UNSWEET REVENGE: WHISTLEBLOWER PROTECTION UNDER THE FALSE CLAIMS ACT

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Introduction

By now, most if not all attorneys – particularly healthcare attorneys – know about the federal False Claims Act ("FCA")[1] and the types of behavior that the FCA prohibits. The government has recovered billions of dollars per year for the last several years[2] pursuing cases against healthcare providers and other entities and individuals that accept government funds for presenting false or fraudulent claims, making or using false records or statements material to such claims, and improperly concealing obligations owed to the government (e.g., the retention of an overpayment).[3] The availability of treble damages and per-claim penalties of up to $11,000[4] makes the FCA one of the most powerful tools in the federal government's arsenal. In fiscal year 2014 alone, the Department of Justice ("DOJ") recovered nearly $6 billion from FCA cases, both through settlements and judgments.[5] The Civil War-era statute originally designed to punish those who sold decrepit horses and sickly mules to the Union Army, and later revived to prevent contractors from selling $900 toilet seats to the federal government,[6] is now one of the government's most reliable and consistent sources of revenue.

The FCA's Anti-Retaliation Provision

The FCA's qui tam provisions – which permit a private whistleblower (or "relator") to file an FCA complaint on the government's behalf and collect anywhere between fifteen and thirty percent of the total recovery – provide a tremendous incentive for would-be whistleblowers and their attorneys.[7] Another incentive provided to whistleblowers is the FCA's anti-retaliation provision:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[8]

Relief for any retaliatory act in violation of the FCA includes reinstatement with the same seniority status, two times back pay plus interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and attorneys' fees.[9] The statute of limitations for FCA retaliation claims is three years.[10] Like other employment-related claims, FCA retaliation claims are typically evaluated under the *McDonnell-Douglas* burden-shifting framework.[11] Under that framework, an FCA relator must first set forth a prima facie case of retaliation.[12] The burden then shifts to the defendant to articulate "a legitimate, nonretaliatory reason for the adverse employment action," which is simply a burden of production and not a burden of proof.[13] If the defendant produces evidence of a legitimate nonretaliatory reason, the plaintiff has the further burden of showing that the proffered reason is a pretext "calculated to mask retaliation."[14] Although the substantive provisions of the FCA are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b), FCA retaliation claims are subject to the lower, notice-pleading standard of Rule 8(a), thereby making it less onerous to properly plead an FCA retaliation claim than to plead a substantive FCA violation.[15]

2009 FERA Amendment

Along with various other changes to the FCA, the Fraud Enforcement and Recovery Act of 2009 ("FERA") amended the FCA's anti-retaliation provision in an important way.[16] Prior to the FERA amendment, the FCA protected only lawful acts done "in furtherance of" an FCA qui tam action.[17] As the Seventh Circuit has explained, this language reached conduct that put an employer "on notice of potential [FCA] litigation."[18] After FERA, the FCA anti-retaliation provision now protects an additional category of conduct: "other efforts" to stop a violation of the FCA, such as reporting suspected misconduct to internal supervisors.[19] In support of the FERA amendment, Representative Howard Berman (D-Cal., retired) stated that the additional language was "intended to make clear that [§ 3730(h)] protects not only steps taken in furtherance of a potential or actual qui tam action but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department, whether or not such steps are taken in furtherance of a potential or actual qui tam action."[20] Although it has been over six years since the FERA amendments have taken effect, as discussed below, courts are still working to analyze the post-FERA anti-retaliation provision.

Recent Anti-Retaliation Court Decisions

This year has seen a flurry of important court decisions related to

the FCA's anti-retaliation provision, likely the result of the dramatic increase in FCA claims being brought by private whistleblowers.

Internal Reports of Fraud Constitute Protected Activity

Post-FERA, courts have held that internal reports of fraud – even where an employee is tasked with investigating potential fraud – constitutes protected activity under the FCA's anti-retaliation provision. In *Mikhaeil v. Walgreens Inc.*, for example, the United States District Court for the Eastern District of Michigan denied a motion for summary judgment filed by Walgreens on a pharmacist's FCA retaliation claim.[21] After making numerous complaints to management about the conditions of her employment, Mikhaeil was terminated, allegedly for failing to submit certain reports related to improperly-dispensed prescriptions.[22] Although most of the complaints that Mikhaeil made to management prior to her termination related to alleged national origin discrimination, Plaintiff testified at her deposition that she also informed management about a potential instance of Medicare fraud prior to being terminated.[23] Mikhaeil alleged that Walgreens terminated her for reporting prescription violations and Medicare fraud.[24]

