Whistleblower-Retaliation Claims Under the False Claims Act and the Protected Activity Needed to Support Such Claims

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Recent Developments in Sarbanes-Oxley, Dodd-Frank, and False Claims Act Whistleblower Retaliation and Litigation

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by

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This paper provides an introduction to the litigation of claims of retaliation arising under the U.S. False Claims Act (“FCA”), 31 U.S.C. §§ 3729 – 3733. Following a brief summary of the FCA’s “qui tam” provisions, the paper will review the elements of claims arising under the FCA’s anti-retaliation provision found in 31 U.S.C. § 3730(h). The main focus of this review is a survey of how courts have interpreted the “protected activity” element of retaliation claims in light of amendments to the statute that Congress enacted in 2009 with the goal of broadening the range of employee conduct that would be protected by the FCA.

A. Qui Tam Suits

The FCA provides significant monetary incentives to private citizens to file claims on behalf of the federal government to recover moneys lost to fraud. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government. See 31 U.S.C.A. § 3730(d). Under the FCA, a person is liable for treble damages and penalties if that person:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

In December 2013, the U.S. Department of Justice (“DOJ”) reported that FCA whistleblower lawsuits had aided DOJ in the collection of some $2.9 billion in settlements and judgments during fiscal year 2013, down from the previous year but still the second-highest single-year total in FCA history. See Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (DOJ Press Release, December 20, 2013), available at http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html. More than two thirds of these recovered funds resulted from allegations of healthcare fraud in connection with government-funded programs, with the remainder recovered in cases involving fraud in government procurement contracts and other government contracts, grants and programs.

B. The FCA’s Anti-Retaliation Provision

Congress added the following anti-retaliation protections to the False Claims Act (“FCA”) in 1986, codifying them at 31 U.S.C. § 3730(h):

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 employer 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.

The broad scope of whistleblower protection intended by Congress under the 1986 version of § 3730(h) was clear from the time of its enactment. The Senate committee report accompanying the 1986 amendments to the FCA stated as follows: “[T]he committee believes protection should extend not only to actual qui tam litigants, but to those who assist or testify for a litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be construed broadly.” S. REP. NO. 99-345 at 34, reprinted in 1986 U.S.C.C.A.N. 5266, 5299. Section 3730(h), as contemplated by Congress even in 1986, was to protect conduct “in any way connected with the person's activities under [the FCA].” 132 CONG. REC. 29,322 (1986) (emphasis added).

To prove that an employer retaliated against an employee in violation of 31 U.S.C. § 3730(h), an employee must demonstrate that: (1) she engaged in protected activity; and (2) that she was discriminated against because of her protected activity. See Harrington v. Aggregate Industries-Northeast Region, Inc., 668 F.3d 25, 30 (1st Cir. 2012); U.S. ex rel. Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 111 (3d Cir. 2007); United States ex rel. George v. Boston Scientific, 864 F. Supp. 2d 597, 604 (S.D. Tex. 2012). To demonstrate that she was discriminated against “because of” conduct in furtherance of a False Claims Act suit, an employee must show that her employer had knowledge of the protected activity and that her employer’s retaliation was motivated, at least in part, by the employee’s engaging in protected activity. See Hefner, 495 F.3d at 111.
1. Protected Activity

Congress has amended § 3730(h) on two recent occasions, confirming the intended broad scope of protected activity under the FCA and the protections afforded to whistleblowers who expose fraud on the federal government. First, on May 20, 2009, Congress enacted the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, § 4(d), 123 Stat 1617 (2009) (“FERA”), which amended § 3730(h) to protect employees from being “discharged, demoted, . . . or in any other manner discriminated against in the terms and conditions of employment . . . because of lawful acts done by the employee . . . in furtherance of other efforts to stop [one] or more violations of this subchapter.” Second, in July 2010, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1079A (c)(1), 124 Stat. 1376 (2010) (“Dodd-Frank”), which again amended § 3730(h) to protect employees who have acted “in furtherance of a[][FCA] action” or who have taken “other efforts” to stop violations of the FCA. The current version of § 3730(h)(1) reads as follows:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

