Qui Tam: Technical Deviation From Plan Which Has No Impact on Plan Implementation Does Not Form Basis for False Claims Act Suit

***United States of America ex rel Theresa Hill v. City of Chicago*, No. 14-1317 (7th Cir. Nov. 14, 2014).**

The fact that a Chicago implemented an Equal Opportunity program which did not include a position called for under its mandated Equal Employment Opportunity Plan--but which deviation did not undermine the function or effectiveness of the Chicago program—was insufficient to form the basis of a False Claims qui tam suit.

Between 2005 and 2008 Chicago applied for several grants from the United States. The grants were subject to the Omnibus Crime Control and Safe Streets Act of 1968, which requires Chicago, in applying for the money, to certify that it had "formulated an Equal Employment Opportunity Plan in accordance with 28 C.F.R. §42.301, *et seq*., subpart E." By doing so, Chicago certified that it had a plan and that it would implement a program under that plan.

Theresa Hill filed a *qui tam* action under the False Claims Act, 31 U.S.C. §§3729-33, alleging the certification was false because the city's program differs from its plan. The District Court granted summary judgment to the city. Hill appealed.

HELD: The Seventh Circuit affirmed the District Court holding that, though the program differed from the plan, it was substantively effective.

DISCUSSION: Hill's argument, no doubt a formal one, pointed out that Chicago certified to the federal government that its "Commissioner of Personnel" chairs the "Equal Employment Opportunity/Affirmative Action Advisory Council." However, it is undisputed that the city has not had a "Commissioner of Personnel" since it reorganized in 2000, when it replaced it with a "Commissioner of Human Resources." Moreover, that Commissioner of Human Resources testified in her deposition that she had never heard of the "Equal Employment Opportunity/Affirmative Action Advisory Council" and that she was not familiar with any "Equal Employment Opportunity Plan." Hill did not contend that the city's program on equal opportunity and affirmative action, whatever it was formally titled, fell short of federal requirements, but that instead the program did not follow the city's written plan.

The Seventh Circuit was not receptive to this argument. It said the city had a plan and that it was implementing the substance of it, if not every detail. And given these circumstances "no federal agency ha[d] parted with money under false pretenses." The Court noted it was "doubtless" that the people submitting the grants knew each agency within Chicago's overarching bureaucracy developed its own method to do things – that job descriptions do not match what everyone is doing, that the organizational chart does not show properly who reports to who, or who signs off finally on what. But the Court ruled in favor of functionalism over formalism, noting that "[d]eparting from the formal documents in order to get things done more quickly or accurately is common, and some flexibility is essential when administrators encounter circumstances that plan-writers did not anticipate." Since Chicago has a "huge bureaucracy . . . slavishly following a single plan could be counterproductive." In fact, the Circuit Court went so far as to say "No one who stands in line for service at a public agency, or waits impatiently for an agency to resolve a grievance or issue a license, wants every written procedure to be followed. Practical accommodations are a relief." Ultimately, though Hill's argument was

technically accurate, Chicago's substantive compliance with the policies, purposes, and impact of federal equal opportunity and affirmative action regulations won the day.

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