

Medical Co. In FCA Case Looks To Dodge Retaliation Claims

By **Chuck Stanley**

Law360, New York (August 28, 2017, 2:24 PM EDT) -- A medical goods company on Friday urged a Massachusetts federal judge to toss retaliation claims brought by a whistleblower in a kickback suit, saying the company "took the high road" when it placed her on fully paid administrative leave after a customer complaint.

Coloplast Corp. made an effort to do right by Amy Lestage after her largest customer abruptly demanded she be removed from its account, placing her on fully paid leave, maintaining her full benefits and even giving her a raise during an internal investigation of the issue, rather than simply terminating her or continuing to allow her to work with just a fraction of her sales customers, the company said in a memorandum in support of its motion to dismiss.

The company says it was not even aware of Lestage's involvement with a False Claims Act suit against it when it placed her on leave, and that the decision did not constitute "adverse employment action" because it did not materially change the conditions of her employment.

"Plaintiff cannot establish Coloplast took any adverse action with retaliatory motives when it placed her on a fully paid administrative leave, especially since Coloplast was not even aware she was one of the relators in the qui tam action at the time it made the decision to put her on leave," the memorandum states.

Lestage is one of three Coloplast employees who **accused the company** of supplying kickbacks disguised as discounts to CCS Medical Inc. in exchange for converting patients to continence care products sold by the company.

Coloplast's memorandum points to Lestage's own testimony that she does not know when her employer found out she was part of the suit as proof she has failed to demonstrate a causal relationship between her participation in the FCA suit and her placement on leave.

Even if the company did know Lestage was involved in the FCA suit, Coloplast argues that placing her on leave was not an adverse employment action.

Coloplast claims it took action after Lestage's primary client, Byram Medical Inc., stopped returning her emails and indicated the company would only communicate with her through an attorney. In response to Byram's unexplained demand that she be replaced on its account, Coloplast says it placed Lestage on paid leave and initiated an investigation into the issue.

The company says it has since learned that Byram became aware of Lestage's involvement in the suit prior to demanding her removal from its account, but Coloplast did not know this at the time.

During the investigation, Coloplast says Lestage continued to receive full salary, incentive pay and benefits, continued to drive a company car with gas paid for by Coloplast and received a salary raise.

Lestage was eventually brought back under the same titles and responsibilities, and she was placed in charge of a new account to replace Byram, according to the memorandum.

"Plaintiff has not identified (and cannot identify) a single objective term or condition of her employment that changed as a result of her administrative leave. Rather, plaintiff simply speculates that she may have earned more than 100% of her commissions had she been an active employee," the memorandum states.

Upon her return, Coloplast says it gave Lestage a six-month commission guarantee and "modest" growth targets to help her transition back from leave.

Representatives for the parties could not immediately be reached for comment.

Coloplast is represented by Brian P. Dunphy of Mintz Levin Cohn Ferris Glovsky and Popeo PC and Jacqueline A. Mrachek and Nicole A. Truso of Faegre Baker Daniels.

Lestage is represented by Jeffry E. Marcus of Marcus Neiman & Rashbaum LLP and Taylor R. Neff and Paul W. Shaw of Verrill Dana LLP.

The case is U.S. et al. v. Coloplast A/S et al., case number 1:11-cv-12131, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Jeff Overley. Editing by Sara Ziegler.