The plain language of the current statute and the legislative history of recent revisions make clear that Congress intended to broaden the scope of protected activity under § 3730(h).1 The addition of a reference to “other efforts to stop 1 or more violations of [the FCA]” is a clear attempt to shield from retaliation not only individuals who have taken steps in furtherance of a qui tam action, but also those who have engaged in investigatory or oppositional activity related to fraud against the government. In 2009, Congressman Howard Berman, one of the drafters of the FERA amendments, made this intent plain in the following statement:

To address the need to widen the scope of protected activity, Section 4(d) of [FERA] provides that Section 3730(h) protects all “lawful acts done ... in furtherance of ... other efforts to stop 1 or more violations” of the False Claims Act. This language is intended to make clear that this subsection protects not only steps taken in furtherance of a potential or actual qui tam action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department and refusals to participate in the

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1 In addition to a broadened definition of protected activity, other significant expansions in whistleblower protection effected by the revisions include: (1) the elimination of the requirement of an employment relationship between whistleblower and defendant; (2) the provision of protection to contractors and agents, in addition to employees; and (3) the specific proscription of retaliation against individuals based on their association with a whistleblower. Several courts have also found that the changes now allow for individual liability for violations of Section 3730(h). See, e.g., Huang v. Rector and Visitors of Univ. of Va., 2013 WL 865845 (W.D. Va. Mar. 7, 2013).
misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual qui tam action.


As is detailed in the survey below, most courts interpreting the revised FCA have indicated that they view the amendments as having increased the scope of protection afforded to whistleblowers, whether or not that broadened scope was determinative in the case at hand. Some decisions, however, appear to reflect a deference to pre-amendment precedent. In these cases, courts have maintained a narrow focus on whether an individual has clearly taken steps “in furtherance of” an action under the FCA – the standard that had developed under the 1986 version of § 3730(h) – whether or not he or she has engaged in efforts to stop a violation of the FCA.2

a. First Circuit

Courts in the First Circuit have generally reasoned that the revised § 3730(h) was intended to cover a broader range of protected activity than its predecessor, but have at times suggested that the amendment has had little practical effect in the First Circuit. The pre-amendment standard was set forth in U.S. ex rel. Karvelas v. Melrose–Wakefield Hosp., 360 F.3d 220, 236-37 (1st Cir. 2004), which held that a plaintiff must show that he or she was engaged in conduct that reasonably could lead to a viable FCA action, such as “investigations, inquiries, testimonials or other activities that concern the employer’s knowing submission of false or fraudulent claims for payment to the government.”

Courts in the First Circuit have held that the post-FERA standard for finding protected activity remains “essentially the same” as the standard laid out in Karvelas. U.S. ex rel. Nowak v. Medtronic, Inc., 806 F.Supp.2d 310, 339 (D. Mass. 2011); see also Manfield v. Alutiiq Intern. Solutions, Inc., 851 F.Supp.2d 196 (D. Me. 2012) (stating that “just as an employee’s internal complaints which relate to an FCA violation would be considered ‘conduct that reasonably could lead to a viable FCA action’ under Karvelas, they would also naturally fall within the ambit of an ‘effort to stop’ a violation under the amended section 3730(h)”).

The U.S. District Court for the District of Massachusetts suggested that the pre-FERA standard for protected activity still applied in U.S. ex rel. Provuncher v. Angioscore, Inc., No. 09-12176, 2012 WL 1514844 (D. Mass. May 1, 2012), in which it implied without stating expressly that the refusal to sell a misbranded product, coupled with voicing concerns about its safety, did not constitute protected activity under the FCA.

Other decisions in the First Circuit have been more encouraging. Representative cases citing the amended FCA and finding that an employee engaged in protected activity include:

2 The cases are organized by circuit for ease of reference.

• **U.S. ex rel. Gobble v. Forest Labs, Inc.,** 729 F. Supp. 2d 446 (D. Mass. 2010) (holding that the relator’s complaints to his supervisor were sufficient to put defendants on notice of his protected conduct and that complaints of kickbacks and off-label promotions could predicate an FCA whistleblower-retaliation claim in a case where defendants argued that the relator had not engaged in protected activity because the basis of relator’s complaint was non-compliance with laws governing pharmaceutical sales).

