

Third Circuit Confirms Expansion of Anti-Retaliation Standard Under the False Claims Act

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On November 30, 2022, the Third Circuit Court of Appeals vacated dismissal of a retaliation action brought by Don Ascolese (“Ascolese”) under the False Claims Act (“FCA”). See *United States ex rel. Don Ascolese v. Shoemaker Constr. Co.*, No. 21-2899, ECF No. 30 (3d Cir. 2022) (“3d Cir. Opinion”).

In the complaint before the lower court, Ascolese alleged that Shoemaker Construction Co., McDonough Bolyard Peck (“MBP”), and Shoemaker Synterra JV falsely certified construction work in a public housing project for the Philadelphia Housing Authority (“PHA”) such that the project was not in compliance with build specifications or in accordance with established building and safety codes. See *United States ex rel. Don Ascolese v. Shoemaker Constr. Co.*, No. 2:18-cv-01864-MSG, ECF No. 26 (E.D. Penn. May 3, 2018). Ascolese also claimed he was fired for raising the issue internally, which allegedly violated the FCA’s anti-retaliation provisions because whistleblowing is a protected activity. *Id.*

In response to the allegations, all three Defendants moved to dismiss all claims on the basis that Ascolese’s complaint failed to meet threshold-pleading requirements. On April 19, 2021, the District Court dismissed the vast majority of Ascolese’s claims against the Defendants, including dismissing all retaliation claims. *Id.* at ECF No. 42. In finding Ascolese’s retaliation claims were not plausibly plead, the District Court explained that Ascolese had not demonstrated that MBP had knowledge that Ascolese was engaging in protected conduct and that because Ascolese was not an employee of Shoemaker Construction or Shoemaker Synterra JV, as a matter of law Ascolese could not pursue a claim for retaliation against them. *Id.* at 22-24.

Following dismissal of his claims for retaliation, Ascolese moved for leave to file a Second Amended Complaint, which MBP opposed. The District Court denied the motion, finding that Ascolese had failed to plead “reliable indicia” for the court to infer false claims were submitted to MBP, and that Ascolese had merely “re-package[d]” his

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previously deficient claims of retaliation. *Id.* at ECF No. 48. Ascolese appealed.

In an opinion dated November 30, 2022, the Third Circuit Court of Appeals vacated the District Court's decision to deny Ascolese the opportunity to file a Second Amended Complaint, explaining that the District Court did not take into consideration statutory changes to the FCA retaliation standard introduced by Congress in 2009 and 2010. 3d Cir. Opinion at 3-4.

The Third Circuit explained that Congress had previously "expanded the universe of protected conduct to whistleblowers who lawfully try to stop one or more violations of the Act, without regard to whether their conduct advances a *qui tam* suit under the Act." *Id.* at 4. In effect, Congress had taken steps not only to protect "potential or actual" *qui tam* actions, but also to remedy misconduct "whether or not such steps are clearly in furtherance of a potential or actual *qui tam* action." *Id.* at 5. Therefore, the Third Circuit explained, the 2009 and 2010 FCA amendments expanded the anti-retaliation standard to protect "lawful acts in furtherance of *either* an action under the FCA *or other efforts to stop 1 or more violations of the Act.*" *Id.* at 12 (emphasis in the original).

Under the new standard, the Third Circuit found that Ascolese had sufficiently plead that he engaged in "protected conduct" when he "went outside of his chain of command to report his concerns of fraudulent work to the PHA," raised project "issues and safety concerns" with superiors at MBP and to PHA, and sufficiently plead that MBP was on notice of his protected conduct and retaliated against him because of it. *Id.* at 14-16. Accordingly, the Third Circuit vacated the District Court's denial of Ascolese's motion for leave to file a Second Amended Complaint and remanded to the District Court.

Companies and practitioners should familiarize themselves with the ever-changing standards implemented by Congress and the courts, especially in jurisdictions that have not yet explicitly adopted the post-amendment standards for retaliation under the FCA. Understanding the scope of the amendments, and what is required to allege retaliation, will be vital for companies to ensure they are not running afoul of the expanded standards under the FCA.