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False Claims Act decisions to know from Q2 2024

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In case you missed it, this post recaps some key False Claims Act (FCA) decisions and case updates from the second quarter of this year. Courts weighed in on the FCA's anti-retaliation provision, its first-to-file bar, and issues around judgments and awards.

FCA retaliation claims sustained and tossed at summary judgment

Section 3730(h) of the FCA provides anti-retaliation protection[1] for relators[2] bringing FCA actions. Plaintiffs are required to establish the following:

(1) They engaged in protected activity.

(2) An adverse employment action occurred.

(3) The adverse action was causally related to their protected activity.

If plaintiffs establish these elements, the burden of production shifts to the defendant to come forward with a legitimate, non-discriminatory reason for the challenged employment action. Then, the plaintiff has the ultimate burden of proving the reason to be a pretext for unlawful discrimination.

The plaintiff in U.S. ex rel. Witkin v. Medtronic *claimed he was let go in early 2011 after raising questions about the company allegedly advising doctors to bill insurers for procedures that had actually been performed by a Medtronic employee.*

In *Ruffolo v. Halifax Health, Inc.*, the Eleventh Circuit affirmed summary judgment for the defendants on the plaintiff's FCA retaliation claims. Halifax moved for summary judgment on two grounds:

(1) The plaintiff failed to show that she had engaged in protected activity as required by the FCA.

(2) Halifax had legitimate business reasons for firing her.

The district court granted summary judgment on the basis of the first ground and did not address the second ground. The relator appealed, and the Eleventh Circuit conducted a de novo review, affirming summary judgment on the second ground.

Halifax argued that it terminated Ruffolo after learning she was purchasing personal protective equipment (PPE) to re-sell to China during the COVID-19 pandemic using Halifax's connections to the vendor and its email and online ordering system. Ruffolo argued she was only investigated after she had complained about fraud.

Because the court found Halifax's reason to be a legitimate business reason, *i.e.*, one that would motivate a rational employer to terminate an employee, Ruffolo bore the burden of proving this reason was pretextual.

The court concluded she failed to do so: "In light of [her office mate]'s testimony and the corroborating emails and the serious nature of conduct attributed to Ruffolo [regarding the plot to re-sell PPE], we cannot conclude that there is a genuine issue of fact about Halifax's honest belief in its asserted reason for terminating Ruffolo" and thus Ruffolo had not satisfied her burden of proving pretext.

In contrast, in *U.S. ex rel. Witkin v. Medtronic,* the district court denied summary judgment to defendants on the plaintiff's FCA retaliation claim. The court noted the record presented a "very close call" but ultimately concluded that a reasonable jury could find Medtronic terminated Witkin "when it did because of his protected activity" rather than the alternative reasons that Medtronic provided.

Witkin claimed he was let go in early 2011 after raising questions about the company allegedly advising doctors to bill insurers for procedures that had actually been performed by a Medtronic employee. While there was "substantial evidence" that Medtronic was dissatisfied with Witkin's performance in 2010, the record showed that the company only terminated him after he sent a February 2011 email to Medtronic's counsel.

While Witkin also failed to satisfy his corrective action plan in this time period, Witkin showed Medtronic's normal practice would have been to place an employee on a performance improvement plan if needed after the corrective action plan was completed.

First-to-file bar

The FCA's first-to-file bar[3] generally limits the rights of whistleblowers to bring an action based on facts that are already at issue in another pending FCA lawsuit, but the nuances of this bar have been the subject of litigation in recent years.

In *U.S. ex rel. Rosales v. Amedisys, Inc.*, the relator alleged that Amedisys, a hospice operator, falsely certified patients as terminally ill and submitted claims for reimbursement to Medicare and North Carolina Medicaid for patients who were not properly eligible for hospice care.

Amedisys filed a motion to dismiss Rosales' Amended Complaint for lack of subject-matter jurisdiction, arguing that another FCA lawsuit pending in South Carolina barred Rosales' claims. The Eastern District of North Carolina made several findings and holdings in granting the hospice operator's motion:

- The court would compare Rosales' *initial* complaint to that in the South Carolina action. Noting that the Fourth Circuit has not decided whether a relator can defeat the first-to-file bar by amending her initial complaint, the court found the reasoning of the Second Circuit and D.C. Circuit persuasive that she cannot.
- Both Rosales' claims and those in the South Carolina action centered on allegations that Amedisys sought and received government payments by submitting claims for patients falsely certified as eligible for hospice care, triggering the first-to-file bar.
- Even if the court were to consider Rosales' amended complaint, naming different defendants was not enough to save the North Carolina action under the "material elements test" because naming different defendants did not amount to allegations of a different or more far-reaching scheme. Put differently, the allegations in the South Carolina action of a company-wide scheme supplied enough information for the government to discover the fraud alleged in the North Carolina action.

Judgments

The Seventh Circuit upheld a trial verdict of liability in an Anti-Kickback Statute (AKS)-based FCA lawsuit against related home health entities and their owner, but it vacated the nearly $6 million judgment and remanded the case to recalculate the damages award.

As to the monetary judgment, the Seventh Circuit held: (1) the damages award did *not* violate the Excessive Fines Clause of the Eighth Amendment, reasoning that the availability of criminal liability under the AKS reflects the gravity of defendants' kickback scheme; but (2) the lower court's damages calculation may have improperly included claims for patients who were legally referred, though the Seventh Circuit did not explicitly wade into the circuit split interpreting the AKS's causation standard.

For additional details about *Stop Illinois Healthcare Fraud, LLC v. Sayeed*, check out our previous blog post.[4]

Fee awards

The FCA includes a fee-shifting provision, allowing for a whistleblower's attorneys' fees and costs to be awarded against the defendant. However, those fees must be "reasonable," as the District Court for the District of Massachusetts recently reminded counsel in *Drennen v. Fresenius Medical Care Holdings, Inc.*

The defendant lab testing company reached a settlement with the government, and the relator in 2019, and the relator subsequently filed the subject motion for $11.5 million in attorneys' fees and costs. As grounds for slashing this "exorbitant" fee request, the court criticized unsupported hourly rates, inflated or inaccurate hours, and improper billing practices.

The court also reduced claimed expenses, questioning "problematic" and "extraordinary" costs for things like travel and meals. Recently, the court entered a reduced award for costs and fees of over $6.6 million, but Fresenius has appealed the court's original order.

Notes:

[1] https://bit.ly/3XbzV3O

[2] https://bit.ly/3ZdmenE

[3] https://bit.ly/4d1n6Pu

[4] https://bit.ly/4ee1W1x

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