

When the False Claims Act Relator is Our Former Attorney or Auditor

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In a "qui tam"[1] action by a relator under the federal False Claims Act, 31 U.S.C. §§ 3729-33 (FCA), a private plaintiff, the relator, sues on behalf of the government to recover treble damages, civil penalties, and attorneys fees and expenses - and shares in any recovery. *See Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 97 (2d Cir. 2009); 31 U.S.C. § 3730(b). As the "real party in interest" in a qui tam action, *United States ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009), the government may intervene and take over prosecution of the lawsuit, 31 U.S.C. § 3730(b)(2), (4), but the relator would usually still get a reduced share of recovery. 31 U.S.C. § 3730(d).

The FCA is intended to "encourage private individuals who are aware of fraud being perpetrated against the [g]overnment to bring such information forward," *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 18 (2d Cir. 1990) (*quoting* H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)).

However, it would be downright aggravating if your local government is sued by your own staff lawyer under the FCA using confidential information that the professional gained while working for the local government – perhaps even when working on an official audit or investigation into the very transactions that form the basis for the FCA claim.

We may have some relief from that super-annoying possibility. A recent Second Circuit decision subordinates the federal interest in encouraging whistleblowers to bring qui tam actions to the state interest in holding lawyers to ethical standards protecting the confidentiality of client information.

The False Claims Act does not preempt state ethical rules governing the disclosure of client confidences; therefore, N.Y. Rule 1.9(c), which generally prohibits its disclosure of confidential information of a former client, governs a New York attorney's conduct as relator in a qui tam action under the False Claims Act.

United States ex vel. Fair Laboratory Practice Assocs. v. Quest Diagnostics Inc., 734 F.3d 154, at 168 (2d Cir. 2013).

As one court recognized, "[w]hile the [FCA] permits any person ... to bring a qui tam suit, it does not authorize that person to violate state laws in the process." *United States ex rel. Doe v. X. Corp.*, 862 F.Supp. 1502, 1507 (E.D. Va. 1994) *Id.* at 163.

Therefore, the Second Circuit affirmed the dismissal of the FCA case and the disqualification of the relators'[2] lawyers (because they were tainted by the former in-house lawyer's knowledge of defendant's confidential information) after deciding that the district court's selection of this remedy was not an abuse of discretion. *Id.* at 169.

Some observations on *Quest Diagnostics*:

1. Unless overruled en banc or by the Supreme Court (no petitions have yet been filed) this could become an important decision, providing significant protections to cities and other employers from their own professionals. However, the decision does *not* establish a blanket rule requiring dismissal of FCA qui tam actions brought by current or former counsel. The appeals court merely decided that the district judge had not abused his discretion in ordering dismissal on the specific facts. Perhaps under other facts less drastic remedies such as limiting or barring compensation for the relators might have sufficed. Indeed, perhaps the Second Circuit would have affirmed such remedies even in the instant case as being within the trial court's discretion if the trial court had opted for some less drastic approach.
2. The *Quest Diagnostics* court recognized the exception to the rule protecting client confidentiality that disclosure is ethically permitted to prevent the former client from committing a crime, but agreed with the district court that in the instant case the disclosure of confidences that were several years old by the time of suit was unnecessary to prevent any new criminal conduct. *Id.* at 169. The result might be different if the fraud were ongoing, particularly if the confidences were fresher. What about other exceptions to the confidentiality obligation? I suspect the defendant would get no relief if the defendant had waived confidentiality either by express waiver or implicitly, as by disclosing the confidential information to others. Would the court have permitted the qui tam suit to proceed if the relator could have shown that the suit was necessary to enable the former in-house counsel to collect his salary as an in-house attorney, or if a former outside counsel showed that the FCA suit was being used to collect her fees? Disclosure that is necessary for a lawyer to collect fees is usually permitted.
3. Dismissal of the qui tam action does not necessarily bar the government from bringing an independent FCA action based on the same transactions.[3] Assuming federal officials could bring a new case directly (and I think that it would be permitted to do so), *Quest Diagnostics* did not address whether deference to the state's attorney ethics rules might require the federal government to base any new case on independent evidence, untainted by the unethically obtained information. If the courts adopted any such

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gated a "Model Salary Basis Policy" under which an employer may be permitted to avoid the more drastic consequences that may arise from improper pay deductions for salaried employees. That sample policy reads as follows (taken from http://www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm).

Model Salary Basis Policy

Overtime Security for the 21st Century Workforce

The information below is designed to provide an example of what constitutes compliance for purposes of §541.603(d) (addressing "Effect of improper deductions from salary") and is for illustrative purposes only. Other policies may comply with §541.603(d) which contain more or less information.

The Model Policy:

The FLSA is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section (a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section (a)(1) and Section (a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week . . .. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour. Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance; or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do If An Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [*insert alternative complaint mechanism(s)*]. Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made. ML

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future rather than face that expense.

However your municipality deals with snow, I will offer one final thought. I would recommend not dealing with it like one mayor did. His response to not plowing snow was "God put it there and God will take it away." Such a response is not what a community and its citizens need in a time of crisis. Needless to say, that mayor was not re-elected. ML

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exclusionary rule, the Department of Justice would face a difficult hurdle, because by law the relators must submit to DOJ a "written disclosure of substantially all material evidence and information the person possesses, 31 U.S.C. § 3730(b)(2), before the qui tam complaint is unsealed to enable DOJ to decide whether it wants to take over the litigation from the relator. 31 U.S.C. § 3730(b)(4). The Department would likely have to use an entirely new team of lawyers and investigators, and demonstrate that the new team had no access to information from the relator, if the courts imposed an exclusionary rule.

