False Claims Act Retaliation in 2021

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INTRODUCTION

A corporate whistleblower can create more financial, organizational, and reputational damage to an employer by using the federal False Claims Act (FCA), 31 U.S.C. § 3729-33, than by using any other "whistleblower" law. While the FCA contains no requirement that the whistleblower be an employee to create the damage, most FCA whistleblowers are employees, and almost all of them bring the problem to their management or human resources department before they suffer an adverse employment action. Management often does not hear the whistle blowing when the damage is still avoidable.

Take the case of the pharmaceutical representative who reported to his management in 2010 that illegal kickbacks were tainting the sale of some of the company's blockbuster drugs. Management declined to act on his report and discouraged him from further reporting. Ten years later, the United States Department of Justice announced that the whistleblower lawsuit the pharmaceutical representative filed in 2011 resulted in a $678 million FCA illegal kickback settlement.[1] For his reporting, evidence gathering (including wearing a wire for the government investigators against his managers) and 10 years of patience, the whistleblower received more than $100 million.

High-dollar, meritorious cases are not the only ones that present problems for employers. Many human resources managers and in-house attorneys have experienced the marginal performer with a bad attitude and a distrust for authority who claims fraud just before the manager presents a performance improvement plan. In the pharmaceutical or healthcare industries, managing such employees can be time-consuming, disruptive and expensive. If employees manage to convince a lawyer that their claims of fraud are meritorious, the problems multiply. The courts dismiss dozens of FCA cases every year, but the expense and disruption to the defendants in these cases is significant.

Employment lawyers should understand the basics of the FCA, from the fraud provisions that define the structure of the statute to the nuances of the whistleblower protection provisions.

I. A Brief History Lesson: How The Government's Principal Weapon Against Procurement And Program Fraud Became A Whistleblower Protection Statute

A. 1863: Congress Passed The False Claims Act

Congress passed the FCA,[2] now codified at 31 U.S.C. § 3729-33, in 1863 to deter and punish unscrupulous sellers of shoddy or nonconforming goods to the Union Army.[3] Congress intended the law to be both remedial and punitive.[4] The statute originally provided that a person who submitted a false claim to the United States or any of its agencies was liable for two times the amount of the damage to the government and an additional civil penalty of $2,000 per false claim submitted.[5] The 1863 enactment contained a *qui tam*[6] provision that authorized any citizen to file an action in the name of the government against a person who had submitted false or fraudulent claims to the government and it provided a reward to

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1 Gretchen Morgenson, *It was his dream job. He never thought he'd be bribing doctors and wearing a wire for the feds*, nbcnews.com, July 7, 2020.

2 President Abraham Lincoln signed the FCA, popularly referred to at the time as the "Lincoln Law." See 132 Cong. Rec. H6479 (Sept. 9, 1986) (statement of Rep. Glickman); see also 89 Cong. Rec. S10,741 (Dec. 16, 1943) (statement of Sen. Langer).

3 *See* False Claims Act, Pub. L. No. 37-88, ch. 67 § 3, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729-3733).

4 *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119 (2003).

5 *See* False Claims Act § 3, 12 Stat. at 698.

6 *Qui tam* is a shortened form of the Latin "*qui tam* pro domino rege quam pro se ipso in hac parte sequitur," or he "who sues on our Lord the King's behalf as well as his own." *Rockwell Intern. Corp. v. United States*, 549 U.S. 457 n.2 (2007).

the citizen in the form of a percentage of the government's recovery from the case.[7] The theory behind the legislation was that "one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."[8]

Originally, the relator—the individual bringing the action—could not participate in the litigation if the government intervened, although the relator's share of the recovery was 50 percent of the government's recovery regardless of whether the relator or the government ultimately pursued the case. The 1863 statute did not contain protection for the relator/whistleblower who, although highly valued by Congress, was then considered "the informer." It was many years before the more glamorous appellation "whistleblower" came into use.

B. 1943: Supreme Court Decided *United States ex rel. Marcus v. Hess*

Not much FCA litigation occurred between the Civil War and World War II, which saw a predictable upturn in military procurement fraud claims. The Supreme Court decided *United States ex rel. Marcus v. Hess*[9] during the war, holding that the government could not prevent a relator from recovering his share of a civil judgment in a *qui tam* case, even though the relator did nothing more than convert the United States Attorney's criminal indictment of the defendant into a civil fraud complaint. This ploy was available to Mr. Marcus because the original statute did not require that the relator be an original source of the information about the fraud, and the Department of Justice at the time was not diligent in pursuing the civil remedies available to it. The possibility of a private citizen capitalizing on the hard work of the DOJ was not considered desirable, and Congress amended the FCA to prevent a relator from bringing a *qui tam* action based on information already known to the public. This principle is now known as the "public disclosure bar," and it is a hotly litigated issue in the FCA field today. There was still no whistleblower protection in the statute.

