# False Claims Act Retaliation Claims not Dependent upon Proof of Actual FCA Violation, but Proof Requirements Remain Unclear

*Kerry M. Parker, Esquire*
*Daniel R. Levy, Esquire**
*Epstein Becker & Green PC*
*Newark, NJ*

## Introduction

Recent decisions by the U.S. Supreme Court and several U.S. Courts of Appeals have addressed the legal requirements for claims of retaliation brought by employee or former employee "whistleblowers" under the False Claims Act (FCA).[1] While such courts consistently have held that a plaintiff seeking redress under the retaliation provision of the FCA need not prove that fraud in fact occurred in order to proceed with such a claim, varying tests have emerged as to exactly what employer conduct a plaintiff must plead and prove to succeed on a retaliation claim. The Supreme Court has not enunciated a definitive proof standard to be applied to FCA retaliation claims, and circuit courts of appeal have adopted varying standards. This article examines the standards discussed in several recent decisions and how those standards may impact employers subject to FCA retaliation claims.

## Background

The FCA imposes civil liability on any person who knowingly uses a "'false record or statement to get a false or fraudulent claim paid or approved by the government.'"[2] A 1986 amendment to the FCA created a private cause of action for an individual retaliated against by his employer for investigating a potential FCA violation or assisting in a FCA proceeding.[3] The whistleblower protection provision states in relevant part (emphasis added):

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section*, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.[4]

By enacting the whistleblower protection provision of the FCA, Congress aimed "to make employees feel more secure in reporting fraud to the United States."[5]

Courts of appeal of several circuits have consistently held that, to prevail on a FCA retaliation claim, a plaintiff must show that: (1) the employee's conduct was protected under the FCA; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged or discriminated against the employee because of his or her protected conduct.[6] Circuits have disagreed, however, over the issue of what is required under the FCA for a plaintiff to establish "conduct in furtherance of an action under" the FCA.

It is clear that an employee whistleblower need not develop a winning FCA case to be afforded protection against retaliation for whistleblowing activity.[7] Federal appeals courts have developed three tests to determine whether an individual has engaged in protected conduct. The Supreme Court, in dicta, provided a fourth potential test that has worked only to further muddle the standards applied by the circuit courts. Each of the tests require, consistent with the statutory language, that the plaintiff must have engaged in lawful acts "in furtherance of" a FCA action, such as an investigation. The tests discussed below examine, to varying degrees, the employer's underlying conduct and the whistleblower's state of mind at the time he or she "investigated" such conduct (or otherwise engaged in acts in furtherance of a FCA action).

### Subjective and Objective Reasonable Belief Standard

The Ninth Circuit has adopted a test that requires both a subjective good faith belief and an objective standard. In *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*,[8] the Ninth Circuit held that "an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe that the employer is possibly

committing fraud against the government."[9] This standard has also been adopted by the Fifth, Seventh, and Eighth Circuits.[10]

## Reasonably Could Lead to a Viable FCA Action Standard

Another standard that has been adopted by several circuits, including the First Circuit, requires the plaintiff to establish "conduct that reasonably could lead to a viable FCA action."[11] In applying this standard, the Ninth Circuit held that a "plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action."[12] This standard, requiring proof of a reasonable belief by the plaintiff of the existence of a viable FCA action against his/her employer, has also been adopted by the District of Columbia Circuit.[13] The Sixth Circuit has also adopted this standard with the clarification that a FCA retaliation plaintiff need not use formal words such as "illegality" or "fraud" but "must sufficiently allege activity with a nexus to a qui tam action, or fraud against the United States government" to satisfy the requirement.[14]

## Litigation as a Distinct Possibility Standard

Other circuits, including the Third Circuit in *Dookeran v. Mercy Hosp. of Pittsburgh*, have adopted what appears to be a stricter standard in holding that an employee engages in protected activity where FCA litigation is a "distinct possibility."[15] This standard has also been adopted by the Fourth Circuit in *Eberhardt v. Integrated Design & Const. Inc.*[16] The Eleventh Circuit has also adopted the "distinct possibility" standard, holding that the retaliation provision protection is available where the filing of a false claims action, by either the employee or the government, is a distinct possibility.[17] District courts within the Second Circuit have also adopted the "distinct possibility" standard.[18] These courts, however, have not further defined what proof is required to demonstrate a "distinct possibility" of FCA litigation.

