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False Claims Act Retaliation Decision Calls into Question Heightened Notice Standard for Fraud Alert Employees

Article By:

Jason Zuckerman

A recent decision denying summary judgment in a False Claim Act retaliation case signifies further erosion of the "distinct possibility" standard that governed FCA retaliation claims in several circuits prior to the adoption of the 2009 amendments to the FCA and calls into question why any court would continue to apply a heightened notice standard to fraud alert employees. Judge Adelman's construction of FCA protected conduct in *Patzer v. Sikorsky Aircraft Corp*. is consistent with the text and purpose of the FCA and recognizes that Congress intended to encourage whistleblowers to stop violations of the FCA before before they happen or recur.

Patzer's False Claims Act Retaliation Claim

Patzer brought suit under the False Claims Act's whistleblower protection provision alleging that Sikorsky and two of its subsidiaries, Derco and SSSI, terminated her employment because she tried to prevent them from defrauding the government. In particular, she tried to stop Derco from representing on a disclosure statement that it complied with the FAR provision prohibiting profits on transfers of noncommercial items between

affiliates while simultaneously adding a profit to its transfers of noncommercial materials to its affiliate SSSI.

As Derco's Assistant Controller of U.S. Government Accounting and SOX Compliance, Patzer calculated annual forward pricing rates, developed disclosure statements, and investigated and reported potential fraud related to accounting rules and regulations and financial reporting in connection with contracts for maintenance of Navy trainer aircraft. Patzer became concerned that Derco's Cost Accounting Standards Disclosure Statement stated that transfers to its affiliates would be at cost unless the parts or services were commercial, yet the subcontract between SSSI and Derco stated that Derco's work was non-commercial (*i.e.*, Derco would be selling parts and materials to SSSI at cost). Under FAR 31.205-26(e), any transfers of materials or services between corporate affiliates must be at cost unless, among other things, the work is commercial, in which case the transfer may include a profit.

Patzer raised her concerns to a Derco's CFO and a Sikorsky employee who oversaw government accounting, informing them that the Disclosure Statement appeared to be inaccurate and that she wanted to avoid making any false statements to a DCAA auditor. The CFO told Patzer that the non-commercial designation in the subcontract was a mistake and that he would fix it and send her a revised subcontract. But Patzer never received a revised subcontract. Within a day of Patzer emailing the CFO and another employee to revisit the issues the concerns Patzer raised, Derco terminated her employment in a layoff.

False Claims Protected Whistleblowing is Not Limited to Disclosures of Actual Fraud and

Encompasses Whistleblowing About A False Certification of FAR Compliance

Derco argued in its motion for summary judgment that Patzer did not engage in False Claims Act protected conduct because she could not have reasonably believed that Derco committed fraud by representing in its Disclosure Statement that it complied with the FAR provision prohibiting profits on transfers of noncommercial items between affiliates while Derco simultaneously added a profit to its transfers of noncommercial materials to its affiliate SSSI.

Judge Adelman, however, found that Patzer had a reasonable belief that Derco was defrauding the government by charging profit for non-commercial work. The contract between SSSI and Derco stated that Derco's work was non-commercial and when the CFO claimed that the non-commercial designation in the contract was a mistake, he never provided Patzer with an amended contract. Therefore, Patzer could have reasonably believed that non-commercial designation was not a mistake and that Derco was defrauding the government by charging profit for non-commercial work.

In discussing the standard governing FCA protected conduct, Judge Adelman held that while FCA whistleblower protection requires an employee to have a reasonable belief that her employer is committing fraud against the government, "an employee does not have to be certain that fraud is being committed." Indeed, "Congress intended to protect employees from retaliation while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together."

Court Rejects Heightened

“Fraud Alert” Standard to Prove Protected Conduct

Derco asserted that Patzer’s work investigating and reporting potential fraud related to accounting rules and financial reporting renders her a “fraud alert” employee and therefore she must satisfy a heightened notice requirement to prove FCA protected conduct, *i.e.*, she must do more than simply raise concerns about potential violations and instead put her employee on notice that she was planning to take a far more aggressive step and bring a *qui tam* action.

Judge Adelman called into question whether this heightened notice standard applies to FCA retaliation claims in which the whistleblower engaged in protected conduct by undertaking efforts to stop violations of the FCA:

> it is not clear that a fraud-alert employee must meet a heightened notice requirement to receive protection. Under the second category, an employee’s conduct is protected so long as the employer was aware that the employee was attempting to stop a violation of the FCA; the employer does not need to be on notice that the employee was prepared to take the extra step of filing a *qui tam* action. Thus, even a person whose job duties include preventing violations of the FCA should be entitled to the Act’s protections. Indeed, allowing an employer to retaliate against an employee whose job it is to prevent fraud would run directly contrary to the purpose of the 2009 amendments. *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 5:28 (Westlaw, August 2023).

She further held that even if the heightened standard for fraud-alert employees applies to the second prong of protected conduct, Patzer met the heightened standard in that she complained about what she thought was a form of ongoing fraud, and went to great lengths to have that issue addressed by her employer, including by raising her concern outside of her chain of command.

Implications for False Claims Act Whistleblowers

Recognizing that "few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation," S. Rep. No. 99-345, at 34 (1986), Congress included a robust whistleblower protection provision in the 1986 amendments to the False Claims Act. Some courts have weakened FCA whistleblower protection by requiring retaliation plaintiffs to establish that their disclosures could lead to a viable qui tam action or that qui tam litigation was a distinct possibility. That narrow construction of FCA protected conduct is irreconcilable with the 2009 amendments to the FCA, which expressly protect efforts to stop violations of the FCA before they happen or recur.

Accordingly, most courts construing the second prong of FCA protected conduct do not require a showing that the whistleblower's disclosure would have led to a viable *qui tam* action and instead focus on whether the whistleblower's disclosure reasonably could be expected to prevent the submission of a false claim to the government. *See, e.g., Singletary v. Howard Univ.,* 939 F.3d 287, 295–96 (D.C. Cir. 2019)*; United States ex rel. Grant v. United Airlines, Inc.* 912 F.3d 190, 201 (4th Cir. 2018); *United States ex rel. Chorches v. American Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017). By recognizing that an FCA retaliation plaintiff need not prove that their employer is committing actual fraud and that a whistleblower is protected when they are putting all the pieces of the puzzle together, *Patzer* adheres to the text and purpose of the FCA. It is also

consistent with a trend of FCA retaliation decisions rejecting the “distinct possibility” standard.

Patzer is also consistent with a strong trend in the wake of the 2009 amendments to the FCA rejecting a heightened notice standard for fraud alert employees. As FCA protected conduct does not require the whistleblower to show that the employer was on notice of the whistleblower’s intention to bring or assist in an qui tam action, there is no textual basis for a heightened notice requirement. Indeed, imposing such a requirement amends the statute to create an exception for fraud alert employees that Congress never authorized.

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