C. 1986: Congress Amended The FCA During Reagan's Military Buildup

Congress made significant amendments to the FCA in 1986 following the Reagan administration's military buildup, which had in Congress's view attracted more fraud than the government could discover and pursue on its own.[10] Members of Congress described numerous examples of contractor abuse during hearings on the reform amendments. These abuses included contractor payments of $7,622 for a coffee pot, $435 for a hammer, and $640 for a toilet seat.[11] The principal changes included:

- The government's recovery was increased from two times to three times the loss resulting from the fraud;
- The amount of the civil penalty per claim increased from $2,000 to $10,000;
- The intent requirement was softened so that the government need not prove specific intent to defraud; the government can now establish liability through (1) actual knowledge of the falsity of a claim submitted, (2) deliberate indifference to whether the claim was false, or (3) reckless disregard for whether the claim was false;
- The six-year statute of limitations was expanded to the longer of six years from the date the false claim was submitted or three years from the date the government learned of the fraud, but in no case longer than 10 years from the date the false claim was submitted;
- Congress conferred party status in the litigation to the relator regardless of whether the government intervened to control the lawsuit; and

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[7] *See* False Claims Act § 6, 12 Stat. at 698.

[8] *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885) *aff'd* 30 F. 762 (1987).

[9] *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

[10] *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986); S. REP. 99-345, 2, 1986 U.S.C.C.A.N. 5266, 5266.

[11] Dean A. Calloway & Dan M. Silverboard, *The Georgia Taxpayer Protection and False Claims Act*, 65 Mercer L. Rev. 1, 17 n.12 (2013).

- Congress for the first time provided the relator and persons working with the relator protection against retaliation in employment, thereby recognizing implicitly that the great majority of relators are employees of the government contractors they sue.[12]

The 1986 Amendments had the predictable effect of increasing the number of FCA cases filed, and government recoveries increased exponentially; the government has recovered more than $64 billion under the FCA since 1986, and the great majority of those dollars have come from *qui tam* actions.[13] Most *qui tam* actions originate with disgruntled employees whose first instinct is to attempt to correct problems internally.[14] When corporate indifference or hostility frustrate those employees, they turn to the FCA to make money—in addition to making their point.

D. 2009 - 2010: Congress Amended FCA To Enhance Retaliation Protections

Congress strengthened the False Claims Act in 2009 and again in 2010. Enacted in the wake of the 2008 financial downturn, the Fraud Enforcement and Recovery Act of 2009 (FERA) targeted mortgage fraud, securities fraud, and other financial frauds with some sweeping amendments to the FCA, second in significance only to the 1986 amendments.[15] FERA eliminated judicially-created defenses, and included changes to the FCA unrelated to the financial markets the amendment targeted. The FCA amendments were characterized as "[c]larifications," but they expanded the liability provisions of the Act, including defining or redefining "claim," "materiality," and "obligation." FERA created liability for the retention of overpayments and eliminated the requirement that a claim for payment be presented to the government directly, meaning that a claim is covered by the FCA if it is presented to an entity administering government funds. This expansion was significant for health care providers and suppliers that receive Medicare funds through intermediaries or the through the states.

FERA also amended the anti-retaliation provision in section 3730(h). The anti-retaliation revisions expanded those covered by the FCA to include not only employees, but also contractors or agents. The amendment also added to what the statute protects, specifically prohibiting retaliation "because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."[16] Instead of requiring a whistleblower to take lawful actions in furtherance of a *qui tam* action, under the FERA amendments to the FCA, a whistleblower need only take "lawful acts … to stop 1 or more violations of" the FCA. These amendments greatly increased the anti-retaliation protections under the FCA.

However, the anti-retaliation language that emerged from the 2009 amendments does not appear to have been what Congress intended, so Congress again amended section 3730(h) as part of the Patient Protection and Affordable Care Act (ACA) in 2010.[17] These amendments added new limitations to the public disclosure bar, requiring the court to dismiss an action where the relator was not an original source but permitting the government to oppose a dismissal—rather than defendants raising the bar as a defense. The ACA also limited the disclosures to federal disclosures, excluding state or local

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[12] Pub. L. No. 99-562, 100 Stat. 3153 (1986) (current version at 31 U.S.C. §§ 3729-3733).

[13] According to the U.S. Department of Justice, "[r]ecoveries since 1986, when Congress substantially strengthened the civil False Claims Act, now total more than $64 billion." *See* Press Release No. 21-55, U.S. Department of Justice, *Justice Department Recovers Over $2.2 billion from False Claims Act Cases in Fiscal Year 2020*, Jan. 14, 2020, *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020.

[14] *See* Sean Bosack and Nina Beck, *Qui Tam Actions: Managing Risk in the Wake of COVID-19*, A.B.A., Sept. 1, 2020, *available at* https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2020/summer2020-qui-tam-actions-managing-risk-in-the-wake-of-covid-19/ ("History shows that internal whistleblowers who are ignored or feel slighted are prime candidates to become *qui tam* relators.").

[15] FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[16] 31 U.S.C. §3730(h).

[17] 31 U.S.C. § 3730(e)(4)), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the ACA).

reports, and expanded the original source exception to eliminate the "direct and independent" knowledge requirement, instead requiring only "independent knowledge" that "materially adds" to the allegations.

Also in 2010, Congress further amended the anti-retaliation provisions of the FCA in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under these amendments, those "associated" with those covered by the FCA ("employees, contractors, and agents") are also protected by the anti-retaliation provision of the FCA. The amendments also provided a three-year statute of limitations.

The net effect of the 2009 and 2010 amendments was to enhance protection against retaliation for (a) employees who gather information to bring a *qui tam* action against the employer, and (b) employees who take steps to prevent the employer from violating the fraud provisions of the FCA. The meaning of the two "prongs" of the statute has been the most heavily litigated issue under section 3730(h).

