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First Cir. Sets Pleading Standard For FCA Whistleblower Retaliation Claims

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On January 15, 2019, the First Circuit ruled that a plaintiff adequately alleges protected activity under the FCA whistleblower protection provision where he asserts that he reported concerns about his employer's conduct that could reasonably lead to a viable FCA action. *Guilfoile v. Shields, Sr.*, No. 17-1610.

Background

Plaintiff, a former executive of pharmacy chain Shields Health Solutions who reported directly to owner John Shields, alleged that during the course of his employment he became concerned that Shields was paying a consulting firm $35,000 per quarter for each hospital contract the consulting firm successfully referred to the company. Plaintiff allegedly believed this violated the federal Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b)(2)(B). Plaintiff alerted Shields of his alleged concerns, causing Shields to have the consulting firm waive a payment yet to be made for one of two referrals. Allegedly believing this was insufficient, Plaintiff asked Shields to notify the board of directors, but Shields refused. On December 22, 2015, Shields told Plaintiff he was concerned that Plaintiff was "going over his head," and suggested they consider "parting ways." A week later, the company terminated Plaintiff's employment with no further explanation. Plaintiff then sent the board of directors a letter setting forth the concerns he previously voiced to Shields. Thereafter, Shields alleged that Guilfoile threatened to sue him for defamation and tortious interference. On February 26, 2016, Guilfoile received a letter from the company stating for the first time that his employment had been terminated for cause.

Ruling

Plaintiff filed suit against Shields, Shields Health Solutions and several related entities alleging he was retaliated against under the FCA. He alleged that defendants retaliated against him for his "efforts to stop violations of the [FCA]," specifically his "disclosures … related to kickbacks [defendants] paid [to the consulting firm] in exchange for referrals of federally insured patients." Plaintiff further alleged that he reasonably believed the payments violated the Anti-Kickback Statute. The District of Massachusetts granted a motion to dismiss, determining Plaintiff failed to adequately plead protected activity.

A split panel of the First Circuit reversed the dismissal of Plaintiff's claim that he was retaliated against under the FCA for complaining of kickbacks. The majority determined that protected activity under the FCA should be interpreted broadly, and a plaintiff need only plead that he was retaliated against based on conduct that reasonably could lead to a viable FCA action. In other words, a plaintiff need not plead the existence of the actual submission of a false claim to the government. Moreover, because an FCA retaliation claim does not require a showing of fraud, a plaintiff alleging retaliation need not meet the heightened pleading standards of FRCP 9(b).

Implications

This decision arguably sets a less stringent pleading standard with respect to protected activity under the FCA.

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