Applying the *McDonnell-Douglas* burden-shifting framework, the court first held that Mikhaeil's reports of Medicare fraud were protected activity under the FCA,[25] and then held that, because Mikhaeil reported her concerns directly to her supervisor, there was sufficient evidence that Walgreens knew that Mikhaeil was engaged in a protected activity.[26] The court rejected Walgreens' argument – based upon pre-FERA case law – that Mikhaeil's report failed to provide notice to Walgreens because her job duties already required her to alert the company to potential false-claims liability.[27] The court held that because the FCA's anti-retaliation provision no longer requires that conduct be "in furtherance of" an FCA action to be protected, an employee – even if charged with investigating potential fraud – does not need to make clear his or her intentions of bringing or assisting in an FCA action.[28] Simply reporting her concerns directly to her supervisor satisfied the notice element of Mikhaeil's *prima facie* case.[29]

The court held that Mikhaeil completed her *prima facie* case by establishing a causal connection between her protected activity (report of potential Medicare fraud to her supervisor) and her termination, based upon both temporal proximity (she was terminated two weeks after making her report) and by providing evidence that, after she made her report, her work was more heavily scrutinized.[30] Finally, the court held that, for these same reasons, Mikhaeil demonstrated that the reasons given by Walgreens for her termination were pretextual.[31]

Internal Reports of Regulatory Violations Constitute Protected Activity

In *Arthurs v. Global TPA LLC*, a District Court in Orlando, Florida denied a motion to dismiss an FCA retaliation claim, finding that the plaintiff stated a claim for relief where he alleged that he was terminated for reporting violations of Medicare's HMO marketing regulations.[32] According to the complaint, Arthurs – who was hired by the defendant to sell Medicare Advantage plans – witnessed "numerous and pervasive" violations of Medicare's marketing regulations, including making prohibited, unsolicited contact with certain individuals, upselling of additional services to current members, using unapproved marketing material, and directing sales representatives to make unsolicited contact to former members.[33]

After a dispute as to whether Arthurs attended a certain marketing event, the defendant terminated Arthurs' employment.[34] The defendant moved to dismiss Arthurs' complaint, asserting that the complaint failed to allege sufficient facts showing that Arthurs engaged in protected conduct.[35] The court disagreed, holding that the complaint sufficiently alleged that his conduct fell into the anti-retaliation provision's opposition clause – conduct in furtherance of "other efforts" to stop a violation of the FCA.[36] The court held that although the Eleventh Circuit had not yet addressed the issue, the Circuit's old "distinct possibility" standard – under which an employee engages in protected conduct only where his actions place his employer on notice of a "distinct possibility" of litigation – did not apply to the anti-retaliation provision's opposition clause because, under that clause, there is no possible litigation for an employer to anticipate.[37] The court did go on to hold, however, that the anti-retaliation provision's opposition clause was not "without bound":

> By the explicit terms of the statute, only conduct which is taken as an "effort to stop" the violation is protected. ... Therefore, a person who acts to oppose an FCA violation for reasons other than protecting the federal government from potential fraud has not engaged in protected conduct. Likewise, a person who quietly refuses to participate in violative behavior with the silent hope that others will take notice is also not protected. Indeed, the FCA's purpose can only be accomplished by encouraging individuals protected by the statute to "come forward with allegations of fraud perpetrated upon the government."[38]

The court rejected the defendant's assertion that Arthurs was not engaged in protected conduct because the alleged violations of which he complained had nothing to do with fraudulent claims for payment, but rather consisted of "mere regulatory transgressions outside the scope of the FCA."[39] The court noted that, although prior to the 2009 FERA

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amendments regulatory violations could only form the basis for FCA liability where a nexus existed between the violation and a claim for payment,[40] the FERA amendments made clear that regulatory violations may now form the basis of an FCA claim where a connection exists between the violation and an entity's participation in a government-funded program.[41] The court concluded that because the defendant's participation in the Medicare Advantage program was conditioned as a matter of law on its compliance with Medicare's marketing regulations, and because Arthurs made numerous complaints about the defendant's violation of those marketing regulations, his conduct fell within the scope of the opposition clause.[42]

Terminating an Employee for Engaging in Protected Activity Against Former, Unrelated Employer Violates the FCA's Anti-Retaliation Provision

