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False Claims Brought by Qui Tam Relators

By: Kristine L. Cato
McAngus Goudelock & Courie
Columbia, South Carolina

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A. False Claims Brought by Qui Tam Relators

1. Prohibitions against retaliation toward whistleblowers

a. Congressional Intent

The False Claims Act ("FCA" or "the Act") seeks to redress fraudulent activity which attempts to or actually causes economic loss to the United States government.[1] As the Supreme Court held in *United States ex rel. Marcus v. Hess*,[2] the purpose of the False Claims Act "was to provide for restitution to the government of money taken from it by fraud." In *United States v. McNinch*,[3] the Supreme Court traced the legislative history of the False Claims Act stating:

> The False Claims Act was originally adopted following a series of sensational Congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for non-existent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of the war. Congress wanted to stop this plundering of the public treasury.

The False Claims Act was designed to encourage apprehension of profiteers by providing financial incentives to private parties to expose and prosecute fraud against the government.[4]

The individual parties are usually private citizens with first-hand knowledge of the fraudulent activities. As a result, Congress instituted the *qui tam*, or whistle blower, provisions of the Act to encourage these private citizens to expose fraud that the government itself cannot easily uncover, and to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to disclosure of fraud.

Since the purpose of the *qui tam* provisions of the Act is to encourage private individuals who are aware of fraud being perpetrated against government to disclose that information,[5]

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[1] *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3rd Cir. 2001).
[2] 317 U.S. 537, *reh'g denied*, 318 U.S. 799 (1943).
[3] 356 U.S. 595 (1958) (quoting *United States v. Tieger*, 234 F.2d 589 (3rd Cir. 1956).
[4] *United States v. Burmah Oil Co.*, 558 F.2d 43 (2d Cir. 1977).

Congress enacted the whistleblower provision.[6] The primary purpose of 31 U.S.C. §3730(h) is to provide aggrieved plaintiffs with complete compensation for any injuries incurred as a result of an employer's retaliatory conduct.

This whistleblower provision protects employees who assist the government in the investigation and prosecution of violations of the False Claims Act. Congress enacted §3730(h) to "encourage any individuals knowing of government fraud to bring that information forward."[7] "The courts have determined that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, lost employment of any other form of retaliation."[8] Therefore, §3730(h) broadly protects employees who assist the government in prosecuting and investigating False Claims Act violations.[9]

Additionally, "the FCA whistleblower provision explicitly mandates compensation for any special damages sustained as a result of the discrimination. . . . Providing compensation for such harms comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole.'"[10]

Section 3730(h) also protects whistleblowers against discrimination in the terms and conditions of their employment where the employee has <u>only</u> made an internal report about fraud against the government. Thus, the whistleblower protection provision of the Act was enacted to prevent discrimination against an employee who has made an <u>intra-organization</u> complaint about fraud against the government. Effectively, the anti-retaliatory provision is intended to encourage <u>anyone</u> with knowledge of fraud to come forward.

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[5] *United States ex rel. Hopper v. Anton,* 91 F.3d 1261 (9th Cir. 1996).
[6] 31 U.S.C. §3730(h).
[7] S. Rep. No. 99-345 at 4 (1986), printed in 1986 U.S.C.C.A.N. 5266.
[8] *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994); *Id.* at 5300.
[9] *Hutchins*, *supra.*
[10] *Id.*

b. Substantive Provisions

Paragraph (h) of 31 U.S.C. §3730 contains the anti-retaliatory provisions against a *qui tam* "relator," or whistleblower. The statute provides:

> (h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

In 1986, Congress amended the Act to insert and broaden the definition of claim under the qui *tam* provisions of the Act. It said:

> For purposes of this section, "claim" includes any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse the contractor, grantee or other recipient for any portion of the money or property which is requested or granted.

The issue of whether a reported false claim made directly to the government or just a grantee is protected conduct was litigated in *Yesudian v. Howard University.*[11] In *Yesudian*, defendant argued that Yesudian could not establish he engaged in protected conduct because a viable *qui tam* action requires that the alleged false claim be presented to the government and not simply to a grantee of federal funds, which is the status Howard University held. The court rejected that theory, applying a broad reading to the provision.[12] Employers should be aware that courts interpret the substantive coverage and protections of the statute extremely broadly and opt for inclusion rather than exclusion.

