

Alleging Improper Use of Funds Legitimately Obtained from the Government Insufficient to State FCA Retaliation Claim

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by Ben Kappelman

The U.S. District Court for the Southern District of Texas has dismissed an FCA retaliation claim brought by a nurse who claimed to have blown the whistle on misuse of funds at a hospital that received significant federal revenue. In *Endicott v. Oakbend Medical Center*, the nurse alleged she was fired after she complained that several hospital executives were using hospital employee time to enrich the executives' private business. She alleged the hospital and executives "knowingly used Medicaid and Medicare funds that were supposed to be used to pay vendors, physicians, and fund employee salaries" to advance the private business's interests. She claimed illegal retaliation under the FCA, asserting she was fired for objecting to the alleged activity.

The FCA bars an employer from retaliating against an employee who engages in lawful acts in furtherance of an FCA lawsuit or other efforts to stop FCA violations. But the employee's acts must be aimed at matters that could reasonably lead to a viable FCA claim. For an employee's internal complaints to be protected, they must concern false or fraudulent claims for payment submitted to the federal government. The employee must allege that she believes in good faith, and a reasonable employee in similar circumstances might believe, that the employer is defrauding the government. Complaining about an employer's internal misconduct unrelated to false claims is not enough. Nor is it sufficient to allege a non-governmental third party was the victim of fraud.

The court rejected the premise of the nurse's FCA claim—the hospital's receipt of "substantial revenue" from Medicare and Medicaid. The nurse alleged the hospital improperly used this revenue to pay employees who were simultaneously working for the executives' business. But she failed to assert that the hospital submitted false claims for payment to the federal government. The hospital's alleged use of legitimately obtained funds for improper purposes did not create FCA liability. The nurse's subjective belief that the hospital's activity constituted fraud on the government was thus insufficient to state a claim for retaliation.

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The court's decision reaffirms that hospitals may face a host of consequences for misusing legitimately obtained federal revenue, but FCA liability is not typically one of them.