

PUBLICATION

Blowing the Whistle on Whistleblowers [Ober|Kaler]

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The False Claims Act (FCA) creates strong financial incentives for whistleblowers to file lawsuits. Successful whistleblowers have obtained multi-million dollar payouts. Sometimes, however, a whistleblower – in his or her attempt to strike it rich – crosses an ethical line and suffers the consequences.

Such is the case in *U.S. ex rel. Frazier v. IASIS Healthcare Corp.*, 2012 WL 130332 (D. Ariz. Jan. 10, 2012). In that case, the whistleblower had been the compliance officer of IASIS. The company terminated his employment, but requested him to remain as a consultant for another year to assist with the transition to a new compliance officer. The whistleblower later filed an FCA case against his former employer, alleging that IASIS requested federal payment for medically unnecessary services and for health care services that violated the Stark law and the antikickback statute. The court previously dismissed the whistleblower's case as defective. The court's most recent decision addressed misconduct by the whistleblower and his lawyers.

According to IASIS, prior to leaving his employment at the company, the whistleblower "copied and removed approximately 1,300 pages of documents, emails and other IASIS Healthcare proprietary materials." The whistleblower did not notify IASIS that he was taking the documents, nor did he have the company's permission to take the records. The court concluded that the whistleblower "stole documents from IASIS without permission and then used those documents against IASIS in the present lawsuit."

IASIS had requested the court to impose sanctions against the whistleblower for his misconduct, but the whistleblower avoided that threat by reaching a settlement with the defendants in which he agreed to release all pending claims and not to pursue any new claims against IASIS.

IASIS also requested sanctions against the whistleblower's lawyers. At the outset of the case, the whistleblower provided his lawyers with the documents he had taken from IASIS. Some of those documents were labeled as privileged. Upon receipt of those documents, the whistleblower's lawyers claimed that the privileged documents were set aside and were not used to prosecute the whistleblower's case. Later in the case, a lawyer for IASIS contacted the whistleblower's lawyers, stating that IASIS had reason to believe that the whistleblower had taken IASIS's privileged documents and was requesting their return.

The court concluded that the whistleblower's lawyers had engaged in misconduct, and thus ordered the lawyers to pay sanctions. The court faulted the whistleblower's lawyers for failing to seek a ruling from the court regarding the handling of IASIS's privileged documents, and for failing to notify IASIS after the case was unsealed that they were holding IASIS's privileged records. According to the court, when IASIS notified the whistleblower's lawyers that it suspected the whistleblower of taking privileged records, the lawyers "appeared to play dumb."

The *Frazier* case is a timely reminder of several important principles regarding interactions with potential whistleblowers:

- Providers are in a perilous position because they routinely create a wide variety of confidential, proprietary and/or privileged records and, in the ordinary course of business, must make such records

available to selected employees; yet disgruntled employees may be motivated to misappropriate the provider's records for their own financial gain. Keeping an inventory of sensitive records, and who has access to them, can assist providers in tracking missing or misappropriated information.

- Whistleblowers sometimes engage in misconduct in a search for "false claims," and their lawyers sometimes cross an ethical line when prosecuting FCA cases. Misconduct by a whistleblower or a whistleblower's lawyers – if brought to light – may impair the whistleblower's case, creating an opportunity for dismissal or favorable settlement.
- Providers should diligently investigate potential misconduct by whistleblowers and their lawyers – without retaliation against the whistleblower – as part of an overall strategy to defend against false claims allegations.
- Providers dealing with potential whistleblowers must vigorously protect their interests, without falling into the trap of retaliation against a whistleblower. The appropriate handling of whistleblowers requires careful consideration in consultation with legal counsel.