

D.C. Circuit Weighs in on the FCA's Anti-Retaliation Statute

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by Benjamin Greenberg

Last month, the D.C. Circuit revived a False Claims Act (“FCA”) retaliatory discrimination claim by a former employee of Howard University contending that she was fired by the University for objecting both internally and externally to the University’s alleged failure to maintain the humane laboratory animal living conditions on which the University’s receipt of federal funding was conditioned. *See Singletary v. Howard University*, No. 18-7158 (D.C. Cir. Sept. 20, 2019). The lower court dismissed the case for failure to state a claim and denied the employee’s motion for leave to amend her complaint on the grounds of futility. In reversing the lower court’s decision, the D.C. Circuit reasoned that the lower court took too narrow of a view of the FCA’s protection for whistleblowers, and clarified the proper standards for analyzing what constitutes protected activity under the FCA’s anti-retaliation statute.

As a voluntary recipient of funding from the federal government for research activities involving live animals, the University is subject to the Animal Welfare Act and the Health Research Extension Act. In addition to mandating internal compliance with these acts and their corresponding regulations, they also require that each qualifying institution file a report with the Department of Agriculture and the National Institutes of Health (“NIH”) certifying compliance with the required animal welfare standards. These certifications are necessary for research institutions to receive and retain grant monies.

In her proposed amended complaint, the plaintiff, Dr. Sylvia Singletary, alleged the following. In 2013, Singletary was retained by the University for a 30-month appointment as the Attending Veterinarian at its Medical School. Singletary alleges that over an approximately nine month period she repeatedly warned her direct reporting superior that the air temperature in the laboratory animals’ living quarters was too high, was not in compliance with the NIH standards, and constituted violations of the terms and conditions of the University’s grants from the NIH. She urged him to take corrective action to remedy the temperature deviations and report the non-compliance to the federal government, but her superior did neither. She then voiced her concerns with the Dean of the Medical School and another superior, who both likewise were unresponsive.

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Over the same time period that Singletary was registering warnings and complaints internally, the University made certifications to the NIH and other federal agencies that the laboratory animals were being maintained and cared for under certain federally mandated ambient living conditions. Things came to a head when in mid-April 2014, Singletary arrived at work to find 21 mice dead from apparent heat exhaustion. Because she believed her superiors had not acted in response to her prior complaints, she took matters into her own hands by e-mailing the NIH directly to report the rodents' deaths and air temperature issues generally. The NIH thanked Singletary and directed her superior to submit a corrective action plan; this prompted the University to finally solve the air temperature problem. Shortly thereafter, Singletary's superior excoriated her at a faculty meeting and the University subsequently notified Singletary that it was cutting her appointment short by six months. Singletary subsequently filed a lawsuit against the University alleging that the University's termination of her employment constituted a violation of the FCA's anti-retaliation provision (31 U.S.C. § 3730(h)).

The FCA offers protection to whistleblowers who seek to expose or to prevent government fraud. To make out a claim of retaliation under the FCA, a plaintiff must plead facts showing: (1) that he/she engaged in protected activity, (2) because of which he/she was retaliated against. To satisfy the second element, a plaintiff must further allege (a) that the employer knew he/she engaged in protected activity, and, at least in the D.C. Circuit, (b) that the retaliation was motivated at least in part by his/her protected activity (the majority of circuits require "but-for" causation). As the Court explained in its opinion, protected activity under the FCA takes two forms: (1) lawful acts done in furtherance of an action under the FCA – that is, steps taken antecedent to a FCA proceeding; namely, investigating matters that reasonably could lead to or have a distinct possibility of leading to a viable FCA claim; or (2) lawful acts done in furtherance of other efforts to stop one or more violations of the FCA.

In *Singletary*, the Court focused its analysis on the second protected activity prong, which unlike the first, is not tied to the prospect of a FCA proceeding. Instead, it focuses on the whistleblower's efforts to stop violation of the statute before they happen or recur. As the Court explained, "[t]o put it simply, the focus of the second prong is preventative—stopping 'violations'—while the first prong is reactive to an (alleged) actual violation of the statute." Like the first prong, the second prong requires that the employee's efforts pertain to fraud in connection with the submission of a claim for federal government funds. That test is met if the employee has an objectively reasonable belief that the employer is violating, or will violate, the FCA. This reasonable belief standard is meant to avoid burdening a lay person with the "sometimes impossible task" of correctly anticipating how a given court will interpret a particular statute.

The Court found that Singletary's proposed amended complaint sufficiently alleged protected activity under the second prong, and thus reversed the lower court. In doing so, the Court first reasoned that the lower court had incorrectly analyzed the second protected activity prong to require the plaintiff to have investigated matters that reasonably could lead to a viable FCA claim. The Court clarified that this requirement only applies to the first prong, as the second prong focuses exclusively on preventing or

abating violations of the law in the first place. Second, the Court stated that the lower court had wrongly required Singletary to allege that her efforts were outside the scope of her responsibilities as Attending Veterinarian; a causal inquiry that also only applies to the first prong. Thus, the Court held that when viewed through the proper lens, the proposed complaint plausibly alleges that Singletary undertook lawful acts in furtherance of her efforts to stop one or more violations of the FCA. The Court also went on to find that Singletary had plausibly alleged the remaining elements of a retaliation claim, which require a showing of (a) a qualifying retaliatory employment action; (b) the University's knowledge that she was engaged in protected activity; and (c) facts showing that the employment action was caused by engagement in that activity.

The Court also pointed out that the lower court incorrectly suggested that FRCP 9(b)'s heightened pleading standard for fraud is applicable to the relation claim. The Court clarified that while FRCP 9(b) does apply to FCA *qui tam* actions, it does not extend to retaliation claims because such claims do not themselves assert or seek to prove actual fraud.

The D.C. Circuit's opinion provides a useful clarification for lower courts regarding the differing and applicable standards for analyzing what constitutes protected activity under the first and second prongs of the anti-retaliation statute. As the Court reiterated throughout its opinion, the second prong is focused on conduct that is meant to prevent or abate violations of the FCA, when the employee reasonably believes the employer has or will violate the law.