• **Jewell v. Lincare, Inc.,** 810 F. Supp.2d 340 (D. Me. 2011) (citing Karvelas for the principle that “protected conduct” is construed broadly in the First Circuit, and holding that the plaintiff engaged in protected activity when he reported to his supervisor that he had observed a coworker backdating and forging client signatures on documents submitted to Medicare and the state public insurance provider).

• **Manfield v. Alutiiq Intern. Solutions, Inc.,** 851 F.Supp.2d 196, 202-03 (D. Me. 2012) (holding that an employee engaged in protected activity when he made internal complaints to his employer about inadequacies in equipment provided pursuant to a contract with the Navy, because the reports “may [have] concern[ed] FCA violations”).

• **U.S. ex rel. Booker v. Pfizer, Inc.,** CIV.A. 10-11166-DPW, 2014 WL 1271766 (D. Mass. Mar. 26, 2014) (denying defendant’s motion to dismiss plaintiff’s claim that the defendant retaliated against him in violation of the FCA when it terminated him after he reported fraudulent conduct directed at physicians to encourage off-label drug use because such conduct “reasonably could lead” to false claims).

**b. Third Circuit**

• **U.S. ex rel. Portilla v. Riverview Post Acute Care Ctr.,** CIV. 12-1842 KSH, 2014 WL 1293882 (D.N.J. Mar. 31, 2014) (dismissing FCA retaliation claim where plaintiff “was terminated because of her administrative, regulatory whistleblowing,” nothing that “she was not acting ‘in furtherance of’ an FCA action because the allegations could not ‘give rise to a viable FCA violation’ ”). 

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3 *Manfield* also discussed the effect of the amendments to § 3730(h) on the “employer notice” requirement of a *prima facie* case of retaliation: “Since a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.” *Manfield*, 851 F. Supp. 2d at 203.
c. Fourth Circuit

Courts in the Fourth Circuit have acknowledged that “in enacting [amendments to § 3730(h)], Congress has broadened the scope of . . . protected activity.” Layman v. MET Labs., Inc., No. RDB-12-2860, 2013 WL 2237689 at *5 (D. Md. May 20, 2013). Still, the Fourth Circuit retains the “distinct possibility” standard for protected activity, i.e., the requirement that at the time of the alleged protected activity, there was a distinct possibility that the plaintiff’s actions would lead to a viable FCA claim. Moreover, at least one federal district court has applied the 1986 version of the law to conduct occurring after the May 20, 2009, enactment of FERA. These decisions suggest that the Fourth Circuit may for now continue to apply the protected activity prong of § 3730(h) narrowly, notwithstanding the district court’s statements in Layman.

- **Williams v. Basic Contracting Servs., Inc.**, No. 5:09-cv-00049, 2010 WL 3244888 (S.D. W.Va. Aug. 17, 2010) (investigatory efforts, short of filing suit, constitute protected activity for the purposes of the anti-retaliation provision, in a case in which the plaintiff had not filed a *qui tam* suit but had located a copy of the defendant’s government contract and spoken to people regarding alleged fraudulent billing practices).

- **Weihua Huang v. Rector and Visitors of University of Virginia**, No. 3:11-cv-00050, 2012 WL 4458177 (W.D. Va. Sept. 6, 2012) (quoting the 1986 version of the FCA in analyzing conduct that occurred after the enactment of FERA, but holding that a genuine issue of material fact existed as to whether university employee engaged in protected activity where he reported to his department chairman his suspicion that the university was improperly charging hours to a federal grant).

- **Layman v. MET Labs., Inc.**, No. RDB-12-2860, 2013 WL 2237689 at *7, 9 (D. Md. May 20, 2013) (acknowledging that Congress had enacted FERA to “counter perceived restrictive judicial interpretations of the protected activity prong” so as to clarify that internal reports to management were protected under the FCA and holding plaintiff had properly pleaded that he engaged in protected activity by refusing to continue and/or approve testing of a component that he believed was deficient, and informing his supervisor that the test results were fraudulent and that he would not sign the testing report).