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[11] *United States ex rel. Yesudian v. Howard Univ.,* 153 F.3d 731 (D.C. Cir. 1998)

[12] *Id.*

In order to establish violation of 31 U.S.C. §3730(h), the relator must demonstrate that: (1) that he engaged in protected activity, that is, "acts done . . . in furtherance of an action under this section;" and that (2) he was discriminated against "because of" that activity. To establish the second element, the employee must in turn make two further showings. The employee must show that: (a) the employer had knowledge the employee was engaged in protected activity; and (b) the retaliation was motivated, at least in part, by the employee's engaging in that protected activity.[13] At that point, the burden shifts to the employer to prove the employee would have been terminated even if he had not engaged in protected conduct.[14]

c. Protected Conduct

The requirement that employers have knowledge that an employee is engaged in "protected conduct" ensures that §3730(h) suits are only prosecuted where there has been actual retaliation.[15] In addressing what activities constitute "protected conduct," the case law indicates that protected conduct requires a nexus with the "in furtherance" prong of a False Claims Act action.[16] This inquiry involves determining "whether the plaintiff's actions sufficiently further an action filed which should be filed under the False Claims Act, and thus, equate to protected conduct.[17] Section 3730(h) specifies that protected conduct includes "investigation for, initiating of, testimony for, or assisting in" an FCA suit.[18]

Determining what activities constitute protected conduct is a fact specific inquiry. Case law indicates that the protected conduct element does not require the plaintiff to have developed a winning *qui tam* action. This is critical for employers to know and understand. It only requires

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[13] *Yesudian, supra.,* (quoting S. Rep. No. 99-345 at 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5300); *Hutchins*, *supra, see also Zahodnick v. IBM,* 135 F.3d 911 (4th Cir. 1997).

[14] *Hutchins, supra*, citing *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995).

[15] *Robinson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994) (quoting S. Rep. No. 99-345 at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300).

[16] *Hutchins*, *supra,* citing *McKenzie v. BellSouth*, 219 F.3d 508 (6th Cir. 2000).

[17] *Id.* at 516.

[18] 31 U.S.C. §3730(h).

that the plaintiff engage in acts in furtherance of an action under the False Claims Act.[19] Under the appropriate set of facts, these activities can include internal reporting and investigation of an employer's false or fraudulent claims. The D.C. Circuit Court of Appeals has held that: "It would not be in the best interest of law abiding employers for the FCA to force employees to report their concerns outside the corporation in order to gain whistleblower protection. Such a requirement would bypass internal controls and hotlines, damage corporate efforts at self-policing, and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers."[20]

Most courts have held that coverage of the statute at issue should be broadly construed so as to include internal, or "intra-corporate" whistleblowing, even where the conduct involved did not come under the literal terms of the statute.[21]

The courts have looked to the judicial interpretation of the retaliation provisions of other statutes to assess coverage under the FCA whistleblower provision. In *NLRB v. Scrivener*,[22] the Supreme Court held that language in the National Labor Relations Act extended whistleblower protection to an employee who did not meet the literal requirements of the statute. While the statute expressly covered an employee who "has filed charges or given testimony," the Court extended protection to an employee who had given a statement to an NLRB examiner but who had neither filed charges or testified at a formal hearing. In so holding, the Court noted that such interpretation had a long history: the Labor Board, since 1934 interpreted the language to cover "those giving information relating to violations of the N.L.R.A."[23] In *Passaic Valley Sewerage*

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[19] *Hutchins, supra,* citing U.S.C.C.A.N. 153 at 739; *Yesudian*, 153 F.3d at 739.
[20] *Yesudian, supra*; *see also Childree v. UAP/GA Chem., Inc.*, 92 F.3d 1140 (11th Cir. 1996).
[21] *Neal, supra.*
[22] 405 U.S. 117 (1972).
[23] *Id*. at 123 (citing *New York Rapid Transit Corp*., 1 NLRB, December 192 (1934)); *see also NLRB v. Retail Stores and Trade Union*, 570 F.2d 586 (6th Cir. 1978).

Comm'rs v. United States Dep't of Labor,[24] the Third Circuit Court of Appeals upheld the Secretary of Labor's construction of whistleblower protection clause in the Clean Water Act to cover internal whistleblowers. The language at issue in *Passaic* was similar to the language of the False Claims Act. It protected any employee who "has filed, instituted, or caused to be filed, or instituted any proceedings under this chapter."[25] The Secretary of Labor held that the language protected an employee who had made only internal complaints to his superiors. The Third Circuit Court of Appeals agreed.[26]

