

Protected Activity Under 31 U.S.C.A. § 3730(h)

Courts have generally broadly interpreted what constitutes protected activity in furtherance of an action under the False Claims Act (“FCA”) anti-retaliation provision, 31 U.S.C.A. § 3730(h). The provision specifies that “protected conduct” “includes “lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiating of, testimony for, or assistance in” an FCA suit. 31 U.S.C.A. § 3730(h) does not require the plaintiff to have developed a winning *qui tam* action. See e.g., U.S. ex rel. Yesudian v. Howard University, 153 F.3d 731, 739, (D.C. Cir. 1998). Instead, to establish protected conduct under the statute, plaintiff must show only that they engaged in ‘acts ... in furtherance of an action under [the False Claims Act].’ ” See e.g., Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir. 2001), cert. denied, 536 U.S. 906 (2002). Protected conduct may include internal reporting and investigation of an employer's false or fraudulent claims. See e.g., Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186-7 (3d Cir. 2001), cert. denied, 536 U.S. 906 (2002).

However, not all types of investigations give rise to § 3730(h) protections. For example, when investigations of noncompliance are part of the employee’s duties, the mere performance of those duties may not suffice to establish protected conduct under the FCA. See e.g., U.S. ex rel. Bartlett v. Tyrone Hosp., Inc., 234 F.R.D. 113 (W.D. Pa. 2006). Courts have also established that § 3730(h) does not cover situations in which a complaint could not be filed consistent with Rule 11. See Lang v. Northwestern University, 472 F.3d 493 (7th Cir. 2006).

The Courts of Appeals have developed varied interpretations of what conduct is protected by the statute:

First Circuit

The First Circuit follows the approach of the Fifth Circuit and interprets conduct in furtherance of an action under the FCA as protected conduct that “reasonably could lead” to a viable FCA action. See U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 236 (1st Cir. 2004). Protected conduct includes “investigations, inquiries, testimonies or other activities that concern the employer's knowing submission of false or fraudulent claims for payment to the government. Id. at 237 (citing U.S. ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C.Cir.1998)). An employee can put his employer on notice by “any action which ... [regardless of his job duties,] would put the employer on notice that [FCA] litigation is a reasonable possibility.” Maturi v. McLaughlin Research Corp., 413 F.3d 166, 173 (1st Cir. 2005) (citing Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 868 (4th Cir.1999)).

Second Circuit

While there is no Second Circuit case directly addressing scope of protected activity under § 3130(h), a leading district court case, Mikes v. Strauss, 889 F. Supp. 746, 753 (S.D.N.Y. 1995), held that “an employee must supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a *qui tam* action against it.”

Third Circuit

The Third Circuit uses the “distinct possibility” test to determine whether an employee has engaged in protected activity. To satisfy the distinct possibility test, an employee must put his employer on notice of the “distinct possibility” of False Claims Act litigation. See Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 188 (3rd Cir. 2001) (noting that while the protected conduct and notice requirements are separate elements of a *prima facie* case of retaliation the inquiry into these elements involves a similar analytical and factual investigation); Dookeran v. Mercy Hospital of Pittsburgh, 281 F.3d 105, 108 (3d Cir. 2002). The Third Circuit has noted that determining what activities constitute “protected conduct” is a fact specific inquiry. See Wilentz, 253 F.3d at 186.

Fourth Circuit

The Fourth Circuit has recently noted that “protected activity” under the FCA is to be interpreted broadly. “Courts have interpreted FCA-protected activity broadly to cover not only the filing of a *qui tam* suit but also a variety of actions aimed at ascertaining whether or not a fraud has been committed that would give rise to a possible FCA suit.” U.S. ex rel. Elms v. Accenture LLP, 2009 WL 2189795, 3 (4th Cir. 2009) (citing United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 739-40 (D.C. Cir. 1998)). However, the Fourth Circuit has held that simply reporting a concern to a supervisor of a mischarging to the government does not suffice to establish that an employee was acting “in furtherance of” a *qui tam* action. See Zahodnick v. International Business Machines Corp. 135 F.3d 911, 914 (4th Cir. 1997). Instead, the Fourth Circuit has specified that an employee engages in protected activity only when he makes clear to his employer that there is a reasonable possibility of *qui tam* litigation. See Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861 (4th Cir. 1999). The employee may do so by, for example, complaining that the conduct is clearly illegal or that the employer should consult its lawyer with regard to possible fraudulent actions it has undertaken. Id.