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4 The function of the “distinct possibility” test has been defined as follows: “Analysis of the protected activity element of an FCA retaliation action can . . . be distilled to the requirement that an employee-plaintiff make two showings: (1) the employee took action in furtherance of an FCA claim that (2) raised a distinct possibility of suit, from the perspective of the employee at the time. Glynn v. Impact Sci. & Tech., Inc., 807 F. Supp. 2d 391, 404 (D. Md. 2011) aff’d sub nom. Glynn v. EDO Corp., 710 F.3d 209 (4th Cir. 2013)

5 Ultimately, the court dismissed the plaintiff’s retaliation claim without prejudice because he made his complaint in the context of his employer’s relationship with another private company, and not with the government.
Glynn v. EDO Corp., 710 F.3d 209, 216 (4th Cir. 2013) (affirming dismissal of claims where plaintiff alleged that he had engaged in protected activity by: (1) investigating and opposing his employer’s provision of defective anti-IED devices to the government; (2) investigating and opposing his employer’s false certification of compliance with the requirements in the contract to provide the devices; and (3) initiating a government investigation into his employer’s fraudulent conduct). The court noted that it was clear that the defendant had complied with contractual requirements by testing the allegedly defective units and thus had made no false certifications of compliance, and therefore the plaintiff’s activities “did not raise a distinct possibility of a viable FCA action.”

Young v. CHS Middle E., LLC, 1:13-CV-000585-GBL, 2013 WL 4498680 (E.D. Va. Aug. 20, 2013) (plaintiff surgery nurses failed to plead viable FCA retaliation claim where they had acted to stop alleged FCA violations but had only complained about – and thereby put the defendant on notice of – substandard patient care). The court noted that “[t]he FERA amendments expand the definition of protected activity to include not only acts in furtherance of an FCA claim but also ‘efforts to stop’ a violation,” id. at *6, but the court nonetheless went on to quote the pre-amendment standard from an earlier case stating that “protected activity occurs when … litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when litigation is a reasonable possibility.” Id., citing Mann v. Heckler & Koch Def., Inc., 630 F.3d 338, 344 (4th Cir. 2010).

Elder v. DRS Technologies, Inc., 1:13CV799 JCC/TRJ, 2013 WL 4538777 (E.D. Va. Aug. 27, 2013) (denying motion to dismiss where plaintiff alleged he was terminated for complaining of fraudulent timekeeping policies, but noting that “[i]n the Fourth Circuit, a protected activity takes place where an employee's opposition to fraud takes place in a context where litigation is a distinct possibility, when the conduct could reasonably lead to a viable FCA action, or when . . . litigation is a reasonable possibility.”)


d. Fifth Circuit

In the wake of the FCA amendments, at least one court in the Fifth Circuit has acknowledged that the amended § 3730(h) broadened the scope of protected conduct under the act, although, like the Fourth Circuit, it nonetheless maintained adherence to the “distinct possibility” standard. In U.S. ex rel. George v. Boston Scientific Corp., 864 F.Supp.2d 597, 607 (S.D. Tex. 2012), the court held that a pharmaceutical company employee had engaged in protected activity when she asked during two presentations whether the federal government

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6 In another decision discussing the amended statute, the district court focused on whether the amendments to the FCA removed the requirement of an employment relationship, finding that it did not. See Howell v. Town of Ball, No. 12–951, 2012 WL 3962387 (W.D. La. Sept. 4, 2012).
might view off-label marketing of a medical device as fraud on the government. The court reasoned that her inquiries “raised a ‘distinct possibility’ that she, or other employees attending the presentation[s], might bring False Claims Act litigation” against her employer. *Id.*


