

CLIENT ALERT

Eleventh Circuit Holds that a Sincere Belief is not the Same as a Reasonable One Under the False Claims Act's Retaliation Provision

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On January 19, 2021, the Eleventh Circuit affirmed a district court's rejection at summary judgment of a disgruntled employee's False Claims Act (FCA) retaliation claim in *Hickman v. Spirit of Athens*, No. 19-10945 (11th Cir. Jan. 19, 2021). The Court's decision makes clear that, despite expansions to the FCA in 2009 and 2010 protecting employees who engage in "efforts to stop 1 or more violations" of the FCA, plaintiffs must nevertheless establish that they held an objectively reasonable belief that they were attempting to prevent the submission of false claims to the government for their conduct to constitute protected activity.

The plaintiffs worked for Spirit of Athens, a nonprofit organization. The executive director became concerned in reviewing tax returns that \$61,000 of the organization's expenses were generally categorized as "other expenses" without any further explanation. The executive director verbally retracted her signature on the tax forms, but the organization's president signed and submitted them himself. The executive director and her assistant then arranged for the board members to receive a copy of the tax documents, shared their concerns with the president, and even hired an outside firm to audit the organization's tax returns. Apparently unhappy with the executive director and her assistant's conduct, the president fired them. The two then brought suit against the organization, claiming that they were terminated for "their attempts to combat the organization's misuse of federal funds." The district court granted summary judgment for the defendant, finding that plaintiffs had failed to establish that they had engaged in protected activity under the FCA.

The Eleventh Circuit affirmed the district court's grant of summary judgment, explaining that Spirit of Athens received federal funds through an attenuated process that simply did not involve any submission of claims to the government. The Court found that this was not sufficient to establish a retaliation claim under the FCA. Specifically, "at a minimum, [the plaintiffs were] required to show that the activity they were fired over had something to do with the False Claims Act—or at least that a reasonable person might have thought so. And the False Claims Act requires a false claim; general allegations of fraud are not enough." In short, mere suspicion or even a sincere belief that Spirit of Athens was misusing the federal funds it had received or committing "garden-variety fraud" was not enough to demonstrate a reasonable belief of a false claim being submitted to the government.

This holding from *Spirit of Athens* is similar to another decision the Eleventh Circuit issued just a few months ago in *Brown v. Morehouse College*, No. 19-13773 (11th Cir. Oct. 23, 2020). As an employee at Morehouse College, the plaintiff there worked under a federal grant and was charged with "ensuring compliance with the reporting obligations established by" the agency providing the grant. Suspecting errors in the College's handling of the grant, the plaintiff submitted a series of internal complaints asserting that the College was not complying with its cost-sharing obligations and was wrongfully expensing the grant for more people than the budget allowed. Eventually, the College decided not to renew the plaintiff's contract, after which he sued for retaliation under the FCA.

As in *Spirit of Athens*, the Eleventh Circuit in *Morehouse College* affirmed the district court’s grant of summary judgment because it found that the internal complaints did not amount to efforts to stop FCA violations. The plaintiff’s allegations of “mismanagement of funds” or “abuse of funds,” among similarly worded phrases, did not constitute protected activity where the College was not required to submit anything to the government under the terms of the grant. Thus, the Court reasoned, there could be no cognizable false claim.

These decisions help clarify the objective thresholds that employees must satisfy for their complaints to properly be considered “protected activity” under the revised and broadened FCA retaliation protections and provide employers with guideposts to understand when they may be at risk of potential FCA liability. Employers who have any doubt about internal complaints and potential retaliation concerns should seek legal advice prior to taking any adverse employment actions.

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