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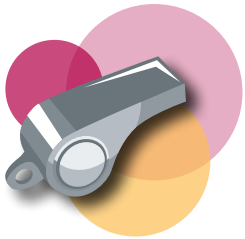

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Seventh Circuit Vacates Multi-Million Dollar Whistleblower Jury Verdict

By Paul E. Freehling

In a stunning reversal, the Seventh Circuit recently vacated an over $12 million jury verdict against a nursing home and its president, and remanded it to the district court for judgment to be entered in favor of defendants. *U.S. ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, Nos. 13-1886 and 13-1996 (7th Cir., Aug. 20, 2014). Two nurses filed claims on behalf of themselves and the government (*qui tam*) under the False Claims Act, 31 U.S.C. § 3730 ("FCA") and the Illinois False Claims Act, 740 ILCS 175(1) (2010). They alleged that, over an eight-year period, a nursing home submitted thousands of false Medicare and Medicaid reimbursement claims and then retaliated against the nurses for reporting evidence of the supposed fraud. A jury returned a verdict in favor of the nurses for $3 million in compensatory damages, which the trial court trebled, and $412,000 as damages for retaliation. On September 3, 2014, the nurses filed a motion asking the Seventh Circuit to reconsider *en banc* the panel's August 20 ruling.

The FCA precludes a *qui tam* action where all "critical elements of the fraudulent transactions themselves" are based on facts in the government's possession at the time the suit was filed, unless the relators were the original source of the information. Here, the appeals court found that certain of the FCA allegations "were based extensively upon incidents of non-compliant care documented in government [inspection] reports that gave rise to administrative penalty proceedings" prior to the litigation. The nurses were not the "original source" of information concerning non-compliant care, and so that portion of their qui tam action was barred. Moreover, courts have held that they are not ideal bodies for resolving disputed issues concerning the adequacy of medical care. *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011); *Hoyle v. American Nat. Red Cross*, 518 F.3d 61, 67 (D.C. Cir. 2008); *U.S. ex rel. Mikes v. Straus*, 274 F.3d 687, 699-700 (2nd Cir. 2001).

The nurses' *qui tam* lawsuit also accused the nursing home of providing "worthless services." The Seventh Circuit said that the "'worthless services' theory of FCA liability" requires a deficiency so severe that "it is the equivalent of no performance at all." The burden of showing "worthlessness" is not satisfied by proving merely that services rendered were "worth less" than the amounts reimbursed. Finding that the "worthlessness" standard had not been met, the Seventh Circuit declined to adopt worthless services as a separate theory of liability under the FCA. The nurses alleged that certifications filed by the nursing home regarding plans to correct deficiencies were knowingly false and that patient data sheets were submitted which did not properly document symptoms, diagnosis or treatment. Those claims were dismissed because no statistical or other evidence was presented showing even a rough approximation of the number of false certifications, and a jury is not permitted to compute damages based on speculation. A significant part of the nurses' motion for rehearing *en banc* takes aim at these grounds for the reversal of the judgment.

By this ruling, the Seventh Circuit reinforces the common-sense notion that to be protected, whistleblowers must report conduct actually prohibited by the FCA. This ruling is consistent with the view of other circuits. *See, e.g., Hutchins v. Wilantz, Goldman & Spitzer*, 253 F.3d 176, 187 (3rd Cir. 2001) (submission of fraudulent invoices to bankruptcy court not acts in furtherance of a FCA action because payment would have been obtained from bankruptcy estate, not federal government); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (internal report urging compliance with laws, rules and regulations not a protected activity on which a FCA cause of action could be based).

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