e. Sixth Circuit

Sixth Circuit courts have issued conflicting decisions in the wake of the amendments to the FCA. In *U.S. ex rel. Yanity v. J&B Med. Supply Co.*, 2012 WL 1247163 at *3 (E.D. Mich. Apr. 13, 2012), the court found that a complaint alleging the plaintiffs “reported false billings to their supervisors” and “objected to the submission of false claims and fraud on the government” was sufficient to survive a motion to dismiss. *See also U.S. ex rel. D’Alessio v. Vanderbilt Univ.*, 3:11-00467, 2014 WL 1094452 (M.D. Tenn. Mar. 19, 2014) (“Dr. Fisher raised concerns about false billings, was then told to look for another job, and his contract at Vanderbilt was not renewed allegedly because of his false billing complaints. . . . This is sufficient to overcome a motion to dismiss.”) However, some courts in the Sixth Circuit have retained a fairly narrow view of protected activity, in some cases apparently looking to a plaintiff’s subjective motives:

- *Cabotage v. Ohio Hosp. for Psychiatry, LLC*, No. 2:11–cv–50, 2013 WL 1281940 (S.D. Ohio Mar. 26, 2013) (granting defendants’ motion for summary judgment and finding no protected activity where relator alleged that she assumed that her former employer had improperly billed Medicaid and Medicare for services, but did not allege that she took any steps to investigate her assumption or report her suspicion of illegal conduct to her superiors, and where the investigation she did conduct was focused on patient care rather than fraudulent billing of the federal government).

- *Watts v. Lyon County Ambulance Serv.*, No. 5:12-CV-00060-TBR, 2013 WL 557274 (W.D. Ky. Feb. 12, 2013) (granting defendant’s motion to dismiss after citing Sixth Circuit precedent on the pre-amendment “in furtherance of” requirement of § 3730(h) where plaintiff refused to reclassify and submit to Medicaid and Medicare certain ambulance charges). The court reasoned as follows: (1) under Sixth Circuit precedent, reporting wrongdoing to supervisors and urging compliance with applicable laws and regulations is not enough to meet the “protected activity” standard; (2) plaintiff’s refusal to engage in allegedly fraudulent conduct was based on “a single event;” (3) plaintiff did not submit any report or other communication to his employer alleging fraud on the government; (4) plaintiff did not conduct any investigation into alleged fraudulent conduct; (5) plaintiff did not take any action “in furtherance of” a *qui tam action* under the FCA; (6) legal action was neither a reasonable or distinct possibility at the time of
plaintiff’s alleged protected activity; and (7) plaintiff did not allege that any fraud on the government actually occurred either before or after the meeting in question.

- **Solano-Reed v. Leona Group, LLC**, No. 11–14245, 2013 WL 501612 (E.D. Mich. Feb. 11, 2013) (holding that guidance counselor at charter school did not engage in protected activity when she protested school’s practices of administering only to select students the standardized tests required to receive federal funds under the No Child Left Behind Act and complained to a state government official and the charter school company’s CEO about the practice; the court stated that the plaintiff “provided no evidence that she was at all concerned with the government's allocation of funding to a school that fails to properly test its students,” but that she “merely found it against her ethical obligations as a guidance counselor,” and that her complaints, which did not mention fraud, were “not reasonably connected to the FCA [and did not] serve to further a viable qui tam action”).

- **Jones-McNamara v. Holzer Health Sys., Inc.**, 2:13-CV-616, 2014 WL 1671495, at *5 (S.D. Ohio Apr. 28, 2014) (plaintiff compliance officer who “was investigating conduct that related to improper, fraudulent reporting, had sent a memorandum complaining of conduct that she indicated needed to be banned, and, perhaps most notably, had advised that reimbursement checks needed to be sent to the government,” adequately alleged she had engaged in protected activity). The court found that under the post-FERA amendments, “protected activity was simply engaging in efforts to stop one or more FCA violations . . . . This could apparently take the form of trying to stop the misconduct by external means (e.g., an FCA action) or by internal means (e.g., reporting violations up a company's chain of command in an effort to effectuate institutional course correction).” *Id.* at *4.

f. **Seventh Circuit**

- **Halasa v. ITT Educ. Servs., Inc.**, No. 10–cv–437–WTL–MJD, 2011 WL 4036516, *4 (S.D. Ind. Sept. 12, 2011) (holding that plaintiff did not engage in protected activity where he made vague allegations about alleged improprieties by his employer with respect to the provision of government funding, but did not connect them to fraud, and where he “drew conclusions based solely upon rumors and speculation and complained of problems when he had no proof that problems actually existed”).

