
Court Dismisses RICO and Allows False Claims Act Retaliatory Discharge Count to Proceed Without Substantive Pleading of Fraud

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On March 12, the U.S. District Court for the Western District of Texas, El Paso Division, dismissed a count under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Total Renal Care Inc. (TRC), but permitted a False Claims Act (FCA) retaliatory discharge count to proceed. A former employee alleged that he was fired after he told supervisors of his plans to report that he suspected a coworker of charging Medicare and Medicaid for dialysis procedures that were not performed or not ordered. The decision discusses pleading standards for retaliatory discharge claims under the FCA, particularly where no substantive FCA count is alleged.

The court first dismissed the RICO count under *Beck v. Prupis*, 529 U.S. 494 (2000). In that decision, the U.S. Supreme Court resolved a circuit conflict as to whether a plaintiff has standing to sue for a RICO conspiracy if the injury-producing wrongful acts were overt acts taken in furtherance of the conspiracy but not predicate acts within Section 1961(1) of RICO. *Beck* held that RICO standing requires injury from an overt act that is itself a RICO predicate act. The plaintiff here admitted his lack of RICO standing.

The court then addressed the FCA retaliatory discharge claim. The threshold issue, which had not been determined in the Fifth Circuit, was whether the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure apply to a retaliatory

discharge claim. Citing decisions by courts of appeal in five other circuits, the court held that Rule 8(a), requiring only “a short and plain statement showing that the pleader is entitled to relief,” applies to such claims rather than Rule 9(b) because FCA retaliation counts are not dependent on a fraud count.

The court next analyzed TRC’s substantive challenges to the FCA retaliation claim. The complaint did not allege a substantive FCA violation, but only that the plaintiff had been terminated after stating to supervisors that he intended to further report his charge that a co-worker “was committing Medicare/Medicaid fraud.” TRC contended that the plaintiff failed to allege two elements of retaliatory discharge: (1) that the plaintiff engaged in a protected activity; and (2) that TRC knew that the plaintiff engaged in a protected activity. The court held that both elements were satisfactorily pleaded, and therefore upheld the retaliation claim.

On the protected activity element, the court held that “an employee does not need to file a qui tam suit to be protected by Section 3730(h)” and “need not have even ‘discovered a completed case’ by the time the retaliation takes place.” The employee’s reference to “fraudulent claims for federal funds” in his statements to supervisors was sufficient, the court said, to establish the protected activity element. The court further held that a plaintiff need not detail the specific

facts supporting a “good faith” belief that federal fraud was occurring in order to sufficiently plead a protected activity. The court found “not persuasive,” at least at the motion to dismiss stage, Seventh and Ninth Circuit decisions that inquire into the subjective and objective reasonableness of the possibility of a substantive FCA claim. “Requiring a plaintiff to include detailed facts regarding the underlying fraud in their complaint is tantamount to requiring a plaintiff to ‘put all pieces of the puzzle together’ before allowing them access to the courts.”

The court’s reasoning was similar on the element of employer knowledge. The court stated that “whether an employer was on notice of possible qui tam litigation” is to be determined “by analyzing whether the employee characterized his or her complaints in terms of fraud or illegality.” This standard, the court

held, does not require the plaintiff to have reported the alleged fraud or illegality in detail because such a requirement would be inconsistent with both the Rule 8 pleading standard and Congress’s intent “to protect employees while they are collecting information about a possible fraud”

In sum, the court held that Rule 8 rather than Rule 9(b) applies to retaliatory discharge “because claims under Section 3730(h), at their core, address retaliation issues and not fraud,” and a plaintiff’s internal reporting of alleged fraud, without detail, is sufficient to satisfy the protected activity and employer knowledge elements of the claim.

The case is [Guerrero v. Total Renal Care, Inc., d/b/a DaVita, a/k/a Sierra Mobile Acute Dialysis Services](#), Docket No. EP-11-CV-449-KC.

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