It should come as no surprise that if a company terminates an employee for filing a qui tam against it, that company has violated the FCA's anti-retaliation provision. Perhaps less obvious is that, at least in some jurisdictions, terminating an employee after discovering that the employee is a whistleblower in an ongoing qui tam case against his former, unrelated employer could also violate the FCA's anti-retaliation provision. In *Cestra v. Mylan, Inc.*, the plaintiff began working for the defendants while an FCA qui tam that he previously filed against his former employer was still under seal.[43] After Cestra's role as a qui tam relator was made public, he emailed his supervisors alerting them of this fact and assuring them that he was not "whistleblowing" against his current employer.[44] After several months of allegedly hostile behavior towards Cestra, the defendants fired him, citing performance issues.[45]

The defendants moved to dismiss Cestra's FCA retaliation claim, arguing that liability under the FCA's anti-retaliation provision only extends to the terminating employer if the employee was investigating the terminating employer, or if the terminating employer is "closely related to and influenced by" the employer of the other entity which the FCA complaint was made.[46] Noting that the issue before the court was one of first impression, the court first noted that the plain text of the FCA's anti-retaliation provision does not impose a restriction that the protected activity of the employee must be taken against the terminating employer.[47] The court also cited *Townsend v. Bayer Corporation*, where the Eighth Circuit Court of Appeals held that the FCA's anti-retaliation provision "does not restrict the class of persons who may be violating the substantive provisions of the FCA to employers":[48]

> Instead, the statute broadly protects any lawful acts done by an employee to stop violations of the FCA, and broadly prohibits the demotion, suspension, threatening, harassment, or other discrimination in the terms and conditions of employment against an employee for engaging in such lawful acts. Nothing in the plain language of the statute limits the protected "lawful acts" of an employee to efforts to stop *an employer's* violations of the FCA.[49]

The court cited several other district court cases that recognized a broad application of the FCA's anti-retaliation provision to include former employers.[50]

The court rejected the defendants' policy concerns, including that if their motion was not granted, the court would "open the floodgates to potential FCA litigants" who would "obtain a lifetime of protection ... simply by alleging that a separate, unrelated entity was aware of her protected activity and took an adverse action against it."[51] The court held that it need not consider the defendants' "lifetime protection" hypothetical because, in the case before it, the plaintiff was engaged in protected activity at the time that he was fired.[52] The court held that the FCA's anti-retaliation provision "plainly applies" to the defendants' alleged conduct.[53]

Criticism of Implied False Statements and Certifications Can Constitute Protected Activity

More recently, in *Young v. CHS Middle East, LLC*, the Fourth Circuit Court of Appeals held that an employee's criticism of an employer's implied false statements or certifications can constitute protected activity for purposes of an FCA retaliation claim.[54] The Youngs worked as nurses for a defense contractor in Iraq.[55] Both plaintiffs informed their supervisors on numerous occasions that the defendant was violating its contractual obligations with the State Department and defrauding the government.[56] They were both fired on the same day.[57] The district court twice dismissed the Youngs' complaint alleging FCA retaliation for failure to state a claim, the second time with prejudice.[58]

Reversing the district court's dismissal of the Youngs' complaint, the court cited its earlier decision in *United States v. Triple Canopy, Inc.*[59] In *Triple Canopy*, the Fourth Circuit held that an FCA relator sufficiently pleads a false claim "when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements."[60] In *Young*, the Fourth Circuit reasoned that if making false implied staffing certifications to the government can

constitute a violation of the FCA per *Triple Canopy*, then acts undertaken to investigate, stop, or bring an action regarding such false implied staffing certifications constitute protected activity for purposes of an FCA retaliation claim.[61]

Post-Employment Retaliation May Be Prohibited in Limited Circumstances

In *Fitzsimmons v. Cardiology Associates of Fredericksburg, Ltd.*, another recent FCA retaliation case, the plaintiff brought suit against a physician group and certain individuals claiming that the defendants retaliated against him in violation of the FCA's anti-retaliation provision.[62] The plaintiff did not allege, however, that his termination was retaliatory.[63] Instead, he alleged that the defendants violated the FCA's anti-retaliation provision by not providing him with certain post-termination compensation to which he claimed entitlement pursuant to his employment agreement.[64]

The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) arguing, among other things, that the FCA's anti-retaliation provision does not provide a remedy for post-termination retaliation.[65] The court denied the defendants' motion to dismiss in relevant part, holding that the plaintiff pleaded sufficient facts to plausibly meet each element of an FCA retaliation claim, and that "summary judgment would provide a more suitable means to evaluate whether the FCA contemplates recovery for [the plaintiff's] post-termination retaliation."[66] In so ruling, the court in *Fitzsimmons* noted that no appellate court has addressed whether the FCA's anti-retaliation provision permits a claim for post-termination retaliation, although the court acknowledged that "[t]he vast majority of [district] courts to have considered the issue have found, most even at the motion to dismiss stage, that § 3730(h) provides no remedy for retaliation alleged to have occurred following a plaintiff's termination of employment."[67]