- **Gronemeyer v. Crossroads Cnty. Hosp.**, 3:10-CV-00571-WDS, 2013 WL 4510006 (S.D. Ill. Aug. 26, 2013) (holding that plaintiff successfully alleged protected activity by reporting fraudulent Medicare and Medicaid reimbursements to her superiors, but dismissing case for lack of notice). The court held that the “defendant incorrectly overstates the “in furtherance of” requirements of the Seventh Circuit,” and that “employee need not have actual knowledge of the FCA . . . 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.” *Id.* at *3 (internal citations and quotations omitted).
g. Eighth Circuit

- *Dutcher v. Mid Iowa Reg'l Hous. Auth.*, 12-CV-3081-DEO, 2014 WL 1165856 (N.D. Iowa Mar. 21, 2014) (citing *Schweizer*, 677 F.3d at 1238, for the principle that “an employee . . . can be engaging in protected activity—although the employee is not contemplating bringing a qui tam suit, is not even aware that there is such a thing as a qui tam action . . .”). The court noted that the plaintiff “sought to expose that the government was paying money it either was not required to pay or should not have been paying. That is sufficient to establish that Dutcher, in making these complaints, was engaged in protected activity for purposes of the anti-retaliation provision of the FCA.” *Id.* at *12.

h. Ninth Circuit

- *Brazill v. California Northstate Coll. of Pharmacy, LLC*, 2013 WL 2449544 (E.D. Cal. June 5, 2013) (assuming for purposes of motion for summary judgment, but not deciding, that plaintiff engaged in protected activity by reporting to dean of College that students of the College were using federal financial aid they received to pay for their expenses at another university to pay for tuition at the College instead, and by telling the dean that the practice was “illegal”).

i. Tenth Circuit

- *McCurdy v. Cowley Cnty. Developmental Servs., Inc.*, 11-1392-CM, 2014 WL 298680 (D. Kan. Jan. 28, 2014) (denying motion to dismiss FCA retaliation claim in case where plaintiff alleged she had been terminated for raising questions about the propriety of practices at an organization that determined eligibility for services and funding for persons with developmental disabilities). The court did not elaborate on the causation standard it was applying.

j. Eleventh Circuit

- *Bell v. Dean*, No. 09–cv–1082–WKW, 2010 WL 2976752 at *1–2 (M.D. Ala. July 27, 2010) (noting that under the amended version of § 3730(h), “[n]o nexus to actual or threatened litigation is required, in contrast to the former version of the statute, which measured a retaliation claim by the likelihood of a substantive FCA suit being brought” and denying defendant’s motion to dismiss where the plaintiff alleged that he explicitly threatened to report what he viewed as an unauthorized use of Title III grant funds, and where documents existed that would likely constitute false claims if they were submitted to the Government).

- *Marbury v. Talladega Coll.*, 1:11-CV-03251-JEO, 2014 WL 234667, at *10 (N.D. Ala. Jan. 22, 2014) (plaintiff’s complaints about coworker’s failure to complete forms and protestations about misuse of Title III funds constituted protected activity under the FCA). Citing the legislative history of recent amendments to the FCA anti-retaliation provision, the court noted that the new language was intended to protect not only steps taken “in furtherance of” a qui tam action but also efforts to remedy the misconduct such
as by internal reporting to a supervisor. *Id.* at 8.

**k. D.C. Circuit**

- *Pitts v. Howard Univ.*, CV 13-1398 (JEB), 2014 WL 69032 (D.D.C. Jan. 9, 2014) (holding that plaintiff who had “reported the potential irregularities and financial mismanagement that he discovered, issues which may have uncovered a possible fraud upon Howard University,” had adequately alleged that he engaged in protected activity)

- *Bland-Collins v. Howard Univ.*, CV 09-0394 (RJL), 2014 WL 521092, at *3 (D.D.C. Feb. 10, 2014) (holding that plaintiff researcher funded by NSF grant who was forced to resign after complaining of research misconduct had engaged in protected activity, but stating that “the appropriate inquiry is whether a plaintiff was investigating matters that ‘reasonably could lead’ to a viable False Claims Act case.”)


