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Protected Activity? *Think Again*.

Authors: Dena Holly Sokolow, Thomas H. Barnard, Ashleigh Singleton Dyer, Sabrina N. Marquez
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It is widely known that employers are prohibited from retaliating against employees for engaging in "protected activity." But what is "protected activity?" Unfortunately, the definition of "protected activity" varies widely across state and federal laws. Since there is a wide scope of conduct that could be protected from retaliation, it is often difficult for employers to ensure such illegal retaliation does not occur. The recent case from the United States Court of Appeals for the Eleventh Circuit highlights this complexity. *See Simon ex rel. Fla. Rehab. Assocs., PLLC v. Healthsouth of Sarasota Ltd. P'ship*, 2022 WL 3910607 (11th Cir. Aug. 31, 2022). It is important for employers to understand what employee activity/conduct is protected under the law and to train managers so as to avoid retaliation claims.

In *Simon,* the Eleventh Circuit acknowledged that the same legal framework applies under the False Claims Act (FCA) and Title VII of the Civil Rights Act of 1964 (Title VII) for retaliation claims. The Eleventh Circuit explained to establish a *prima facie* case of retaliation under either the FCA or Title VII, employees must show that: (1) they engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the protected activity. However, what constitutes "statutorily protected activity" under the first step of this framework differs under the FCA and Title VII. Under Title VII, the definition is arguably much broader. An employee only needs a good faith, objectively reasonable belief that the employee's activity is protected by Title VII to be protected conduct under the Act. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). Title VII's anti-retaliation provision does not require an employee to show that the employer's conduct violated Title VII. Whereas, under the FCA, the Eleventh Circuit clarified that an employee must show an objectively reasonable belief that the employer was violating the FCA (i.e., that the employer has made a false claim to the federal government). Relying on its decision in *Hickman v. Spirit of Athens, Alabama, Inc.*, 985 F.3d 1284 (11th Cir. 2021), the Eleventh Circuit reiterated that "'the False Claims Act requires a false claim,' including retaliation claims under the FCA, and 'general allegations of fraud are not enough.'" The Court further explained to establish an FCA retaliation claim, an employee "must provide facts showing that a reasonable person might have thought that a false claim, which cannot consist of differences of opinion among physicians, was being conveyed to the government for money." This is a much narrower definition of "protected activity" than the one under Title VII.

This objectively reasonable belief standard for "protected activity" in FCA retaliation claims is an approach consistent with surrounding Circuits. In the Fourth Circuit, for example, "an act constitutes protected activity where it is motivated by an objectively reasonable belief that the employer is violating, or soon will violate, the FCA." *U.S. ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 201 (4th Cir. 2018). While the Eleventh Circuit's decision in *Simon* highlights the differences between establishing "protected activity" under the FCA and Title VII, there are also different standards under state law. In Florida, for example, the courts are split on whether employees alleging a violation of the Florida Whistleblower Act (FWA) must show that an employer "actually violated the law" or whether the employee must only show that he or she had a "good-faith, reasonable belief" that the employer had violated a law, rule, or regulation. *See United States ex rel. Els v. Orlando Heart & Vascular Center, LLC*, 2022 WL 4483723 (M.D. Fla. Sept. 27, 2022).

Florida's Fourth District Court of Appeal has held that all that is required under the FWA is that an employee have "a good faith, objectively reasonable belief that [his or her] activity is protected by the statute." *Aery v.*

Wallace Lincoln-Mercury, LLC, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). This is the same standard for Title VII retaliation claims. Florida's Second District Court of Appeal, however, disagreed with *Aery* and stated, under the FWA, an employee must "prove that he [or she] objected to an actual violation of law or that he refused to participate in activity that would have been an actual violation of law." *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458, 465 (Fla. 2d DCA 2015). The Florida Supreme Court has not ruled on this issue and the uncertainty and confusion will only be increased with the addition of Florida's new Sixth District Court of Appeal, which will not be bound by existing legal precedent to control its decisions (except in situations where the Florida Supreme Court has previously ruled). For more information on this topic, see Baker Donelson's recent article *Florida's New Sixth District Court of Appeal: What It Means for Judges and Attorneys in the State of Florida*.

Accordingly, whether an employee has engaged in "protected activity" depends on which anti-retaliation provision applies. It is important for employers to recognize (and to train managers/supervisors) when an employee griping or complaining might be protected conduct under the law. This is particularly important when an employer is taking adverse employment action against an employee who has complained about the employer or other employees' actions. It is important for employers to seek counsel prior to taking adverse employment actions against an employee who may have engaged in such "protected activity."

At Baker Donelson, lawyers from both the Labor and Employment Group and the Government Enforcement and Investigation Group work collaboratively to assist employers in such circumstances.

If you have any questions about "protected activity," please contact Dena H. Sokolow, Thomas H. Barnard, Ashleigh Singleton, Sabrina Marquez or a member of Baker Donelson's Government Enforcement and Investigation Group.