However, the court in *Fitzsimmons* noted that the case before it was different from the typical case because the plaintiff claimed "improper reimbursement for money owed, post-termination, under the terms of [his employment agreement]."[68] The court concluded that it could not, at the motion to dismiss stage, "find that the anti-retaliation provision of the FCA cannot cover [plaintiff's] claims for post-termination payments he says would be required by the Employment Agreement that set the 'terms and conditions' of his employment."[69]

The FCA's Anti-Retaliation Provision Might Provide for Individual Liability

The individual defendants in *Fitzsimmons* also moved to dismiss on the ground that, according to the defendants, the FCA's anti-retaliation provision does not permit individual liability.[70] The court in *Fitzsimmons* noted that, through the 2009 FERA amendments, Congress removed "an arguably key phrase regarding potential defendants that required discrimination 'by [an employee's] employer.'"[71] The court noted that district courts have been divided as to the interpretation of this amendment, and that no court of appeals had considered the matter.[72]

Some district courts, the court in *Fitzsimmons* noted, have held that the plain language of the amended provision "does not limit defendants to employers" and, therefore, that liability for FCA retaliation extends to individual defendants.[73] Other courts, however, have analyzed the legislative history of the 2009 amendment as indicating that Congress did not intend to expand the class of potential defendants, but instead intended to expand the class of potential plaintiffs to include non-employees such as contractors, and that no individual liability exists.[74] Because there was no binding precedent from the Fourth Circuit and the statute was not clear, the court in *Fitzsimmons* held that summary judgment would provide a more appropriate stage to evaluate the argument and, therefore, denied the defendants' motion to dismiss on this ground.[75]

Even more recently, however, a district court judge in Illinois rejected the argument that the 2009 FERA amendment created individual liability and granted a motion to dismiss. In *United States ex rel. Sibley v. A Plus Physicians Billing Service, Inc.*, the court rejected the argument that Congress' removal of the phrase "by his or her employer" within the anti-retaliation provision was meant to create individual liability for FCA retaliation.[76] The court in *Sibley* agreed with various other district courts that the purpose of the amendment was to expand the class of potential plaintiffs and not the class of potential defendants.[77]

Steps to Avoid an FCA Retaliation Suit

Although there is no fool-proof way for an employer who does business with the government to completely avoid an FCA retaliation suit, the best way to avoid such a suit is the same way to avoid a substantive FCA qui tam suit in the first place: Create an atmosphere of compliance where employees feel comfortable that they can report any compliance concerns without the fear of retaliation, and that the company will take any such concerns seriously, with appropriate investigation and follow up. One of the easiest first steps is to set up a confidential compliance "hotline."[78] Depending on technical sophistication and available resources, this can take the more modern form of a toll-free phone number hosted by an outside vendor, an anonymous intranet portal, or a more old-school locked suggestion box in the employee break room. Regardless of the form, however, the most important aspect of such a hotline is what might seem the most

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obvious – it should be monitored and checked regularly for submissions. Often, where employees feel as though they can approach their employer with potential concerns and that those concerns will be taken seriously, they are less likely to feel intimidated and less likely to resort to litigation.

Finally, and hopefully obviously, employers should never take any adverse employment action – including, but not limited to, demotions, involuntary transfers, duty reassignments and, of course, termination – because an employee reports a compliance-related issue or takes any other steps to stop a potential violation of the FCA. Of course, the fact that an employee raises a compliance-related concern does not give that employee immunity from adverse employment actions from that point forward. Where there is a truly independent, non-retaliatory reason for adverse employment action, the employer is entitled to take the necessary actions, provided that no other statutes are triggered. However, if a lawsuit ensues, assuming the employee is able to establish a *prima facie* case, the employer would then be required to articulate legitimate, non-retaliatory reasons for the adverse employment action.[79] To that end, an employer that believes such legitimate reasons exist should carefully document not only the reasons for the ultimate adverse employment action, but should also document the issues leading to that ultimate action as they occur. Although the employee will still have the opportunity to present evidence to demonstrate that the employer's stated reasons were pretext for retaliation, this will lower the chances that the employee would survive summary judgment and, even if the case does make it past summary judgment, that a jury will find liability.