This rest of this paper describes what employers need to know about the law of FCA retaliation and how they can use that knowledge to help avoid becoming defendants in FCA litigation.

II. The Elements Of An FCA Retaliation Claim

The FCA retaliation provision, 31 U.S.C § 3730(h), provides the following protection for FCA whistleblowers:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor or agent, or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[18]

An employee bringing an action under section 3730(h) must establish three elements to prove a case:

- the employee must have engaged in activity protected under the statute — either (a) acts in furtherance of a *qui tam* action against the employer, or (b) "efforts to stop 1 or more violations of" the FCA;
- the employer must have known that the employee engaged in protected activity; and
- the employer took adverse action against the employee because of the protected activity.[19]

The elements of an FCA retaliation claim appear similar to the elements of a retaliation claim under Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), or any number of federal or state discrimination laws.

There are critical differences, however. First, the FCA retaliation provision is triggered when an employee takes steps to bring the employer's fraud against the government to light, and if the employer's fraud does not appear to violate 31 U.S.C. § 3729, the employee's activities are not protected. As many courts have observed, the FCA does not cover all frauds—only those in which someone has submitted a false claim to the government.[20] This coverage predicate is more complex than opposition to discrimination or participation in an EEOC proceeding, and it is certainly less familiar to the human resources professionals who are often the first persons to encounter the disgruntled employee. Second, the scope of FCA coverage

[18] 31 U.S.C. § 3730.

[19] *See, e.g., Sherman v. Berkadia Commercial Mortgage LLC,* 956 F.3d 526, 531 (8th Cir. 2020); *Singletary v. Howard University*, 939 F.3d 287, 299 (D.C. Cir. 2019); *United States ex rel. Grant v. United Airlines Inc.,* 912 F.3d 190, 200 (4th Cir. 2018).

[20] *Universal Health Services, Inc. v. United States*, 136 S. Ct. 1989, 2001, 195 L. Ed. 2d 348 (2016).

and FCA prohibitions can be a moving target, as demonstrated by the amendments to the statute in 1986, 2009, and 2010. This makes the scope of statutory whistleblower protection a moving target as well.

Employer knowledge is critical in an FCA retaliation claim, and it includes the question of whether an employee assigned to compliance, quality control, auditing, or similar activities must do something beyond the ordinary job duties assigned in order to be recognized as a whistleblower under the statute. This is similar to the difficulty posed by a human resources professional who warns management that a certain personnel decision is likely motivated by an unlawful discriminatory motive. Causation under the FCA is similar to causation under the federal civil rights laws.

The following is a more thorough description of the elements of an FCA retaliation claim.

A. Element 1: Protected Activity

Section 3730(h) presently identifies two protected activities: (1) "lawful acts done by the employee... in furtherance of an action under this section...", and (2) "other efforts to stop 1 or more violations of this subchapter." Courts frequently refer to these activities as "prongs."

The first prong refers to actions taken by the employee or persons associated with the employee to initiate a *qui tam* action. Until 2009, this was the only source of protection for whistleblowers and there is substantial case law in the appellate courts on what an employee must do in order to be protected. Prior to 2009, the courts agreed that the filing of a *qui tam* action was not a prerequisite for whistleblower protection and the employee need not articulate an actual violation of the law.[21] Courts were in general agreement that "acts... in furtherance of an action under this section" included learning about employer practices that exposed the employer to liability, gathering information about claims submitted to the government, and collaborating with other employees and counsel to bring about the *qui tam* lawsuit.[22] Since the employer must have known about the employee's activity in preparing for a *qui tam* lawsuit in order for the prohibition on retaliation to be meaningful, the employee was also required to prove that the employer knew about the employee's efforts to build a case and that a *qui tam* lawsuit was "a reasonable possibility."[23] Thus, general allegations of impropriety were insufficient to trigger protection; the employee must have identified fraudulent activity related to a government contract.[24]

The courts interpreting section 3730(h) before the 2009-2010 amendments also generally held that the employee must have had a reasonable basis for planning litigation against the employer, and that reasonableness was to be assessed both subjectively and objectively. For example, in *Mann v. Heckler & Koch Defense, Inc.*,[25] the court held that the employee had no reasonable basis to believe that the employer was violating the FCA and, thus, could not maintain a *qui tam* action under the whistleblower retaliation provision.

The addition of the second prong to section 3730(h) was a fundamental change to, and a significant expansion of, the FCA whistleblower protections. The phrase "efforts to stop 1 or more violations of this subchapter" detached whistleblower protection from preparation of a FCA *qui tam* lawsuit and expanded it to include objections to and refusals to participate in fraud schemes against the government.[26] In effect, the amendment made whistleblower protection coterminous with activities made unlawful by section 3729. The activities protected—efforts to stop—are more like the opposition activities

[21] *United States ex rel. Wilsons v. Graham Country Soil & Water Conservation District*, 545 U.S. 409, 416 (2005).
[22] *Neal v. Honeywell*, 33 F.3d 860, 865 (7th Cir. 1994); *Glynn v. EDO Corp.*, 710 F. 3d 209, 214 (4th Cir. 2013).
[23] *United States ex rel. Eberhardt v. Integrated Design & Construction, Inc.,* 167 F.3d 861, 868 (4th Cir. 1999).
[24] *McKenzie v BellSouth Telecommunications, Inc.*, 219 F.3d 508, 515-16 (6th Cir. 2000).
[25] *Mann v. Heckler & Koch Defense, Inc.,* 630 F.3d 338 (4th Cir. 2010).
[26] *Singletary v. Howard University*, 939 F.3d 287, 296 (D.C. Cir. 2019).

found under the federal discrimination statutes. The second prong offers greater breadth, flexibility, and simplicity and has become a favorite of the plaintiffs' whistleblower bar.

