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Federal Court Rejects Higher Notice Standard for 'Fraud-Alert' Employees

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In a case with implications for compliance officers, the U.S. District Court for the Southern District of New York has definitively rejected the heightened-notice requirement that some jurisdictions had imposed on certain plaintiffs in False Claims Act (FCA) cases, but it has adopted the “but-for” causation standard in these cases.

At issue in *Malanga v. New York University* was whether an employee, Michelle Malanga, was terminated by the university because she reported the university’s alleged improper billings to the federal government. The FCA protects whistleblowers from retaliatory discharge if the whistleblower establishes that (1) the conduct was protected under the statute, (2) he or she made the employer aware of the conduct, and (3) he or she was terminated in retaliation for the conduct.

Same Rules Apply to Fraud-Alert Employees

In the Jan. 9 order, the court addressed several motions still pending before the case could proceed to trial. The first issue was whether Malanga, who was the director of research for the university’s department of radiation oncology, was a “fraud-alert” employee subject to a higher standard when she notified NYU of the conduct she believed constituted fraud. She alleged that she had discovered that “employees were unlawfully billing tests performed on blood specimens, overcharging federal grants for patient clinic visits, and paying the salary of a post-doctorate employee out of an unrelated federal grant.” She undertook an investigation of these alleged findings and reported her actions to her boss and other NYU employees. She said she subsequently discovered that the department was not following up with patients in a study that resulted in the death of one patient. When the department allegedly did not report the death, she reported it herself. NYU terminated her in 2013.

NYU argued that Malanga was terminated because of poor professional performance and coworker complaints. It also maintained that she was a “fraud-alert” employee (such as a compliance officer) whose duties required her to address the problems that were the basis of her allegations, and thus she was subject to a heightened-notice standard. Under this standard, “an individual whose job entails the investigation of fraud...must make clear their intentions of bringing or assisting in an FCA action in order to overcome the presumption that they were merely acting in accordance with their employment obligations.”

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