Conclusion

As the number of private whistleblower actions filed under the FCA continues to increase, it is likely that the number of actions filed under the FCA's anti-retaliation provision will increase, as well. Both internal reports of fraud and of regulatory violations constitute protected activity under the FCA's anti-retaliation provision, as can criticism of implied false statements and certifications. Further, terminating an employee for engaging in protected activity against a former, unrelated employer can also violate the FCA's anti-retaliation provision, and – in some limited circumstances – even post-termination retaliation might trigger FCA liability. To further complicate matters, some courts are willing to extend liability for FCA retaliation to individual managers in addition to the whistleblower's actual employer.

Although in today's environment employers – particularly larger ones in the healthcare industry – will always face the potential of such a suit, there are steps that a healthcare provider can take to lessen the chances of facing liability for FCA retaliation, including putting in place a robust compliance program wherein employees are encouraged to report any compliance concerns, and wherein those concerns are then taken seriously and investigated thoroughly by the employer.

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Endnotes

1 31 U.S.C. § 3729 *et seq.*

2 www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

3 *Id.* § 3729(a).

4 31 U.S.C. § 3729(a)(1). The original statutory per-claim penalties of between $5,000 and $10,000 has been increased to between $5,500 and $11,000 by Section 5 of the federal Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410; 28 C.F.R. § 85.3(a)(9).

5 *Supra* note 2.

6 www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986; www.okbar.org/members/BarJournal/archive2005/Aprarchive05/obj7612fal.aspx.

7 31 U.S.C. § 3730(d).

8 *Id.* § 3730(h)(1).

9 *Id.* § 3730(h)(2).

10 *Id.* § 3730(h)(3).

11 *See, e.g., Harrington v. Aggregate Industries Northeast Region, Inc.*, 668 F.3d 25, 30-31 (1st Cir. 2012); *United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1241 (D.C. Cir. 2012) *Scott v. Metro. Health Corp.*, 234 F. App'x 341, 346 (6th Cir. 2007); *Forkell v. Lott Assisted Living Corp.*, No. 10 Civ. 5765, 2012 WL 1901199, at *10 (S.D.N.Y. May 21, 2012). In *Townsend v. Bayer Corp.*, the Eighth Circuit declined to decide whether the entire *McDonnell Douglas* framework applies to an FCA retaliation claim, but applied at least part of the framework to the case before the court. 774 F.3d 446, 460 n.3 (8th Cir. 2014).

12 *Harrington*, 668 F.3d at 31 (citing *Mesnick v. Gen. Electric Co.*, 950 F.2d 816, 827 (1st Cir. 1991)).

13 *Id.* (citations omitted).

14 *Id.* (citing *Mesnick*, 950 F.2d at 827).

15 *United States ex rel. Portilla v. Riverview Post Acute Care Ctr.*, No. 12-1842, 2014 WL 1293882, at *6 (D.N.J. March 31, 2014) (noting that all federal circuit courts to have addressed the issue have held that FCA retaliation claims need only meet the Rule 8(a) standard).

16 FERA, PL 111-21, May 20, 2009, 123 Stat. 1617.

17 *Mikhaeil v. Walgreens Inc.*, No. 13-14107, 2015 WL 778179, at *7 (E.D. Mich. Feb. 24, 2015).

18 *Halasa v. ITT Educational Svs., Inc.*, 690 F.3d 844, 847 (7th Cir. 2012) (quoting *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 277 F.3d 936, 944 (7th Cir. 2002)). This pre-FERA interpretation was widely adopted by federal Circuit Courts throughout the country. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 567 (6th Cir. 2003); *Schuhardt v. Washington University*, 390 F.3d 563, 568 (8th Cir. 2004); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 729 (10th Cir. 2006).

19 *Id.* at 847-48.

20 155 Cong. Rec. E1295-03, E1300, 2009 WL 1544226 (daily ed. June 3, 2009).

21 No. 13-14107, 2015 WL 778179 (E.D. Mich. Feb. 24, 2015).

22 *Id.* at *3-*5.

23 *Id.* at *4.

24 *Id.* at *6.

25 *Id.* at *7. The court held that although Mikhaeil's reports concerning potential violations of Schedule II substance regulations did not constitute protected activity because none of those violations alleged fraud on the government, the reports of potential Medicare fraud did constitute protected activity under the FCA. *Id.* at *8.

26 *Id.* at *8-*9.

27 *Id.* at *8.

28 *Id.* at *9.