In *Carlson v. DynCorp International,*[27] the court held that the "reasonable possibility" or "distinct possibility" test that the courts had applied to "actions in furtherance" of a *qui tam* action under the first prong of section 3730(h) did not apply to the second prong. *Carlson* was the first appellate decision on this point and signaled a departure from prior case law.[28] Another change is that the plaintiff is not required to prove that the employer submitted a false claim to the government for payment, only that the plaintiff had an objectively reasonable basis to believe that the employer had submitted or was about to submit a false claim to the government.[29] Of course, the plaintiff must still have made that belief known to the employer.[30] The "reasonable basis" test is less stringent than the pleading standard in Federal Rule of Civil Procedure 9(b), which requires pleading fraud with "particularity."[31]

Interestingly, some courts have recognized that the second prong significantly altered the scope of protection, but they preserve the pre-2009 concept that whistleblower protection depends on the plaintiff establishing the reasonable probability that the information conveyed to the employer could lead to an FCA lawsuit.[32] It is difficult to reconcile this concept with the protection clearly afforded in the statute for "efforts to stop," which could be entirely unrelated to an employee contemplating a *qui tam* action. On the other hand, these courts are correct to the extent they hold that the statute requires that what is to be stopped must be a violation of the FCA, which limits the scope of internal complaints to matters that are likely to lead to an FCA lawsuit of some kind. For example, some courts have held that even an employee's sincere belief that they are making an effort to stop a violation of the FCA may not be enough where the allegations clearly do not support a claim for a violation of the FCA.[33]

B. Element 2: Employer Knowledge

An FCA retaliation plaintiff must plead, and ultimately prove, that the employer knew about the plaintiff's protected activity. In *Armstrong v. The Arcanum Group, Inc.*,[34] the court of appeals affirmed summary judgment for the defendant because the plaintiff could not establish that her employer had actual knowledge of her complaints to government officials

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[27] *Carlson v. DynCorp International*, 657 F. App'x 168 (4th Cir. 2016).

[28] *See also United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 201 (4th Cir. 2018) (following *Carlson*); and *United States ex rel. Chorches v. American Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017) (following *Carlson*).

[29] *See Singletary*, 939 F.3d at 296 ("But that test is met as long as the employee has an objectively reasonable belief that the employer is violating, or will violate, the False Claims Act.")

[30] *See infra*, Section (II)(B).

[31] *Guilfoile v. Shields*, 913 F.2d 178, 188 (1st Cir. 2019); *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d at 200.

[32] *See Strubbe v. Crawford County Memorial Hospital*, 915 F.3d 1158, 1167 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 553, 205 L. Ed. 2d 356 (2019); *Guilfoile v. Shields,* 913 F.2d 178,188 (1st Cir. 2019); *Petre v. Alliance Healthcare Mgmt. LLC,* 2021 WL 1085522 (D.N.J. Mar. 22, 2021).

[33] *See, e.g., Fakorede v. Mid-S. Heart Ctr.*, P.C., 709 Fed. App'x 787 (6th Cir. 2017) (Cardiologist's expression of concerns about attributed expenses and reminding medical group that only federally permitted expenses were attributable to him for state hospital to cover were not protected activities so as to support unlawful retaliation claim for employment termination under the FCA, even though there was a statutory link between Medicare claims tainted by Stark Law and Anti-Kickback Statute violations and FCA violations; it was unreasonable to believe cardiologist's efforts were directed toward preventing what he believed was ongoing federal fraud, and there were no allegations that he understood the connection between the FCA and other federal law, that his activity was motivated by the connection, or that a Medicare claim was submitted by medical group during that time.); *Humphrey v. Napolitano*, 11-23977-CIV, 2011 WL 5433930, at *2 (S.D. Fla. Nov. 10, 2011) (where plaintiff attempted to state a claim for violation of the FCA by citing a string of "gross public deceptions" perpetuated by defendants, but did not allege anywhere any false claims for payment submitted to the government by any Defendant, and although his "belief may be sincere," plaintiff's allegations "clearly do not support a claim for violation of the FCA.").

[34] *Armstrong v. The Arcanum Group, Inc.*, 897 F.3d 1283 (10th Cir. 2018).

involved in the administration of her employer's contract with the Bureau of Land Management. In *Jamison v. Fluor Federal Solutions, LLC*,[35] the court of appeals affirmed dismissal of an FCA retaliation complaint under Federal Rule of Civil Procedure 12(b), because the plaintiff failed three times to plead employer knowledge of the alleged protected activity.

The pre-2010 whistleblower case law presented significant obstacles for an employee in a watchdog role like compliance, quality control, or auditing because the courts imposed the requirement that a watchdog employee make clear to the employer that the watchdog was going beyond the boundaries of every day assignments to threaten the employer with litigation. *United States ex rel. Ramseyer v. Century Healthcare Corp.*[36] is a good example of this type of case. The theory was that an employer did not have knowledge of the whistleblower's protected activity—and thus, the motive to retaliate—if the whistleblower was an auditor or compliance official whose job was to identify financial irregularities or quality issues with products sold to a government entity.