Fifth Circuit

The Fifth Circuit has held that to establish protected activity, an employee must specifically express concern about suspected “fraud” or “illegality” against the government to his company, and not simply state general concerns. See Robertson v. Bell Helicopter Textron, Inc.,

32 F.3d 948 (5th Cir. 1994). The Fifth Circuit has held that a Director of Compliance who did not express concerns to his supervisors outside of those that were part of his duties could not maintain an action under 3730(h). See Sealed Appellant I v. Sealed Appellee, 156 Fed.Appx. 630, 635, 2005 WL 3178190, 4 (5th Cir. 2005) (citing Robertson, 32 F.3d at 952.)

Sixth Circuit

In the Sixth Circuit, the court followed the New York District Court's holding in Mikes v. Strauss, 889 F.Supp. 746 (S.D.N.Y.1995), finding that "an employee must supply facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a *qui tam* action against it." U.S. ex rel. McKenzie v. BellSouth Telecommunications, Inc., 123 F.3d 935, 944, (6th Cir. 1997) (finding that an employee engaged in protected activity, for purposes of retaliation claim, by bringing alleged fraud to the attention of her supervisors and showing them newspaper article describing *qui tam* action in another state involving similar allegations of fraud); see also U.S. ex rel. Marlar v. BWXT Y-12, L.L.C., 525 F.3d 439, 449 (6th Cir. 2008).

Seventh Circuit

The Seventh Circuit has followed the "distinct possibility" test, also employed by the Third Circuit, which holds that an employee is protected where litigation was a distinct possibility when the employee made a disclosure. See Neal v. Honeywell Inc., 33 F.3d 860, 864 (7th Cir. 1994). The Seventh Circuit has also explicitly noted that internal complaints may be protected. See Fanslow v. Chicago Mfg. Center, Inc., 384 F.3d 469, 482 (7th Cir. 2004).

Eighth Circuit

In the Eighth Circuit "the employee's conduct must be aimed at matters which are calculated, or reasonably could lead, to a viable FCA action." See Schuhardt v. Washington University, 390 F.3d 563, 567 (8th Cir. 2004) (citing United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir.1996)). The Eighth Circuit has held that "[a]n employee engages in activity protected under the Act if the employee undertakes acts in furtherance of a False Claims Act suit and if the employee believes, and has reason to believe, that his or her employer might be committing fraud against the government." Green v. City of St. Louis, Mo., 507 F.3d 662, 667 (8th Cir. 2007) (citing Schuhardt v. Washington Univ., 390 F.3d 563, 567 (8th Cir.2004)); see also Wilkins v. St. Louis Housing Authority, 314 F.3d 927, 933 (8th Cir.2002) (citing Moore v. Cal. Inst. Tech Jet Propulsion Lab, 275 F.3d 838, 845 (9th Cir.2002)). The Eighth Circuit has also explicitly held that § 3730(h) protects internal whistleblowers who make a complaint about fraud against the government. See Schuhardt, 390 F.3d 563, 567 (8th Cir. 2004) (citing Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir.1994).

Ninth Circuit

The Ninth Circuit follows the commonly employed rule that to establish protected activity under the FCA, an employee must be investigating matters which are calculated, or “reasonably could lead,” to a viable FCA action. See U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996) (citing Neal v. Honeywell Inc., 33 F.3d 860, 864 (7th Cir.1994) and Robertson v. Bell Helicopter Textron, 32 F.3d 948, 950-52 (5th Cir.1994), cert. denied, 513 U.S. 1154, (1995) (holding that a plaintiff must be investigating fraud in order to bring a FCA suit to be protected under § 3730(h)).

Tenth Circuit

In U.S. ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996), the court noted that internal complaints may fall within the protective scope of § 3730(h), but found that plaintiff's retaliation claim was properly dismissed because her activities were part of her employment duties and she had not otherwise indicated an intent to pursue a *qui tam* action or to report alleged fraud to government officials.

Eleventh Circuit

The Eleventh Circuit applies the “distinct possibility” test for protected activity, noting that as long as litigation is a ‘distinct possibility,’ internal complaints suffice. See Childree v. UAP/GA CHEM, Inc., 92 F.3d 1140 (11th Cir. 1996).

D.C. Circuit

In the District of Columbia, in order to establish that an employee engaged in protected activity, it is sufficient that a plaintiff be investigating matters that “reasonably could lead” to a viable False Claims Act case. See Hoyte v. American Nat. Red Cross, 518 F.3d 61, 69 (D.C. Cir. 2008); see also U.S. ex rel. Yesudian v. Howard University, 153 F.3d 731, 740 (D.C. Cir. 1998).