In addition to *Scrivener* and *Passaic*, the federal courts have been nearly unanimous in holding that whistleblower protection is available under various statutes for employees who are discriminated against after taking their complaints to internal corporate entities rather than an outside law enforcement agency. In *Jones v. Tennessee Valley Auth.*,[27] the Sixth Circuit Court of Appeals held that internal safety complaints are protected by pre-amendment Reorganization Act. In *Pogue v. United States Dep't of Labor,*[28] the Ninth Circuit Court of Appeals noted that there was no dispute that internal whistleblowing was protected under the Clean Water Act. In *Rayner v. Smirl*,[29] the Fourth Circuit Court of Appeals held that Federal Railroad Safety Act,[30] which covers employees who file any complaint or institute any proceeding under or related to the enforcement of the Federal Railroad Safety Law covers internal complaints. In the matter of In re: *Willy*,[31] the Fifth Circuit Court of Appeals noted that the decision in *Brown and Root v. Donnovan*,[32] which denies protection to internal whistleblowers, had been rejected by three other

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[24] 992 F.2d 474 (3rd Cir. 1993).
[25] 33 U.S.C. §1357.
[26] *Neal, supra.*
[27] 948 F.2d 258 (6th Cir. 1991).
[28] 940 F.2d 1287 (9th Cir. 1991).
[29] 873 F.2d 60 (4th Cir. 1989).
[30] Federal Railroad Safety Act, 45 U.S.C. §341(a).
[31] 831 F.2d 545 (5th Cir. 1987).
[32] 747 F.2d 1029 (5th Cir. 1984).

circuits and by the Secretary of Labor.[33] Therefore, it is clear that internal whistleblowers who may not fall within the literal terms of the statute are typically given protection in order to further the remedial purposes of the statutes involved.

Additionally, in triggering coverage, a plaintiff must be investigating matters which are "calculated, or reasonably could lead" to a viable cause of the False Claims Act.[34] Mere dissatisfaction of one's treatment on the job is not enough, nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations.[35] In *Zahodnick*,[36] the Court held that an employee simply reporting his concern of mischarging to the Government and his supervisor does not suffice to establish that Zahodnick was acting "in furtherance of" a *qui tam* action.[37]

Employees need not actually file a false claim or assert a cause of action under §3730. The courts have held that requiring an employee to actually file a *qui tam* suit would block the incentive to investigate and report activity that may lead to viable FCA suits. The FCA was enacted to encourage parties to report fraudulent activity and was intended to "protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together."[38]

Courts have held the following to be examples of protected activity:

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[33] *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (Energy Reorganization Act); *Mackowiak v. University Nuclear* Sys.*, Inc.,* 735 F.2d 1159 (9th Cir. 1984) (Energy Reorganization Act); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954 (D.C. Cir. 1984) (though a literal reading of the Mine Safety Act requires an employee to file charges or give testimony, such a narrow construction frustrates the remedial purpose of the Act); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (assuming without discussion the Energy Reorganization Act covers internal whistleblowers); *Baker v. Interior Bd. of Mine Operation Appeals*, 595 F.2d 746 (D.C. Cir. 1978) (the Mine Safety Act, which protects employees who have filed or instituted or caused to be filed or instituted any proceeding under this chapter protects internal complaints); *Phillips v. Interior Bd. of Mine Operators Appeals*, 500 F.2d 772 (D.C. Cir. 1974) (Mine Safety Act is construed to cover miners who complain but do not initiate formal proceedings).

[34] *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996); Neal, 33 F.3d at 864.

[35] *Yesudian*, 153 F.3d at 740, citing *Hopper*, 91 F.3d at 1259.

[36] *Zahodnick v. IBM*, 135 F.3d 911 (4th Cir. 1997).

[37] *Id.*

[38] *Hutchins*, *supra*, citing *Yesudian*, 152 F.3 740, (citing *Neal*, 33 F.3d at 854).

- When an employee repeatedly advised superiors of financial improprieties committed by his department's director, including that the director had falsified time and attendance records, provided inside information to favored vendors to aid them in the bidding process, accepted bribes from vendors, permitted payments to vendors who did not provide services to the University, and took University property home for personal use.[39]
- Internal reporting of false claims is sufficient to bring an employer within the protection of the whistleblower provisions of other federal statutes.[40]
- Any activity that "could reasonably lead" to a False Claim Act case. The employee does <u>not</u> have to "know" the investigation he was pursuing could lead to a False Claim Act suit.[41]
- Internal reporting of fraudulent activity. However, importantly, the reporting must be characterized as concern the employee has involving something illegal, unlawful, or as false claims investigations. Simply complaining about regulatory non-compliance or shortcomings is not sufficient to trigger the protection of the statute.
- Reporting allegations of fraud or mischarging the employer's legal counsel.