## Supreme Court

Without specifically resolving the apparent split among the circuits, the U.S. Supreme Court, in *Graham County Soil & Water Dist. v. United States ex rel. Wilson*,[19] touched upon the issue of what a plaintiff must show in order to establish a FCA retaliation claim. The issue before the Court in *Graham County* was whether the FCA's six-year statute of limitations governs actions for retaliation, and the Court held that it does not, concluding that the most closely analogous state limitations period applies.[20] In determining the six-year statute of limitations inapplicable to FCA retaliation claims, the Court reasoned that a retaliation plaintiff "need only prove that the defendant retaliated against him for engaging in 'lawful acts done . . . in furtherance of' an FCA 'action filed or to be filed[.]'"[21] The Supreme Court further stated that section 3730(h) "protects an employee's conduct even if the target of an investigation or action to be filed was innocent."[22] In a footnote, the Court cited to the various conflicting standards applied by the circuit courts but offered no further guidance in its statement that "[w]e endorse none of these formulations; we note only that all of them have properly recognized that proving a violation of section 3729 is not an element of a section 3730(h) cause of action."[23]

The defendants in *Graham County* argued that every FCA retaliation action under section 3730(h) requires the plaintiff to prove that he or she engaged in protected conduct related to at least a "*suspected*" violation of section 3729 (emphasis in original).[24] In discussing the possible applicability of the six-year statute of limitations to FCA retaliation claims under section 3730(h), the Court stated that if one were to assume that section 3730(h) retaliation actions have as an element a suspected violation of section 3729, then one has to read "into the statute the word 'suspected' before the phrase 'violation of section 3729.'"[25] The Court did not resolve the question of whether the term "suspected" should be read into the statute for purposes of FCA retaliation claims and, instead, resolved the ambiguity by reading the six-year statute of limitations as governing only sections 3730(a) and (b) actions, not section 3730(h) retaliation actions.[26]

The *Graham County* decision has led only to further confusion among the circuits on the correct standard to apply to this element of FCA retaliation cases. Some courts have continued to utilize the tests adopted prior to *Graham County*. Other circuits, however, have read *Graham County* to require that the plaintiff establish that litigation be "suspected" in order to establish a FCA retaliation claim.

## Post-*Graham County* Decisions

In the April 1, 2008, decision by the Ninth Circuit in *Mendiondo v. Centinela Hosp. Med. Ctr.*,[27] the court interpreted *Graham County* as requiring a FCA retaliation plaintiff to show that he or she suspected that the defendant submitted a false claim.[28] The issue in Mendiondo was whether a claim for retaliatory termination under the FCA must meet the notice pleading standard in

*Fed. R. Civ. P.* 8(a) or the heightened pleading standard in *Fed. R. Civ. P.* 9(b).[29] The court held that, because the FCA is an antifraud statute and requires fraud allegations, complaints alleging a FCA violation must fulfill the heightened pleading standard in *Fed. R. Civ. P.* 9(b). The court held, however, that a FCA retaliation claim need only meet the requirements of Rule 8(a) because, unlike a FCA claim, a FCA retaliation claim "'does not require a showing of fraud.'"[31]

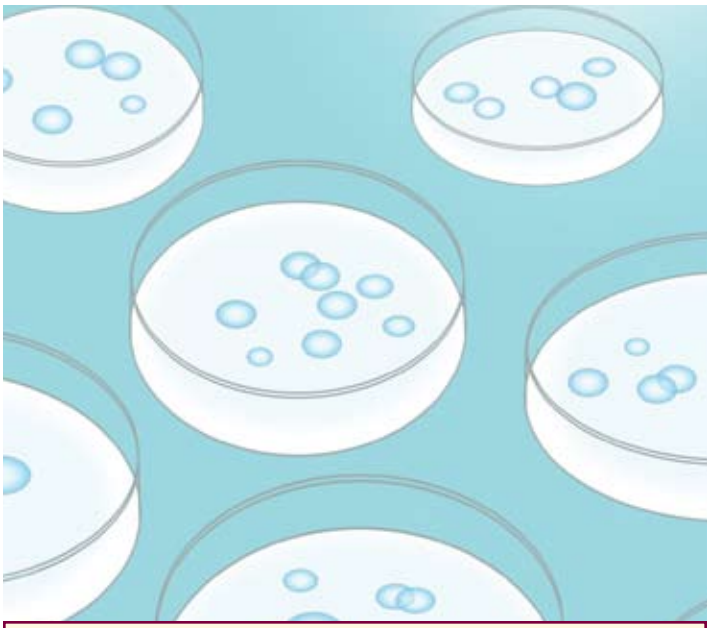
The court reasoned that the elements for a FCA violation claim differ from the elements for a FCA retaliation claim.[32] To state a claim for a FCA violation, the court explained, a plaintiff must allege that the defendant actually violated the FCA by knowingly submitting a false claim to the government.[33] "In contrast, to state a FCA retaliation claim, a plaintiff must show that he or she *suspected* that the defendant submitted a false claim—not that the defendant actually submitted one" (emphasis added).[34] At least one lower court in the Ninth Circuit has already applied the supposed "suspected" standard in a FCA retaliation case.[35]

In the May 13, 2008, decision by the Sixth Circuit in *United States ex rel. Marlar v. BWXT Y-12, LLC*,[36] the court, consistent with prior decisions in the Sixth Circuit, stated that "to be protected by the FCA when confronting an employer, the employee 'must sufficiently allege activity with a nexus to a qui tam action, or fraud against the United States government[.]'" In abiding by the standard established in *McKenzie II,* the *Marlar* court neither discussed nor cited the Supreme Court's opinion in *Graham County*.