The second prong of section 3730(h) does not contain an explicit requirement that the "efforts to stop" on the part of a compliance, audit, or quality control employee take the employee out of the employee's normal role. The District of Columbia Circuit cited the statutory language when it reversed a district court that had dismissed a complaint for failure to plead that the plaintiff was acting outside her role when she complained about fraud on a government contract.[37]

However, the requirement that a compliance employee "step out of role" to gain protection under the FCA whistleblower provision remains strong in the Tenth Circuit, as demonstrated by *United States ex rel. Reed v. KeyPoint Government Solutions.*[38] In *Reed*, the court affirmed the dismissal of the plaintiff's retaliation claim because she failed to allege facts sufficient to overcome the presumption that she was just doing her job as a Senior Quality Control Analyst when she complained about misconduct. The court noted that "nothing about the 2009 amendment undercuts the rationale of our precedent addressing compliance officers who are charged by their employer with investigating fraud."[39] The court found compelling the plaintiff's allegations stating that she "and her staff" reported violations and that she regularly reported violations to her supervisor during her employment. This showed, said the court, that she did not "plausibly" aver that she went outside of her job duties when she made internal reports.[40]

The Third Circuit has not decided whether a compliance officer must step outside of the job role in order to be protected by the second prong of the FCA, but the U.S. District Court for the Eastern District of Pennsylvania has considered it. In *Crosbie v. Highmark, Inc.,*[41] the court held that the plaintiff had met the "heightened pleading standard" necessary when the plaintiff's complaint "overlaps with their ordinary job description." The court noted that the plaintiff alleged he reported his concerns outside of his regular chain of command and persisted in the face of his management's displeasure with his actions. The court considered the out-of-circuit persuasive authority, including the Tenth Circuit decision in *Reed*, and applied pre-amendment Third Circuit precedent.[42]

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[35] *Jamison v. Fluor Federal Solutions, LLC*, 787 F. App'x 241 (5th Cir. 2019).

[36] *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996).

[37] *See Singletary v. Howard University*, 939 F.3d 287, 296 (D.C. Cir. 2019).

[38] *United States ex rel. Reed v. KeyPoint Government Solutions*, 923 F.3d 729 (10th Cir. 2019); *see also Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 568 (6th Cir. 2003) (employee whose job is to investigate fraud must make clear to the employer the intention of bringing or assisting in an FCA action in order to overcome a presumption that the employee is merely doing the job assigned).

[39] *Id.* at *28 (*citing United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 908 (9th Cir. 2017) (deeming the 10th Circuit's pre-amendment case law "instructive" on the point that compliance employees must do more to show an employer's knowledge even in the post-amendment context), *cert. denied*, _U.S._, 139 S.Ct. 783 (2019)).

[40] *Id.*

[41] *Crosbie v. Highmark, Inc.*, Civ. A. No. 19-1235, 2019 WL 6530990 (E.D. Pa. Dec. 4, 2019).

[42] *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d Cir. 2001), holding that a fraud investigator must allege actions that "go beyond the assigned task" in order to put an employer on notice of a FCA claim. *Hutchins,* 253 F.3d at 191 (internal citations omitted).

At this point, it would seem an open question how far a compliance or audit person must step outside the role's job description to make it clear to an employer that the report of misconduct is an effort to stop an FCA violation.

C. Element 3: Causation

The retaliation provision in the FCA uses the phrase "because of lawful acts done by the employee" to describe the requisite causation standard for employer liability.[43] Based on the phrase "because of" and applying the Supreme Court's reasoning in *Gross v. FBL Fin. Servs.*, Inc.,[44] and *University of Texas Southwestern Medical Center v. Nassar*,[45] five circuit courts have held that the plaintiff in an FCA retaliation case must prove that protected activity was the "but-for" cause of the adverse employment action.[46] As explained by the Supreme Court in the recent landmark decision of *Bostock v. Clayton County, Georgia*,[47] this form of causation is established whenever a particular outcome would not have happened "but for" the purported cause.[48] In other words, "a but-for test directs [courts] to change one thing at a time and see if the outcome changes."[49]

The Eighth Circuit has adopted what may be a more stringent causation standard for FCA retaliation claims, requiring that the plaintiff establish that the adverse employment action was "motivated solely by" the protected activity, which it characterized as tighter than the causation required in other types of retaliation and discrimination cases.[50]

Courts addressing the issue have held that the *McDonnell-Douglas*[51] burden-shifting framework applies to § 3730(h) retaliation claims.[52] Analyzing causation in any retaliation case is fact-driven, regardless of the applicable standard. Temporal proximity between protected activity and adverse action is an important factor, although it is not usually sufficient in itself to create causation.[53] But "the combination of suspicious timing with other significant evidence of pretext, can be sufficient to survive summary judgment."[54]

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[43] 31 U.S.C. § 3730(h)(1) (emphasis added) (references to contractors, agents, and associated others omitted).

[44] *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). In *Gross*, the Supreme Court held that the ordinary meaning of "because of" in the ADEA required a plaintiff to prove that age was the "but-for" cause of the employer's adverse action; "[t]he Court went on to consider dictionary definitions of "because of" and explain that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."

