *qui tam* action against his former employer. Mylan then filed a motion to dismiss, which was heard by a Magistrate Justice. On April 6, 2014, the Magistrate issued a report recommending that the court deny Mylan's motion to dismiss, reasoning that the plaintiff need not plead that he engaged in protected activity against Mylan, but only that he engaged in protected activity under the FCA and that Mylan terminated him as a result.

Mylan then filed a timely objection to the Magistrate's Report and Recommendation with the district court. Mylan alternatively filed a motion for certification pursuant to 28 U.S.C. § 1292(b) requesting the court certify its order for immediate appeal to the Third Circuit if the court adopted the Magistrate's Report and Recommendation.

On May 22, 2015, the district court adopted the Magistrate's Report and Recommendation, and denied Mylan's motion to dismiss. In its reasoning, the court stressed that the antiretaliation provision of the FCA is remedial in nature and that courts should therefore construe it broadly. The court adopted the Magistrate's interpretation that the antiretaliation protections should not be narrowly read to apply only in instances where a plaintiff engages in protected activity directly against the defendant. Rather, the court concluded, entities may be liable under the FCA any time they retaliate against an employee for engaging in activity that is defined as protected conduct under the Act. At the same time, however, the court also recognized that "[t]he parties have not identified, and the court's research has not yielded, any authority in which a court has held that the antiretaliation provision of the FCA applies to an employer who fires an employee for engaging in protected conduct against an unrelated entity." As a result, the court also granted Mylan's motion for immediate appeal and granted interlocutory review of its order before the Third Circuit, where the matter remains pending.

Impact on Employers

The Third Circuit's pending decision on this matter may significantly impact companies' overall exposure to FCA retaliation claims. If the circuit court upholds the district court's order, there is an argument that any individual who ever filed a *qui tam* action against an employer could in essence be in a perpetual state of protected activity. This means companies could now be exposed to FCA suits not just from whistleblowers against their own entities, but also those who blew the whistle against wholly unrelated companies in years past. Moreover, if an employee's previous protected activity need not have any relation with its current employer, some companies may not even be aware of this additional litigation risk when making personnel decisions.

It is also important to note that the plaintiff in *Cestra v. Mylan, Inc.* was a current employee, as opposed to a job applicant. In contrast, in *Vander Boegh v. EnergySolutions, Inc.* 772 F.3d 1056 (6th Cir. 2014), the plaintiff claimed that he was denied a job because he engaged in FCA protected whistleblower activity at a prior job. The Sixth Circuit dismissed the claim, holding that the plain language of the FCA's antiretaliation provisions only apply to "employees"—not job applicants. That being said, *Cestra* and other court decisions throughout recent years have commonly stressed the exceedingly "broad remedial scope" of federal whistleblower laws, and employers must remain cautious whenever dealing with these statutes.