**2. Litigation Process**

An employee may bring and FCA retaliation claim directly in federal district court. 31 U.S.C. § 3730(h)(2). Section 1049(b) of the Dodd-Frank Act amends the FCA to provide a uniform limitations periods of three years after the date of the retaliation. *See* 31 U.S.C.A. § 3730(h)(2). This amendment provided much-needed clarity in light of an earlier Supreme Court decision that required plaintiffs to engage in the uncertain task of identifying and applying the most analogous state-law statute of limitations to FCA retaliation claims. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005) (holding that the FCA’s six-year statute of limitations did not govern FCA civil actions for retaliation). Because the amendment did not explicitly apply retroactively to cases filed prior to the Dodd-Frank Act, however, courts have continue to apply limitations found in state-law analogues in those cases. *See, e.g., U.S. ex rel. George v. Boston Scientific Corp.*, 864 F. Supp. 2d 597, 603 (S.D. Tex. 2012) (applying two-year statute of limitations for personal injuries, rejecting defendants’ argument that 90-day Texas Whistleblower Act limitation period should apply, and noting that claim would be timely under other limitations periods argued appropriate by plaintiff); *Riddle v. Dyncorp International, Inc.*, 666 F.3d 940,941-42 (5th Cir. 2012) (reversing the district court’s dismissal because the lower court was incorrect to apply the Texas Whistleblower’s 90-day statute of limitations and should have instead applied the two year statute of limitations applicable to personal injury claims, which the Fifth Circuit found more analogous to FCA claims); *Saunders v. District of Columbia*, 789 F. Supp. 2d 48 (D.D.C. 2011) (holding that a three year statute of limitations applies because both the FCA and the analogous District of Columbia False Claims Act both have three year statutes of limitations, and indicating but not deciding that the amendment should apply retroactively); *United States ex rel. Yanity v. J & B Medical Supply Co., Inc.*, No. 08-11825, 2012 WL 4811288, at *5 (E.D. Mich. Oct. 10, 2012)
(finding Congress did not intend for retroactive application of statute of limitation provision, and applying three-year period applicable to torts claims generally).

In 2012, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court’s dismissal of a retaliation claim under the False Claims Act (“FCA”) and ordered the court to review the settlement of a related qui tam case that the U.S. government had reached with the defendant over the relator’s objection. *U.S. ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228 (D.C. Cir. 2012). Schweizer was hired by Océ in 2004 as a contracts manager for the General Service Administration (“GSA”) to monitor the company’s compliance with government regulations. In early 2005, Schweizer alleges that she discovered Océ was offering customers significant discounts without passing those savings on to the government. Throughout 2005, she alerted her supervisor, her company’s legal counsel, and finally the company’s vice president of business development. Following her final complaint about the issue in December 2005, Schweizer was suspended and terminated within a week and a half. Her termination letter alleged that she “refused to follow orders” and “ignored the chain of command.” *Id.* at 1229-31. Schweizer and another former Océ employee, Nancy Vee, filed a qui tam. Schweizer included a claim of retaliation in the lawsuit, alleging that she was terminated in response to her complaints that Océ was defrauding the government. The government ultimately settled the qui tam suit against Océ for $1.2 million, despite Schweizer’s objections to the settlement. *Id.* at 1231-32. The district court found that the government held “unfettered dismissal power,” and it was therefore not obligated to review the agreement’s fairness. The district court also granted Océ’s motion for summary judgment as to Schweizer’s FCA retaliation claim. *Id.* at 1232. The D.C. Circuit rejected both of these decisions. It held that in order for the government to settle a qui tam case over a relator’s objections, a court must first approve the settlement as “fair, adequate and reasonable.” *Id.* at 1233-37.