d. Discrimination "Because of" Conduct

The False Claims Act also requires employees to prove they were discriminated against "because of" their "protected conduct."[42] To meet this requirement, a plaintiff must show that his employer had knowledge that he was engaged in "protected conduct" and that the employer retaliated against him because of that conduct. Several courts of appeals have held that the

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[39] *Yesudian,* 153 F.3d at 739.
[40] *McKenzie*, 123 F.3d at 944; *Yesudian,* 153 F.3d at 739; *Ramseyer,* 930 F.3d at 1523; *Robertson*, 32 F.3d at 948; *Mike*s, 889 F. Supp at 752.
[41] *Yesudian; Childree, supra.*
[42] *Hutchins*, *supra.*

"knowledge" prong of §3730 liability requires that the employee put his employer on notice of the "distinct possibility" of the False Claims Act litigation.[43]

As the Court of Appeals for the Seventh Circuit has noted, knowledge on the part of the employer is necessary because "some employees will cry 'fraud' and make pests of themselves, in hopes of being bought off with higher salaries and more desirable assignment. Others will perceive disappointments of daily life as 'retaliation' and file suits that have some settlement value because of the high cost of litigation and the possibility of error."[44]

An employee's notice of the distinct possibility of "false claims and litigation" is essential because without knowledge of employee's contemplating a False Claims Act suit, "there would be no basis to concede that the employer harbored §3738(h)'s prohibited motivations."[45] Courts have recognized the kind of knowledge the employer must have mirrors the kind of activity in which employee must be engaged. What the employer must know is that the employee engaged in protected activity – that is, an activity that could reasonably lead to a False Claim Act case action.[46]

Merely grumbling to the employer about job dissatisfaction or regulatory violations does not satisfy the notice requirement – just as it does not constitute protected conduct in the first place.[47] As one court stated, the inquiry into whether an employee puts his employer on notice is "whether the employee engaged in conduct from which a fact-finder could reasonably conclude that the employer could have feared that the employee was contemplating filing a *qui tam* action against it or reporting the employer to the government for fraud. . . Litigation. . .[is] a 'distinct possibility' only if the evidence reasonably supports such fear; if the evidence does not

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[43] *Id; Yesudian*, 153 F.3d at 740, *Childree* 92 F.3d at 1146; *Hopper*, 91 F.3d at 1269; *Neal*, 33 F.3d at 864; *Hutchins, supra.*

[44] *Neal,* 33 F.3d at 863.

[45] *Hutchins*, *supra.*

[46] *Yesudian*, 153 F.3d at 742.

[47] *Id.*

support this fear, litigation would not have been a distinct possibility."[48] Whether an employer is on notice that the "distinct possibility" of FCA litigation is also a fact specific inquiry. While an employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor for litigation, the employer is on notice of "the distinct possibility" of litigation when an employee takes actions revealing the intent to report or assist the government in the investigation of a False Claims Act violation.[49]

In *Neal*,[50] an employee who worked at an Army arsenal plant concluded that co-workers were falsifying ammunition test data reports. She reported this activity to her supervisor and her employer's office of legal counsel. The employer's legal counsel then notified the Army, which conducted an investigation and found plaintiff's fraud allegations were true. The Court of Appeals for the Seventh Circuit found the plaintiff engaged in "protected conduct" and put her employer on notice of "the distinct possibility" of False Claims Act litigation when she reported the fraud to her employer's legal counsel. Specifically, the court noted that plaintiff conducted her own investigation and reported her findings through corporate channels, leading to additional investigations: one by the defendant and the second by the Army.[51]

In *Yesudian*,[52] the Court of Appeals for the D.C. Circuit found an employee who worked for Howard University who worked in the purchasing department engaged in protected conduct when he reported to upper-level University officials that his supervisor was engaged in fraudulent activities. The plaintiff reported, among other things, that his supervisor submitted false time and attendance records, received bribes from vendors, made payments to vendors who did not provide services to the University. The court held that the plaintiff engaged in protected

[48] *Mann v Olsteen Certified Healthcare Corp.*, 49 F. Supp. 2d 1307, 1314; *see also McKenzie*, 291 F.3d at 514-515; *Yesudian*, 153 F.3d at 741-745; *Neal*, 33 F.3d at 863-865.
[49] *Hutchins*, *supra.*
[50] *Neal*, 33 F.3d at 860.
[51] *Id.*
[52] 153 F.3d at 731.