[45] *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350-52 (2013). In *Nassar*, the Supreme Court held that plaintiffs bringing claims under the anti-retaliation provision of Title VII – which forbids employers from discriminating against individuals "because" they have challenged the employer's practices – must prove that retaliation "was the but-for cause of the challenged employment action."

[46] *See Lestage v. Coloplast Corp.*, 19-2037, 2020 WL 7238287, at *1 (1st Cir. Dec. 9, 2020) ("the causation standard for retaliation claims under the False Claims Act is a 'but-for' standard"); *Nesbitt v. Candler Cnty.*, 945 F.3d 1355, 1359 (11th Cir. 2020); *DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 73 (3d Cir. 2018); *U.S. ex rel. Cody v. ManTech Int'l, Corp.*, 746 Fed. App'x 166, 176-77 (4th Cir. 2018) (unpublished opinion); *U.S. ex rel. King v. Solvay Pharms., Inc.*, 871 F.3d 318, 333 (5th Cir. 2017).

[47] *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218 (2020) (holding Title VII prohibits employers from discriminating against gay, lesbian, and transgender employees based on their sex).

[48] *Bostock*, 140 S. Ct. at 1739 (citing *Gross*, 557 U.S. at 176).

[49] *Id.*

[50] *See Sherman v. Berkadia Commercial Mortgage LLC*, 956 F.3d 526, 532-33 (8th Cir. 2020) (citing *Strubbe*, 915 F.3d at 1168).

[51] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

[52] *See Sherman v. Berkadia Commercial Mortgage LLC*, 956 F.3d 526, 532 (8th Cir. 2020); *Miller v. Inst. for Def. Analyses*, 795 Fed. App'x 590, 595 (10th Cir. 2019); *United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 Fed. App'x 166, 176 (4th Cir. 2018), *cert. denied sub nom.*, *U.S. ex rel. Cody v. Mantech Intern. Corp.*, 139 S. Ct. 1304, 203 L. Ed. 2d 416 (2019); *Diaz v. Kaplan Higher Educ., L.L.C.*, 820 F.3d 172, 175 (5th Cir. 2016); *U.S. ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1241 (D.C. Cir. 2012); *Harrington v. Aggregate Indus.–Ne. Region, Inc.,* 668 F.3d 25, 30–31 (1st Cir. 2012).

[53] *See United States ex rel. Complin v. N. Carolina Baptist Hosp.*, 818 Fed. App'x 179 (4th Cir. 2020); *Miller v. Institute for Defense Analyses*, 795 F. App'x 590 (10th Cir. 2019); *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007).

[54] *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999).

III. Beyond The Elements Of A Retaliation Claim

A. Protection For Job Applicants, Former Employees, And Serial Whistleblowers

Employers that conduct business with the U.S. government fear FCA actions and, consequently, they fear the relators who bring them. An employer may think twice before hiring an employee who has already been a relator, especially if the relator's prior employer happened to be in the same industry. Significantly, though, the Sixth Circuit held, in *Vander Boegh v. EnergySolutions, Inc.*,[55] that the FCA anti-retaliation provision does not protect job applicants. Vander Boegh had filed an FCA action against his prior employer and then sought employment at EnergySolutions. EnergySolutions denied him a position based on the prior FCA lawsuit. The court reviewed the statutory language and legislative history of the 2009 amendments and ultimately found that the plaintiff lacked standing. *Vander Boegh* is the only appellate decision on this point.

The same court, in 2021, held that section 3730(h) protects former employees from blacklisting, notwithstanding its prior decision on applicants.[56] The plaintiff in *Felton* alleged that, after he brought a successful and much-publicized relator action, the hospital took steps to prevent him from securing subsequent employment in his field. He filed suit, claiming the protection of section 3730(h). In a 2-1 decision in favor of Felton, the court noted that the only other appellate court to consider the issue had reached the opposite conclusion, deciding the FCA does not extend postemployment protection.[57]

Serial whistleblowers are a recognized phenomenon under the FCA.[58] In *Cestra v. Mylan, Inc.*,[59] the district court confronted the question of whether the FCA protects an employee from termination when the cause for termination was the employee's relator status in a *qui tam* action against a previous employer. The court found that section 3730(h) provided such protection. The employer filed an interlocutory appeal seeking a decision from the Third Circuit on a controlling question of law, but the Third Circuit denied the appeal.

Although the law in this area continues to develop, the trend is toward coverage of former employees in blacklisting claims and coverage of current employees for past protected activity. The courts are split on whether applicants who have taken protected activity with a former employer are covered when applying for jobs with a new employer.

B. Release Of A *Qui Tam* Action In A Severance Or Settlement Agreement

A relator may not enter into an enforceable settlement agreement or release of *qui tam* claims unless the U.S. government gives it approval.[60] However, the FCA does not by its terms address whether a release of claims entered into *before* filing a *qui tam* action—as, for example, in a severance agreement or a settlement agreement after a lawsuit—bars subsequent *qui tam* claims.[61] Limited case law suggests that pre-filing releases may bar subsequent *qui tam* claims if (1) the release

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[55] *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056 (6th Cir. 2014).

[56] *United States ex rel. Felton v. William Beaumont Hosp.*, 993 F.3d 428 (6th Cir. Mar. 13, 2021). A dissent in *Felton* argues post-employment retaliation is not protected under the FCA, and it contains a string of cases disagreeing with the holding in *Felton*. *See* 993 F.3d at 438, n.2.