3. Burden of Proof

In the 2012 case of *Harrington v. Aggregate Industries-Northeast Region, Inc.*, 668 F.3d 25 (1st Cir. 2012), the First Circuit Court of Appeals held, for the first time at the appellate level, that the McDonnell-Douglas burden-shifting framework, borrowed from Title VII, applies to FCA retaliation cases where there is no direct evidence of retaliation. The court found that the fact that Aggregate management learned that Harrington was a relator in March 2007 and then discharged him seventy-two hours after he signed the qui tam settlement was sufficient to state a prima facie case of retaliation. *Id.* at 30-32. The Sixth Circuit Court of Appeals had previously reached the same conclusion in unpublished decisions. See, e.g., *Scott v. Metropolitan Health Corp.*, 234 F. App’x 341, 346 (6th Cir. 2007). After concluding that the plaintiff had set forth a prima facie case of retaliation, the court held that although Aggregate had put forth a legitimate non-retaliatory reason for terminating plaintiff – his refusal to submit to a drug test – “the facts underlying Aggregate’s efforts to force a drug test on appellant, along with the temporal proximity between the time that he signed the settlement agreement and the time of his dismissal, create a trialworthy issue about whether Aggregate’s proffered reason for firing him was a sham.” In so holding, it again reiterated the close temporal proximity and pointed out that there was doubt that Aggregate followed its own drug testing protocol, suggesting that the company’s stated reason was pretextual. *Id.* at 32-35.
Although a number of courts have yet to address the issue, those courts that have addressed it have followed Harrington’s holding. The District of Columbia Circuit Court of Appeals explicitly agreed with Harrington in U.S. ex rel Schweizer v. Oce N.V., 677 F.3d 1228, 1241 (D.C. Cir. 2012). Following these decisions, the United States District Court for the Northern District of Oklahoma also applied the McDonnell-Douglas framework, noting that both the First Circuit and District of Columbia Circuit had held it applied in the context of FCA retaliation claims. U.S. ex rel. Sharp v. E. Oklahoma Orthopedic Ctr., 05-CV-572-TCK-TLW, 2013 WL 5816419 at *14, n. 19 (N.D. Okla. Oct. 29, 2013). The Sharp court also noted:

Although not adopting it by name, other circuits “have adopted or alluded to a similar rule. See Scott v. Metro. Health Corp., 234 F. App’x. 341, 346 (6th Cir.2007); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir.2001); Norbeck v. Basin Elec. Power Coop., 215 F.3d 848, 850–51 (8th Cir.2000). Thus, there appears to be some consensus that analysis of “pretext” evidence is appropriate in determining whether a plaintiff can reach a jury on the causation element.


4. Standard of Causation

While Section 3730(h) claims were long governed by a motivating factor causation standard, a recent District Court decision applied the higher “but-for” causation standard. See United States ex rel. Schweizer v. Oce N. Am., No. 06–648, 2013 WL 3776260 at *11, 956 F. Supp. 2d 1 (D.D.C. July 19, 2013) (“Where Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers ‘because of’ X, plaintiffs may succeed only by showing that X was a ‘but-for’ cause of the adverse action, not merely one of several ‘motivating factors’”). The Schweizer court relied on the Supreme Court’s decision in Univ. of Tex. Sw. Med. Ctr. V. Nassar, 133 S. Ct. 2517, 2533 (2013), which held that Title VII retaliation claims were governed by a but-for standard of causation, which “requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”

5. Available Remedies

The remedies available to a successful claimant are generally designed to “make the employee whole.” 31 U.S.C. § 3730(h). Remedies include reinstatement with seniority, double back pay with interest, and special damages including attorneys’ fees. Id. Two Circuits have held that the FCA allows for payment of compensatory damages for this type of pain, suffering and emotional distress as a component of the “special damages” mentioned in the
statute.  See Brandon v. Anesthesia & Pain Mgmt. Assoc., Ltd., 277 F.3d 936, 943-44 (7th Cir. 2002); Hammond v. Northland Counseling Center, Inc., 218 F.3d 886, 892-93 (8th Cir. 2000) (emotional distress damages are available under the statutory provision for “special damages”); Neal v. Honeywell, Inc., 191 F.3d 827, 831-32 (7th Cir. 1999).