

Underwriter Failed to Meet Employer's Expectations, and thus His FCA Retaliation Burden, at Least in the Eighth Circuit

April 17, 2020 – FCA Now

by Briana Al Taqatqa

On Monday, the U.S. Court of Appeals for the Eighth Circuit affirmed the Eastern District of Missouri's dismissal of appellant's retaliation claim under the False Claims Act, as well as his state law wrongful discharge claim and quasi-contract claims. The decision, *Sherman v. Berkadia Commer. Mortg. LLC*, No. 19-1373, 2020 U.S. App. LEXIS 11713 (8th Cir. Apr. 14, 2020), is yet another example of the difficult "but-for" causation standard required by the Eighth Circuit—but not all circuits—to establish a prima facie case of retaliation under the FCA.

Appellant, Richard Sherman, was a former senior vice president and chief underwriter for Berkadia Commercial Mortgage LLC. Sherman was responsible for a team of underwriters that reviewed mortgages to ensure Berkadia's compliance with the Department of Housing and Urban Development's ("HUD") commercial lending regulations. Sherman's role required him to voice concerns if his team suspected HUD violations or other wrongdoing.

As described in the opinion, tensions arose between Sherman and Berkadia. Eventually, the relationship between Sherman and Berkadia's production manager became unworkable and Berkadia procured an outside consultant to mediate the situation. When those efforts failed, Berkadia terminated Sherman's employment.

Sherman sued Berkadia alleging, among other things, retaliation in violation of the False Claims Act. Berkadia brought a motion for summary judgment, which the district court granted in full and the Eighth Circuit affirmed. The appeals court concluded Sherman failed to meet his burden of proof necessary to establish a prima facie case of FCA retaliation.

That burden required that Sherman show "(1) [he] engaged in protected conduct, (2) [Berkadia] knew [he] engaged in protected conduct, (3) [Berkadia] retaliated against [him], and (4) the retaliation was motivated solely by [Sherman's] protected activity." *Id.* at *10 (citing *United States ex rel. Strubbe v. Crawford Cty. Mem'l Hosp.*, 915 F.3d 1158,

Related People

- Briana Al Taqatqa

Related Capabilities

- Healthcare Enforcement & Compliance
- Government Enforcement & Corporate Investigations

1168 (8th Cir. 2019)). The court emphasized, regarding the fourth element, that “[t]he ‘motivated solely by’ causal link required as part of the prima facie case of a FCA retaliation claim is tighter than that required in other types of retaliation and discrimination claims where we use the same *McDonnell Douglas* framework.” *Id.* at *11 (citations omitted). It is “tighter” because it establishes “but-for” causation. *Id.* Moreover, it is especially tight in the Eighth Circuit because “but-for” causation is required at the prima facie stage. Other circuits only apply a “causal connection” or similar standard at the prima facie stage, and reserve “but-for” causation at the final pretext stage. See *Garcia v. Prof’l Contract Servs.*, 938 F.3d 236, 241-43 (5th Cir. 2019) (noting “[t]he circuits are split on this issue,” and holding consistent with the Third and the Fourth Circuits that “the heightened but-for causation requirement applies only in the third step (the pretext stage) of the *McDonnell Douglas* framework”); *Singletary v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019) (requiring that “the retaliation was motivated ‘at least in part’ by her protected activity”).

In Sherman’s case, the court concluded that he failed to meet the Eighth Circuit’s but-for standard at the prima facie stage because the record evidence showed that Sherman failed to meet Berkadia’s performance expectations, especially with regard to his inability to cooperate with others. Thus, no reasonable jury could find Berkadia fired Sherman “solely” because of activity protected under the FCA.

Although Sherman waived his wrongful discharge claim on appeal, the court also held he failed to show that Berkadia’s activity violated “clearly mandated public policy.”

This decision serves as a reminder of the Eighth Circuit’s position requiring “but-for” causation to prove a prima facie case in support of a FCA retaliation claim, but also a reminder that not all circuits are as “tight” as the Eighth Circuit on this issue.