

Fired Employee Alleges Employer Unlawfully Retaliated Against Him For Complaining of PPP Fraud

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by Kirk Schuler and Alex Hontos

Civil litigation by private parties alleging False Claims Act (“FCA”) violations related to Paycheck Protection Program (“PPP”) fraud appears to be heating up. On September 22, 2021, a former restaurant manager filed a complaint in the Eastern District of New York alleging he was unlawfully terminated from his employment in retaliation for complaining to his employer that it had unlawfully spent its PPP loan proceeds. The case, *Eric Bieber v. Cayuga Capital Management, LLC, Sea Wolf Services, LLC, Jacob Sacks, & James Wiseman*, No. 1:21-cv-05268 (E.D.N.Y.), demonstrates not only the substantive FCA risks facing PPP loan borrowers in obtaining and using a PPP loan, but the related retaliation risks under the FCA’s anti-retaliation provisions in 31 U.S.C. § 3730(h) when employees raise concerns about a borrower’s eligibility for or use of a PPP loan.

According to the publicly available complaint, defendants owned and operated several trendy New York restaurants and a motel that plaintiff helped manage for several years until the summer of 2021 when he was terminated. Plaintiff alleges that one of the defendants—defendant Sea Wolf Services, LLC (“Sea Wolf”), a company created to employ the staff working at a related “Sea Wolf – Bushwick” restaurant in Brooklyn—obtained a PPP loan between \$350,000 and \$1 million to help weather the pandemic. (Although not alleged in the complaint, the publicly available information online shows that Sea Wolf received a “first draw” loan of \$411,217 in 2020 and a “second draw” loan of \$575,704 in 2021.^[1]) Plaintiff further alleges that approximately one month after receiving the PPP loan, the employee roster for Sea Wolf “included eight individuals who did not work at any of the related Sea Wolf restaurants, but had personal connections to [defendants], including business partners and relatives.” In sum, plaintiff alleges that defendant Sea Wolf unlawfully spent its PPP loan proceeds to pay the defendants’ friends, family and business associates, rather than on legitimate payroll expenses.

Plaintiff’s complaint does not, however, assert substantive FCA violations against defendants for filing false claims against the government for allegedly misusing the PPP loan proceeds. Instead, Plaintiff’s unique complaint alleges a single violation under the

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FCA's anti-retaliation provision in 31 U.S.C. § 3730(h) against defendants for allegedly taking adverse employment action against plaintiff (ultimately terminating his employment) after plaintiff had allegedly engaged in protected activity by complaining about defendant Sea Wolf's alleged misuse of the PPP loan proceeds. As part of his requested relief, plaintiff demands damages for front pay, two times the amount of back pay, emotional distress damages, and attorneys' fees and costs. Although the available damages under the FCA for anti-retaliation violations is often less than the potential damages for substantive FCA violations (substantive violations allow for civil penalties for each false claim in addition to damages representing three-times the amount of the government's loss), anti-retaliation claims nevertheless create significant risk. This is particularly true when emotional distress damages are sought, which can be quite high depending on the conduct involved and the alleged severity of a plaintiff's emotional distress. PPP borrowers therefore must be diligent in complying with all of the rules on eligibility, use, and forgiveness of PPP loans to avoid allegations that they presented false claims to the government related to such loans, and, as this new case shows, diligent in responding to employee complaints that they violated the rules of the PPP.

[1] See *Tracking PPP*, Pro Publica, available at <https://projects.propublica.org/coronavirus/bailouts/> (last searched September 27, 2021).