

Protected Activity And Individual Liability: Broadened Interpretations Of The False Claims Act Anti-Retaliation Provision

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The False Claims Act's (FCA) anti-retaliation provision allows private whistleblowers to file an FCA complaint without retaliation from their employers. A series of 2015 decisions interpreting the recent amendments to the FCA indicate that courts have increasingly broadened their view as to which types of activities are protected under the anti-retaliation provisions and whom they may be brought against. The expansion of protected activities and persons covered requires corporate entities to be aware of the inevitable increase in anti-retaliation actions due to the broadened scope of the FCA's whistleblower protections. Prior to 2009, the anti-retaliation provisions protected only those acts done *in furtherance* of an FCA qui tam action. Protected activity included only that which provided an employer notice of possible litigation. The passage of the Fraud Enforcement and Recovery Act of 2009 (FERA) expanded the [FCA protected activity standard](#), and the FCA now protects "lawful acts . . . in furtherance of an action under this section or *other efforts* to stop 1 or more violations of this subchapter." The inclusion of "other efforts" in an attempt to stop an FCA violation casts a wide net in terms of anti-retaliation protected activity. Recent court decisions indicate that this includes not only steps in furtherance of a potential qui tam action, but also internal reporting of potential fraudulent activity to a supervisor, steps taken to stop an FCA violation, and steps taken to remedy fraudulent activity. The broadened view of protected activity under the FCA gained momentum in May 2015 when the Fourth Circuit, in [Youngs v. CHS Middle East, LLC](#), ruled that protected activity under the FCA anti-retaliation provision includes employee activities while collecting information regarding possible fraud even "before they have put all the pieces of the puzzle together." The Youngs alleged that their employer fired them after they made several complaints of contractual violations. While the Youngs had not made the complaints in furtherance of a qui tam action, the Fourth Circuit found that their conduct was protected activity because of the "other efforts" language in the FERA amendments. The circuit court in part relied on its then-recent decision in [United States ex rel. Omar Badr v. Triple Canopy, Inc.](#), and found that since the violations alleged by the Youngs *may* constitute an FCA violation then "acts undertaken to . . . investigate, stop or bring an action regarding such false implied staffing certifications can constitute protected activity for purposes of a retaliation claim." *Youngs* stands for the proposition that the anti-retaliation provisions extend even to claims where the subject of a plaintiff's disclosures may not necessarily support a qui tam action. In light of *Youngs*, additional cases have been filed seeking to further determine the extent of the changes to the definition of protected activity due to the FERA amendments. In addition to broadening the definition of protected activity, recent cases have also broadened the possibility of individuals who may give rise to an anti-retaliation claim. In 2014 the Eighth Circuit [found](#) that the provisions are not limited to protected activity undertaken to stop violations of the FCA by the employer, but also efforts to stop violations of another employee or former employee. In the 2015 case [Cestra v. Mylan](#), the

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anti-retaliation provisions were again expanded to include termination of an employee while a previously filed FCA qui tam claim against a former employer was still pending. The court reasoned that this interpretation was valid because the plaintiff was engaged in the protected activity when he was fired and the current employer had knowledge of the pending claim. The court also granted the defendant's [motion](#) for immediate appeal, which is currently pending before the Third Circuit. All factors indicate that the Third Circuit is likely to hold that termination of an employee while an FCA claim is pending against a former employer may constitute a violation of the anti-retaliation provisions. While anti-retaliation claims were historically brought against employers, there is conflicting precedent regarding whether the FERA amendments allow retaliation claims to be brought against other employees who engaged in alleged retaliatory conduct. Prior to 2009, the FCA stated that an "employee" could bring a claim against his or her "employer" for retaliatory behavior. The FERA amendments expanded this language to allow "any employee, contractor or agent," and removed the word "employer." This sparked claims from plaintiffs alleging that the omission of the word "employers" indicates that it is allowable to recover against supervisors and other individuals within corporate entities, and not only the corporate entity itself. Most recently, courts have reached inconsistent results in the interpretation of individual liability. On Aug. 20, 2015, the Northern District of Illinois, in [United States ex rel. Sibley v. A Plus Physicians Billing Service, Inc.](#), found the amendments did not extend individual liability. It interpreted that the change in language by the FERA amendments was intended to expand the statute's protections to cover contractors and agents. This, however, was inconsistent with other courts, such as the Eastern District of Virginia, that determined individual liability is permissible under the FCA. In [Fitzsimmons v. Cardiology Associates of Fredericksburg](#) the court refused to provide its interpretation of the FERA amendments due to the inconsistencies in district court opinions. The court stated that given the split of authority and lack of interpretation by any appellate court to date, it would not at that time make a determination as to whether the FCA anti-retaliation provisions extend individual liability. As outlined above, recent judicial decisions illustrate a trend of broad interpretations of the FCA's anti-retaliation provisions. The coming year will likely bring with it additional decisions clarifying the implications of the FERA amendments, and requiring corporate entities to be vigilant in making decisions regarding whistleblowers under the False Claims Act.