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## Eighth Circuit Affirms that Retaliation Under False Claims Act Requires Showing that Retaliation Was Motivated Solely by Plaintiff's Protected Activity

On May 20, 2016, the Eighth Circuit affirmed the District Court's grant of summary judgment to defendant on Plaintiff's False Claims Act ("FCA") retaliation claim against his former employer. In *Elkharwily v. Mayo Holding Company, et. al*, 823 F.3d 462 (8th Cir. 2016), the Plaintiff had brought claims under the FCA against his employer—the Mayo Clinic—and several individuals who worked there. In upholding the lower court's decision, the panel held that the FCA's retaliation provision requires that a plaintiff show that the alleged retaliatory act was "motivated solely by the plaintiff's protected activity."

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### Background

Plaintiff Alaa Elkharwily, a medical doctor who worked at the Mayo Clinic, asserted claims against the Mayo Clinic and affiliated entities (collectively "Mayo"), and various individual defendants, for wrongful termination of his employment and retaliation. Specifically, Dr. Elkharwily alleged (1) a defamation claim, asserting that Mayo made false statements about his job performance during his termination and review meetings; (2) violations of the Minnesota Vulnerable Adults Act ("MVAA"), asserting that he was terminated for reporting two instances in which Mayo endangered the lives of patients by providing substandard care; (3) a violation of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), asserting that his termination was retaliation for his (lawful) refusal to transfer an unstabilized patient; (4) a violation of the Minnesota Whistleblower Act ("MWA"), asserting his termination was retaliation for calling a fellow physician "criminally negligent" for refusing to admit a patient whom Dr. Elkharwily believed was having a heart attack; and (5) a violation of the False Claims Act ("FCA"), asserting his termination was retaliation for reporting to his supervisors via email that Mayo was providing unlicensed care and unlawfully billing patients. The District Court granted Mayo's motion to dismiss the defamation, MVAA, and (part of the) EMTALA claims.

After discovery, the District Court granted summary judgment for Mayo on the remaining MWA and FCA retaliation claims.

On appeal, the Eighth Circuit affirmed, focusing on the facts surrounding Dr. Elkharwily's termination. At the time of his termination, Dr. Elkharwily had been a new, probationary employee, whereby he was evaluated on his performance at the end of a 90-day period. Universally, the hospital staff had voiced complaints about Dr. Elkharwily: he had difficulty organizing and prioritizing his work; was unreachable to staff; was adversarial; was resistant to admitting patients; had difficulty completing documentation in a timely manner; and was untrusted by nursing staff.

Further, shortly after this information was collected, Dr. Elkharwily ordered a nurse to give a patient intravenous Tylenol, and the nurse questioned him because she had never heard of it. Dr. Elkharwily insisted he had just given intravenous Tylenol to another patient. The nurse called the hospital pharmacist, who verified that the formulary did not carry intravenous Tylenol. The nurse then reported the incident to the Nurse Executive, and when the Nurse

Executive raised this with Dr. Elkharwily, he changed his story, saying “It would have been the right medication to use had it been available.”

In light of Dr. Elkharwily’s inconsistent responses, the Hospital Administrator and Nurse Executive were concerned about patient safety and Dr. Elkharwily’s trustworthiness. The Clinic placed him on administrative leave pending investigation. Ultimately, the Hospital Administrator concluded that a majority of Dr. Elkharwily’s team members had lost confidence in him, and were pessimistic about his ability to improve. Based on this conclusion, the Clinic decided to end his employment. The Clinic gave him the opportunity to resign, and he did.

### Decision Affirming Summary Judgment on the FCA Retaliation Claim

On appeal, the Eighth Circuit upheld the district court’s earlier dismissals of various claims in the case and affirmed the court’s grant of summary judgment to defendant on Dr. Elkharwily’s FCA retaliation claim. The court held that, even assuming *arguendo* that Dr. Elkharwily had established the first three elements of the claim—namely, that (1) the plaintiff was engaged in conduct protected by the False Claims Act (2) the plaintiff’s employer knew that the plaintiff was engaged in the protected activity; and (3) the employer retaliated against the plaintiff—he could not establish the fourth element: that the Hospital’s decision to terminate him was “motivated solely” by his act of reporting Mayo’s alleged unlicensed care and unlawful billing practices to his supervisors. The court found that Dr. Elkharwily had failed to provide evidence showing that the legitimate nondiscriminatory reason that Mayo provided for his termination—his poor job performance—was pretext. The negative feedback about Dr. Elkharwily’s performance was based on numerous staff interviews, all of which were confidential, and were independent of one another. The court found that this negative feedback, as well as Mayo’s lack of confidence in Dr. Elkharwily’s trustworthiness after the “intervenous Tylenol” incident, motivated his termination.

### Implication

The Eighth Circuit made clear in this case that a plaintiff bringing an FCA retaliation claim must show that the alleged retaliatory act was motivated solely by the plaintiff’s protected activity. In the Eighth Circuit, plaintiffs will not survive summary judgment on FCA retaliation claims where they do not submit evidence showing an employer’s legitimate non-retaliatory reason for the termination was merely a pretext. We will continue to monitor developments in the law in this area. If you have questions, please reach out to the authors of this alert, or to another attorney in our False Claims Act practice.

If you would like to discuss the foregoing or any related FCA matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.