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Sixth Circuit Court of Appeals Holds Whistleblower Protection Is Not Available

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The False Claims Act, 31 U.S.C. §3729 et seq. (FCA), provides for triple damages and a penalty ranging from $5,500 to $11,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States.

The statute has been relatively successful in large part because of its *qui tam* provisions allowing any person or entity to file an FCA claim on behalf of the federal government. This provision recognizes that fraud is often best discovered by private citizens, not government investigators. The private citizen making the complaint is the relator, but is commonly referred to as a whistleblower. Whistleblowers are incentivized by potential receipt of 15 to 30 percent of any award.

FCA whistleblowers are often employees of private government contractors. The FCA contains an anti-retaliation provision codified in 31 U.S.C. §3730(h) to protect whistleblowers. It provides a cause of action for double damages and attorneys' fees to "any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of his employment by his or her employer because of lawful acts . . . in furtherance of [a *qui tam* action] or other efforts to stop one or more violations of [the FCA]." While many retaliation provisions, such as those contained in Title VII of the Civil Rights Act, specifically protect both applicants and employees, the FCA does not.

In a recent Sixth Circuit Court of Appeals decision, the case centered on Gary Vander Boegh, the plaintiff, who managed a landfill for a federal contractor. While he was the landfill manager, he engaged in protected whistleblower activity under the FCA and other federal laws. Mr. Vander Boegh's employer's contract to manage the landfill expired and a new company was awarded the contract to run the landfill. Mr. Vander Boegh applied to the new company to be its landfill manager. The new company did not hire Mr. Vander Boegh and he sued alleging the new company was retaliating against him for participating in protected whistleblower activities under the FCA and other federal laws. The Sixth Circuit Court of Appeals held that based upon the plain language of the FCA, namely its omission of language protecting applicants for employment, that a potential employer may chose not to hire an applicant who is a prior FCA whistleblower. *Gary Vander Boegh v. EnergySolutions, Inc.*, 2014 U.S. App. LEXIS 21810 (6th Cir. 2014).

In states included within the Sixth Circuit, this decision confirms the legality of both asking job applicants if they have filed claims under the FCA and refusing to hire them if he or she answers in the affirmative, thereby offering employers protection from serial FCA whistleblowers.