[57] *See Potts v. Center for Excellence in Higher Education, Inc.* 908 F.3d 610 (10th Cir. 2018).

[58] *See, e.g.*, https://www.medicaidfraudhotline.com/news.php?article=pfizer-medicaid-swindling-785m-settlement_78

[59] *Cestra v. Mylan, Inc.*, No. 14-825 (W.D. Pa. May 22, 2015).

[60] *See* 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); *United States ex rel. Radcliffe v. Purdue Pharma L.P.,* 600 F.3d 319, 326 (4th Cir. 2010); *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 474 (5th Cir. 2009).

[61] *Radcliffe*, 600 F.3d at 326; *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009) (noting that the statute does not apply to pre-filing releases because, "[w]hen there is a release preceding the filing of the *qui tam* action, … no action has been filed, so there is neither an action to dismiss nor a judge to consent to the agreement").

can be fairly interpreted to encompass *qui tam* claims and (2) public policy does not otherwise outweigh enforcement of the release.[62] The latter standard is extraordinarily difficult for a defendant to meet, since public policy will almost always mitigate in favor of government enforcement of its anti-fraud statute. Accordingly, the release of an as-yet-unfiled *qui tam* action without government approval is unlikely to be enforced. In addition, unlike most civil litigation settlements, an FCA settlement agreement to which the United States is a party generally will not be confidential because the DOJ will not consent to confidentiality. Settlement of a Section 3730(h) retaliation claim to which the government is not a party (meaning, there is no underlying FCA claim included in the Complaint) may be settled by the parties without government approval and with a confidentiality provision.

C. Waiving The Right To Bring An Action Under Section 3730(H)

Unlike the *qui tam* lawsuit, which is brought in the name of the government and in which the government has a direct pecuniary interest, a retaliation claim seeks redress for injury to the plaintiff and not the government. No public interest embodied in the statute prevents the application of the general rule that litigants should be encouraged to settle their disputes privately. The case law supports that view.[63] This means that whistleblowers may waive the right to bring a Section 3730(h) retaliation claim in a severance agreement or release. However, an agreement or release may not release a relator's right to recover monies from sources other than the employer. The agreement also cannot prohibit the employee from participating in an investigation or lawsuit about the underlying facts.

D. Requiring Arbitration Of A *Qui Tam* Or Section 3730(H) Action

An employer may not force a *qui tam* action to arbitration because the government is the real party in interest, not the relator.[64] This is true even if the government declines to intervene.[65] When the government declines to intervene, it retains statutory rights, including the right to bar a relator's decision to voluntarily dismiss an action, and may "intervene in the action at a later date upon a showing of good cause."[66] A *qui tam* relator is taking action in the name of the government, or on behalf of the government, and the government cannot be said to be a party to relator's arbitration agreement with an employer.[67]

In contrast, if a relator-employee has an enforceable arbitration agreement, the employer can compel the relator-employee to arbitrate a section 3730(h) retaliation claim.[68] In *Orcutt v. Kettering Radiologists*, Inc., the Southern District of Ohio court examined the conflict between a Northern District of Ohio case, *Nguyen v. City of Cleveland*, where the court refused to enforce an arbitration agreement for a retaliation claim and the Southern District of New York's decision

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[62] *See, e.g., Radcliffe*, 600 F.3d at 329; *Ritchie*, 558 F.3d at 1168–69; *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 231–33 (9th Cir. 1997).

[63] *See Coleson v. Inspector Gen. of Dep't of Def.*, 721 F. Supp. 763, 765, 769 (E.D.Va.1989) (finding that blanket release included release of potential retaliation claims under the Federal Claims Act, 31 U.S.C. § 3730(h)); *VanLandingham v. Grand Junction Reg'l Airport Auth.*, 46 F. Supp. 3d 1119, 1126 (D. Colo. 2014), *aff'd*, 603 Fed. App'x 657 (10th Cir. 2015) (holding that an individual may waive right to bring 3730(h) claim for valuable consideration without obstructing the public interest).

[64] *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017) (holding that the relator's arbitration agreement did not encompass the *qui tam* claim because the government was the real party in interest); *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995) (holding that the *qui tam* claim was not subject to an arbitration agreement, but the retaliation claim was, and splitting the claims for future handling).

[65] *Id.*

[66] 31 U.S.C.A. §§ 3730(b), 3730(c)(3).

[67] *See, e.g., United States v. Bankers Ins. Co.*, 245 F.3d 315, 321 (4th Cir. 2001) (enforcing arbitration agreement in FCA action where the government was a party to the arbitration agreement).