Could the *Quest Diagnostics* deference to state law potentially insulate local governments from qui tam suits brought by its professionals other than lawyers; perhaps by their auditors?

Auditors do not have a confidentiality duty under most states' laws, even if they have the right, and sometimes the duty, to keep their working papers confidential absent subpoena. *See generally,* Annot., Ownership of, and literary property in, working papers and data of accountant, 90 A.L.R.2d 784 (Originally published in 1963 and accessed on WestlawNext, Nov. 2, 2013).

However, auditors do have a professional and ethical duty of independence. *See* Comptroller General of the United States, Government Auditing Standards 3.02-.06 (July 2007), online at Government Auditing Standards--Chapter 3: General Standards, http://www.gao.gov/govaud/govaudhtml/d07731g-5.html (last visited Nov. 2,

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the same dress and grooming standards (if any) that are not otherwise prohibited by law that all other employees are expected to adhere to.[13] For example, if an employee is transitioning from male to female, that employee would be expected to adhere to the grooming standards for other women at the facility (again assuming they are not otherwise prohibited by law and applied uniformly).

ENDA has a long legislative history, going back twenty years. Variations of ENDA have been introduced in Congress at different times since 1994; however this is the first instance where a comprehensive bill has passed in the Senate. (An earlier version of the legislation passed in the House in 2007, but that version did not include any protections for transgender individuals). ENDA was originally introduced and championed by the late Senator Ted Kennedy (D. Mass.) and since his passing, Senator Jeff Merkley (D. Ore.) has taken up the issue. After the Senate passed this version in November 2013, Senator Merkley issued the following statement:

> Today's vote was a historic vote for equality and freedom. Deeply embedded in the constitution are notions of freedom and liberty, and discrimination is the antithesis of those founding values. Everyone should have the right to work hard and earn a living. No one should be fired for who they are or who they love. The Senate said today in a strong bipartisan voice that discrimination is just plain wrong. We are one step closer to equality for our LGBT friends and family.[14]

Although the bill easily passed in the Senate, with sixty four votes in favor of the bill and thirty two against, it will likely be a more uphill battle in the House of Representatives. House Speaker John Boehner has stated that he would oppose any law that would prohibit discrimination against gay and lesbian employees in the workplace as, according to his spokesman, he believes ENDA "will increase frivolous litigation and cost American jobs, especially small business jobs."[15] Speaker Boehner also believes that discrimination against gay and lesbian employees is "covered under existing law."[16]

While discrimination prohibiting sexual orientation and gender identity is not covered under any existing federal law, the Equal Employment Opportunity Commission (EEOC) has recently pushed to include gender identity and sexual orientation under the umbrella of "sex" discrimination under Title VII. Specifically, in 2012, the EEOC held that discrimination because a person is transgender (i.e., discrimination based on gender identity) is discrimination on the basis of sex, in violation of Title VII.[17] Similarly, the EEOC has found that claims by lesbian, gay, and bisexual employees alleging sex-stereotyping can also state a claim for justice, sex discrimination under Title VII.[18]

In *Macy v. Department of Justice*,[19] the complainant interviewed for a job and was told that the position was hers pending a background check. At the time of her interview, the complainant was still presenting as a man.[20] A couple of months later, after the complainant had again been told that she had the job pending a successful background check, the complainant e-mailed her new employer stating that she planned on transitioning from a male to female.[21] Five days later, the complainant was informed that due to budgetary restraints, the job was no longer available.[22] The complainant filed a complaint, alleging discrimination in violation of Title VII based on sex stereotyping and her gender identity.[23] Her gender identity claims were initially dismissed and she appealed.[24] The EEOC found that the agency had erred. The complainant's charge stated a claim for a violation of Title VII in that "discrimination against a transgender individual because that person is transgender is, by definition discrimination 'based on ....sex...'"[25] The EEOC reasoned that the word "sex" as used in Title VII encompasses both a person's biological sex and their gender--and a person's gender includes "not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[26] The EEOC explained the issue of gender stereotyping as follows:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[27]

Similarly in *Castello v. U.S. Postal Service*, the agency initially dismissed the complainant's charge, indicating that she was complaining about harassment based on sexual orientation, which was not protected under Title VII.[28] On appeal, the EEOC disagreed, holding that Title VII's prohibition of discrimination includes a prohibition of sex stereotyping discrimination.[29] The EEOC reasoned that the offensive and derogatory comments about the complainant having relationships with women could have been motivated by the "sexual stereotype that having relationships with men was an essential part of being women..."[30] Although the EEOC has moved forward in the absence of comprehensive federal litigation on the subject by pushing to protect individuals from discrimination based on gender identity and sexual orientation, the fact remains that until ENDA or a similar version of the legislation is passed, these individuals do not share the same workplace protections as other employees.

Notes

1. U.S. Senate, 113th Cong., S. 815, Employment Nondiscrimination Act of 2013 (Nov. 6, 2013) available at http://www.opencongress.org/bill/s815-113/text (last accessed Jan. 8, 2014).
2. *See* http://www.lambdalegal.org/states-regions (last accessed Jan. 8, 2014).
3. *Id.*
4. ENDA, Section 2.
5. ENDA would not apply to religious organizations. Specifically, Section 7 states: "[t]his Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of