## The Future of FCA Retaliation Claims

Until the U.S. Supreme Court adopts a single standard to be applied by lower courts in FCA retaliation cases, the standards used likely will continue to produce inconsistent outcomes among the circuits. There is an additional possibility that some circuits will abandon their existing standards in favor of the less stringent "suspected" standard mentioned, although certainly not adopted, by the Court in *Graham County*. While it is certainly arguable that the Ninth Circuit misread the *Graham County* Court's intentions, it is possible that other circuits may adopt a similar standard.

In addition to the differing standards among the circuits, government contractors may remain liable for retaliatory actions taken against employees under state false claims acts and other state whistleblower protection laws. In New Jersey, for example, the Conscientious Employee Protection Act (CEPA) prohibits employers from retaliating against an employee who discloses, or threatens to disclose, a policy or practice of the employer that the employee reasonably believes is in violation of a law. Furthermore, CEPA specifically protects an employee who is a licensed or certified healthcare professional who discloses, or threatens to disclose, a practice of the employer that constitutes improper quality of patient care.[38] To prevail on a claim under CEPA, a plaintiff must demonstrate, among other things, that he or she reasonably believed that his or her employer's conduct was in violation of law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy.[39]



## Practice Groups Staff


**Trinita Robinson**
Vice President of Practice Groups
(202) 833-6943
trobinson@healthlawyers.org

**Emilee Hughes**
Practice Groups Manager
(202) 833-0776
ehughes@healthlawyers.org

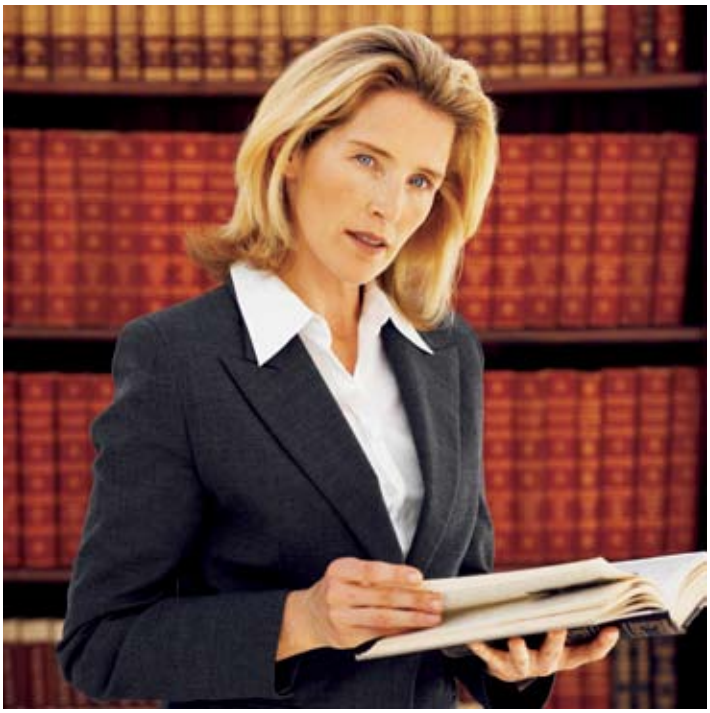
**Magdalena Wencel**
Practice Groups Administrator
(202) 833-0769
mwencel@healthlawyers.org

**Matthew Katz**
Practice Groups Coordinator
(202) 833-0765
mkatz@healthlawyers.org

**Tangie Ricks**
Practice Groups Assistant
(202) 833-0782
tricks@healthlawyers.org

**Mary Boutsikaris**
Art Director/Graphic Designer
(202) 833-0764
mboutsik@healthlawyers.org

**Alex Leffers**
Graphics/Production Assistant
(202) 833-0781
aleffers@healthlawyers.org



In conclusion, given the stepped-up efforts of the federal and state governments to combat fraud by government contractors, and the attendant media attention paid to multi-million dollar whistleblower recoveries, it is likely that contractors will experience increased levels of whistleblowing activities in the years to come. Retaliation suits only compound the problem; indeed, employers are exposed even when they are innocent of the fraud of which they have been accused. Thus employers need to carefully manage the risks of whistleblower retaliation suits, and fraud prevention in the first instance should be the paramount goal. A necessary first step to that end is to develop and implement a robust compliance program that creates an environment in which employees are encouraged to come forward with fraud and other compliance concerns. At the other end, however, employers must comprehensively investigate such allegations and be vigilant in ensuring, through their management and human resources departments, that employees who come forward with good faith concerns of fraud or other compliance issues are not subjected to adverse employment actions as a result of having raised those concerns.