[68] *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 382 (4th Cir. 2008) (enforcing arbitration agreement and finding that the FCA permits a waiver of the right to pursue a claim in federal court); *U.S. ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850, 858-863 (S.D. Tex. 2008) (same); *but see Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000) (finding that a conflict exists with forcing a plaintiff with unequal bargaining power to arbitrate a whistleblower retaliation action after the plaintiff informed on the employer).

in *Mikes v. Strauss*, which compelled arbitration of a retaliation claim under Section 3730(h).[69] The court found the analysis in *Mikes v. Strauss* to be more persuasive because 1) there was no indication that Congress intended to exclude whistleblower claims from arbitration agreements, 2) the plaintiff had initiated a whistleblower retaliation claim in her own capacity, not a *qui tam* relator capacity, 3) Section 3730(h) claims are not limited to relators, but includes employees who participated in the investigation or provided testimony in support of a FCA claim, and 4) the Supreme Court has enforced arbitration agreement over other federal statutory civil rights claims.[70] The court in U.S. ex rel. *McBride v. Halliburton Co.*, further noted that "courts have uniformly rejected" the court's reasoning in Nguyen, and have held that FCA retaliationclaims are subject to valid arbitration agreements.[71] Where a relator in a *qui tam* action also has a retaliation claim, courts will compel the retaliation claim to arbitration, continuing the claims in separate forums.[72]

E. Individual Supervisor Or Co-Employee Liability Under Section 3730(H)

The courts are in general agreement that individual supervisors are not liable under section 3730(h). FCA plaintiffs have argued that the 2009 amendment to the FCA—which removed an explicit reference to retaliatory acts by an "employer"—expands liability.[73] Before the 2009 amendment, federal courts held that the FCA did not impose individual liability for retaliation claims.[74] After the 2009 amendment, courts still hold that while Congress deleted the word "employer" so contractors and agents could bring FCA retaliation claims, it did not intend to expand on personal liability.[75] The logic is that, "[b]ecause Congress did not amend the FCA to [specifically] impose individual liability, the FCA does not impose individual liability for retaliation claims."[76]

Relatively few courts have considered this question, but the trend is against personal liability.

IV. Recommended Employer Responses To The Risks Of FCA Exposure

It is no more possible for an employer doing business with the government to prevent FCA retaliation lawsuits than it is for an employer to prevent race discrimination, sexual harassment, age discrimination and similar employment lawsuits. In the 21st century they are all part of the business landscape. However, prudent management can help prevent the worst form of damage from FCA litigation by having an effective compliance program and by educating its human resources personnel and frontline management on the FCA and its potential implications for the business.

First, companies should establish effective compliance programs because they are critical to reducing risk in this area. Management, HR, and compliance personnel must take seriously every complaint of improper behavior within departments that can affect government billing, regardless of whether the complaint appears meritorious at first blush. Whistleblowers often do not communicate with the clarity and sensitivity that the business organization expects. Management must take into account the whistleblower's communication deficiencies to make sure that it does not miss a significant problem.

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[69] 199 F.Supp.2d 746 (S.D. Ohio 2002).

[70] *Id.* at 756.

[71] Civil Action No. 05–00828, 2007 WL 1954441 (D.D.C. July 5, 2007).

[72] Mikes, 889 F. Supp. at 757.

[73] *See Strubbe*, 915 F.3d at 1167.

[74] *Id.* (citing *United States ex rel. Golden v. Arkansas Game & Fish Comm'n*, 333 F.3d 867, 870-71 (8th Cir. 2003)).

[75] *Id.* (citing *Howell v. Town of Ball*, 827 F.3d 515, 529-30 (5th Cir. 2016)).

[76] *See Strubbe*, 915 F.3d 1158 (hospital's chief executive officer not subject to individual liability under FCA for allegedly retaliating against hospital employees for reporting hospital's purportedly fraudulent Medicare billing practices); *see also United States v. Ndutime Youth & Family Servies, Inc.*, 3:16CV653, 2020 WL 5507217, at *23 (E.D. Va. Sept. 11, 2020) ("[T]o the extent [Plaintiff] seeks to bring an FCA retaliation claim against [Individual Employee] in her individual capacity, the Court finds that such claims are barred.") (citing *Irving v. PAE Gov›t Servs., Inc.*, 249 F. Supp. 3d 826, 831 (E.D. Va. 2017) ("there is no textual basis in § 3730(h), as amended, for allowing plaintiffs to sue individual employees of a corporate employer")).

Second, HR representatives and first-line supervisors are often the first people within the business organization who hear the complaints that end up being significant FCA problems. On many occasions, complaints that might have been resolved in days or weeks have become multi-million-dollar headaches. Employers should train their HR representatives and first-line supervisors on the FCA issues that can arise so they can recognize issues early and help prevent them from becoming unmanageable. Early recognition of FCA problems is better than late recognition.

Finally, companies that do business with the government should search continuously for improvements in their fraud surveillance programs so that they can find problems before whistleblowers and the government find them.

V. Conclusion

The FCA retaliation provision has become a favorite of plaintiff's lawyers representing employees of federal government contractors. The second prong—"efforts to stop 1 or more violations" of the FCA—is especially popular, since it requires only that the employee have opposed practices that the employee reasonably believes is leading to or would lead to submission of false claims for payment to the government. On the other hand, the developing law has not turned the FCA into an all-purpose whistleblower statute. The plaintiff must still tie the subjects of the internal complaints to submission of false claims—regulatory violations unrelated to false claims are not sufficient.[77] Practitioners in this area should be aware that the law is developing rapidly. Employers should establish, maintain and improve their compliance programs to detect violations of the law or the terms and conditions of their government contracts, grants, and entitlement programs. Finally, management should train first-level managers and supervisors on how to identify and respond to potential FCA issues. As always, problems discovered early are easier and less expensive to manage than those allowed to grow.

[77] *See, e.g., Carlson*, 657 F. App'x 168 (violation of Federal Acquisition Regulation provisions does not result in violation of the FCA unless the violation causes the contractor to submit false or fraudulent claims that would damage the government).