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One Minute Memo®

Court Of Appeal Clarifies Protections Afforded By California False Claims Act

The California False Claims Act ("CFCA") prohibits retaliation against employees who report false claims presented to the State Government. Similarly, California Labor Code section 1102.5 prohibits employer retaliation against employees who report unlawful conduct to a government or law enforcement agency. On January 31, 2013, the California Court of Appeal held that employees who have reported an economic loss to the government resulting from unlawful activity by their employer, fellow employees, or third parties may pursue claims of wrongful termination and retaliation under both the CFCA and Section 1102.5.

Factual Background

In August 2009, Brian McVeigh sued his former employer, Recology San Francisco, a company that offers payment for recycled goods to customers based on Recology's reported weight of the goods, and that then sells the recycled goods to third-party purchasers. McVeigh alleged that his termination resulted from his ongoing investigation and repeated reporting of possible fraud in connection with inflated California Redemption Value ("CRV") payments made by Recology to its customers in exchange for recycled materials, as well as inflated CRV payments made to Recology by the State of California's Department of Conservation based on Recology's inaccurate representations of both the weight and the source of goods sold by Recology to third parties.

Specifically, to support his suspicions that Recology was making inflated CRV payments to its customers, McVeigh repeatedly told city police officers that "tag inflation" was occurring. Tag inflation refers to a Recology attendant over-reporting the actual weight of recyclables delivered by customers and resulting in overpayment to customers and potential kickbacks to the attendant weighing the recyclables. To support his suspicions that inflated CRV payments were being made to Recology by the State of California's Department of Conservation, McVeigh repeatedly told city police officers that Recology fraudulently reported inaccurate sources of recycled goods and tag-inflated weights to the state, resulting in excessive state-issued reimbursements.

The Trial Court Decision

The trial court granted Recology's motion for summary judgment on all causes of action. It concluded that although McVeigh had engaged in protected activity, he could not maintain his claims because he could not show the required causal connection between that protected activity and his termination.

The Court of Appeal Decision

The Court of Appeal's decision begins by reciting the *prima facie* elements for claims of retaliation under the CFCA: (1) the employee engaged in protected activity, (2) the employer knew about the protected activity, and (3) the employer discriminated against the employee because of the protected activity. The Court of Appeal then explained that, to engage in protected whistleblowing conduct under CFCA, the employee must have a genuine and reasonable concern that the government was *possibly* being defrauded. Finally, the Court of Appeal clarified that a false claim must demonstrate *both*

the purpose and effect of fraudulently causing the government to be deprived of money.

The Court of Appeal affirmed the trial court's determination that tag inflation resulting in overpayment by Recology to its customers did not violate the CFCA. The court reasoned that the tag inflation resulted only in economic loss to Recology but did not result in any economic loss to the state and thus no viable "false claim" or protected activity could be established.

However, The Court of Appeal reversed the trial court's decision that payments made by the State of California's Department of Conservation to Recology did not violate the CFCA. Here, the court made three main points. First, it deemed McVeigh's reporting and investigation to be protected conduct according to state and federal standards because McVeigh had a reasonable basis for his suspicion about a fraud on the state of California due to the excessive state-issued reimbursements. Second, the court held that McVeigh put Recology on notice that litigation was a reasonable possibility by using legal malfeasance terms such as "embezzlement" in reporting his suspicions to law enforcement as well as to Recology. Because Recology failed to establish that reporting illegal malfeasance to the police and making internal reports of embezzlement were already part of McVeigh's job duties, the court noted that McVeigh's reporting went beyond merely "doing his job." Third, the Court of Appeal found the basis for a causal link between McVeigh's termination and his protected activity because (1) the time between his whistleblowing activities and his termination was no more than three to eight months and, (2) McVeigh's supervisor, just three months before McVeigh's termination, threatened to fire him if he pressed his concern about possible CRV fraud.

In reversing the trial court's decision on McVeigh's claim under Labor Code section 1102.5, the Court of Appeal made two noteworthy points. First, it clarified that the protections of Section 1102.5 are not limited to reports about employers, but rather also extend to reports of unlawful activity by third parties and by fellow employees. Second, the court noted that Section 1102.5 applies regardless of whether reports of unlawful conduct are part of, or extraneous to, an employee's regular job duties. Thus, it was irrelevant whether McVeigh's duties included reporting his suspicions of unlawful conduct.

What *McVeigh* Means for Employers

McVeigh highlights that the whistleblower laws protect an employee's investigation and that a report of economic loss to the government as a result of unlawful activity by an employer, by a fellow employee, or by a third party may be a protected activity. Employers should exercise care with regard to employee reports of economic loss to the government that implicate any of these activities.

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