**Kerry M. Parker is a shareholder, and Daniel R. Levy is an associate, of Epstein Becker & Green PC in its Newark, NJ, office. Both are members in the Health & Life Sciences and Labor & Employment practices of the firm.*

1 31 U.S.C. § 3729 *et seq.*

2 *Allison Engine Co., Inc. v. United States*, 553 U.S. ___ (2008) (quoting 31 U.S.C. § 3729(a)).

3 31 U.S.C. § 3730(h).

4 31 U.S.C. § 3730(h).

5 *Neal v. Honeywell Inc.*, 33 F.3d 860, 863 (7th Cir. 1994).

6 *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 531 F.3d 1097, 1103 (9th Cir. 2008); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 235 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004); *Schuhardt v. Washington Univ.*, 390 F.3d 563, 566 (8th Cir. 2004); *Yuhasz v. Brush Wellman Inc.*, 341 F.3d 559, 566 (6th Cir. 2003); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998).

7 *See, e.g., Karvelas, supra*, 360 F.3d at 236; *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 187 (3d Cir. 2001); *Yesudian, supra*, 153 F.3d at 739; *Maturi v. McLaughlin Research Corp.*, 326 F.Supp. 2d 313, 318 (D.R.I. 2004), *aff'd*, 413 F.3d 166 (1st Cir. 2005).

8 275 F.3d 838, 845 (9th Cir. 2002).

9 *Id.*

10 *See Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 479-480 (7th Cir. 2004); *Schuhardt, supra*, 390 F.3d at 567; *Wilkins v. St. Louis*, 314 F.3d 927, 933 (8th Cir. 2002); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 513 U.S. 1154 (1995)).

11 *Karvelas, supra*, 360 F.3d at 236.

12 *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996).

13 *See Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 68 (D.C. Cir. 2008); *Yesudian, supra*, 153 F.3d at 740.

14 *McKenzie v. BellSouth Telecomms., Inc. (McKenzie II)*, 219 F.3d 508, 516 (6th Cir. 2000).

15 *Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 108 (3d Cir. 2002); Hutchins, supra, 253 F.3d at 191.

16 167 F.3d 861, 869 (4th Cir. 1999).

17 *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997).

18 *See United States ex rel. Smith v. Yale Univ.,* 415 F.Supp. 2d 58, 103 (D. Conn. 2006); *Moor-Jankowski v. Board of Trustees of N.Y. Univ.,* 1998 U.S. Dist. LEXIS 12305, 1998 WL 474084, at *10 (S.D.N.Y. Aug. 10, 1998).

19 545 U.S. 409 (2005).

20 *Id.* at 411.

21 *Id.* at 416 (quoting 31 U.S.C. § 3730(h)).

22 *Id.*

23 *Id.* n.1.

24 *Id.* at 417.

25 *Id.*

26 *Id.*

27 521 F.3d 1097 (9th Cir. 2008).

28 *Id.* at 1103 (citing *Graham County,* 545 U.S. at 416-17).

29 *Id.* at 1100.

30 *Id.* at 1103 (citing *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

31 *Id.* (quoting *Karvelas, supra*, 360 F.3d at 228 n.23).

32 *Id.*

33 *Id.* (citing 31 U.S.C. § 3729(a)).

34 *Id.* (citing *Graham County*, 545 U.S. at 416-17).

35 *See United States ex rel. Woodruff v. Haw. Pacific Health*, 2008 U.S. Dist. LEXIS 36684, at *44 (D. Haw. May 2, 2008) (quoting *Mendiondo* and stating that "[a] plaintiff alleging an FCA retaliation claim must show that he or she 'suspected that the defendant submitted a false claim—not that the defendant actually submitted one.'").

36 525 F.3d 439, 450 (6th Cir. 2008) (citing *McKenzie II, supra*, 219 F.3d at 516).

37 *See Mendiondo, supra*, 521 F.3d at 1103 (Ninth Circuit apparently changing its test to require that an FCA retaliation plaintiff show that he or she "suspected" that the defendant submitted a false claim).

38 *See* N.J.S.A. 34:19-3.

39 *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003); *see also Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398 (3d Cir. 2007).