29 *Id.*; *see also Manfield v. Alutiiq Int'l Solutions, Inc.*, 851 F.Supp.2d 196, 204 (D. Me. 2012) ("Since a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.").

30 *Id.* at *9-*10.

31 *Id.* at *10. The case was dismissed on June 9, 2015, after the parties reached a settlement. *See* Case. No. 2:13-cv-14107 (E.D. Mich.), Doc. No. 42.

32 No. 6:14-cv-1209, 2015 WL 1349986 (M.D. Fla. March 25, 2012).

33 *Id.* at *1.

34 *Id.* at *2.

35 *Id.* at *3.

36 *Id.* at *4-*6.

37 *Id.* at *4-*5.

38 *Id.* at *5 (internal citations omitted).

39 *Id.* at *5-*6.

40 *Id.* at *5 (citing *McNutt ex rel. United States v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256 (11th Cir. 2005)).

41 *Id.* at *6 (citing 155 Cong. Rec. E1295-03 (statement of Rep. Berman), 2009 WL 154426.

42 *Id.*

43 No. 14-825, 2015 WL 2455420, at *5 (W.D. Pa. May 22, 2015).

44 *Id.* at *5.

45 *Id.*

46 *Id.* at *9.

47 *Id.* at *11.

48 774 F.3d 446, 459 (8th Cir. 2014), *reh'g denied* (Jan. 27, 2015).

49 *Id.* (emphasis in original).

50 2015 WL 2455420, at *15 (citing *Hill v. Booz Allen Hamilton, Inc.*, No. 07-00034, 2009 WL 1620403, *4 n.3 (D. Guam June 9, 2009) ("In fact, the statutory language makes it fairly clear that the target of the FCA investigation may be an unrelated party."); *United States ex rel. Satalich v. City of Los Angeles*, 160 F.Supp.2d 1092, 1107 (C.D. Cal. 2001) ("The language of the statute precludes *any employer* from retaliating against an employee for engaging in lawful actions that further an FCA claim or investigation, irrespective of whether it is the employer that is the target of the FCA investigation.") (emphasis in original).

51 *Id.* at *16.

52 *Id.*

53 *Id.* Defendants' petition for interlocutory appeal was denied by the Third Circuit on July 14, 2015. Case No. 15-8051 (3d Cir. July 14, 2015).

54 No. 13-2342, 2015 WL 3396790, at *3 (4th Cir. May 27, 2015).

55 *Id.* at *1.

56 *Id.*

57 *Id.* at *2.

58 *Id.*

59 775 F.3d 628 (4th Cir. 2015). The court in *Young* noted that the district court's dismissal predated its decision in *Triple Canopy*. 2015 WL 3396790, at *3.

60 775 F.3d at 636.

61 2015 WL 3396790, at *3.

62 No. 3:15cv72, 2015 WL 4937461, at *3 (E.D. Va. Aug. 18, 2015).

63 *Id.* at *3 n.8.

64 *Id.* at *3.

65 *Id.* at *4.

66 *Id.* at *7.

67 *Id.* at *6-7 (collecting various district court cases).

68 *Id.* at *7.

69 *Id.*

70 *Id.*

71 *Id.* (alterations in original) (citing *Rangarajan v. Johns Hopkins Health Sys. Corp.*, No. WMN-12-1953, 2014 WL 6666308, at *4 (D. Md. Nov. 21, 2014)).

72 *Id.*

73 *Id.* at *8 (citing *Huang v. Rector and Visitors of Univ. of Virginia*, 896 F.Supp.2d 524, 548 n.16 (W.D. Va. 2012), and *United States ex rel. Moore v. Cmty. Health Servs., Inc.*, No. 3:09cv1127, 2012 WL 1069474, at *9 (D. Conn. March 29, 2012)).

74 *Id.* (citing *Rangarajan*, 2014 WL 6666308, at *4-6, and *United States ex rel. Fryberger v. Kiewit Pac. Co.*, No. 12cv02698, 2014 WL 1997151, at *11-13 (N.D. Cal. May 14, 2014)).

75 *Id.*

76 No. 13 C 7733, 2015 WL 4978686, at *3-5 (N.D. Ill. Aug. 20, 2015).

77 *Id.* at *4-5.

78 For example, in the OIG's published Compliance Program Guidance for Hospitals, one of the seven elements that the OIG states should be included in a comprehensive compliance program is "[t]he maintenance of a process, such as a hotline, to receive complaints, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation." 63 Fed. Reg. 8987, 8989 (Feb. 23. 1998).

79 *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973).