conduct and put the University on notice of the distinct possibility of a False Claims Act because he repeatedly advised his superiors that he had evidence of false records. He wrote several letters to his supervisors and to the University president and vice-president detailing what he believed was illegal conduct that fraudulently resulted in the loss of government money. He also collected evidence from employees to corroborate his claims and took photographs of evidence. The Court of Appeals for the D.C. Circuit held these reporting actions put the University administration and plaintiff's immediate supervisors on notice of a distinct possibility of False Claims Act litigation.[53]

Not all complaints by employees to their supervisors put employers on notice of the "distinct possibility" of False Claims Act litigation. In *Robertson v. Bell Helicopter Textron*,[54] the Court of Appeals for the Fifth Circuit found an employee did not engage in protected conduct nor did he put his employer on notice of potential False Claims Act litigation when he reported to his supervisor that the company was billing the government for various helicopter projects without properly substantiating the charges. The court noted the plaintiff never used the terms illegal, unlawful or *qui tam* action in characterizing his concerns about the charges.[55]

In *Zahodnick*,[56] the Court of Appeals for the Fourth Circuit found that a managing engineer at IBM whose job included assembling cost information for proposals to the Defense Intelligence Agency did not engage in protected conduct or put his employer on notice of the distinct possibility of a False Claims Act suit. In that case, Zahodnick reported to his supervisor that employees were overcharging the firm for the amount of time they worked on the

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[53] *Id.* at 744; *see also Hopkins v. Actions Inc.* 985 F. Supp. 706 (S.D. Tex. 1997) (the court held that the plaintiff, who reported to the chairman of the company that employees were illegally using Medicare forms for payroll costs, as well as informed him that she had reported this activity to the girl, engaged in protected conduct that could have put her on notice of a distinct possibility of litigation.).
[54] 32 F.3d at 948.
[55] *Id.* at 951.
[56] 135 F.3d at 911.

government project. The court said that the record disclosed that Zahodnick merely informed the supervisor of the problem and prompt confirmation that a correction was made. He never informed anyone that he was pursuing a *qui tam* action. Simply reporting his concern of mischarging to the government to his supervisor does not establish that Zahodnick was acting in furtherance of a *qui tam* action.[57] In *McKenzie*, the Court of Appeals for the Sixth Circuit held that as dispatcher for BellSouth, McKenzie's regular job duties included processing complaints about telephone service and closing trouble reports once the telephone repairs were made. As such, she did not engage in protected conduct, nor put the employer on notice of potential False Claims Act litigation when she complained to her supervisors that BellSouth falsified reports.[58]

According to the Fourth Circuit Court of Appeals, notice can be accomplished by expressly stating an intention to bring a *qui tam* suit, but it may also be accomplished by any action which a fact finder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility. Such actions would include, but are not limited to, characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved. These types of actions are sufficient because they let the employer know, regardless of whether the employee's job duties include investigating potential fraud, that litigation is a reasonable possibility.[59]

It is not sufficient to simply report the concern of a mischarge to the government to one's superior, nor is it sufficient to investigate nothing more than an employer's non-compliance with federal or state regulations.[60] The investigation must concern "false or fraudulent" claims, or it does not fall within the realm of the False Claims Act protection.[61] But once an investigation

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[57] *Id*. at 914.
[58] 219 F.3d at 508.
[59] *Eberhardt v. Integrated Design & Constr., Inc.,* 167 F.3d 861 (4th Cir. 1999).
[60] *Id.*
[61] *Id.*

involves such claims and the employee expresses concern to his employer that there actually is a likelihood of fraud or illegality, then the notice requirement is met.

e. Adverse Action

Obviously, most adverse action involved in whistleblower actions is termination or demotion. The statute does not limit its protections to only those situations. Employers may also be found to have taken "adverse action" if they allow their managers and ranking officials to harass or otherwise adversely treat a whistleblower. In *Moore v. California Inst. of Tech.*,[62] the Court of Appeals found that the employer had taken adverse action against Moore when his manager repeatedly harassed him, told him he was not a team player for having caused an ethics investigation, treated him patronizingly and made derogatory comments about him. In reversing the District Court, the Court of Appeals held that an action under the whistleblower provisions is cognizantable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.[63]

f. Damages

Section 31 U.S.C. 3730(h) provides relief to an individual who has been retaliated against for raising a *qui tam* claim "shall include reinstatement with the same seniority status which the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate District Court of the United States for the relief provided in the subsection.[64]

[62] 275 F.3d 838 (9th Cir. 2002).
[63] *Id.*
[64] 31 U.S.C. 3730(h).

Courts have held that reinstatement may not be an appropriate remedy in a number of situations.[65] In *United States Paper Workers Int'l Union, AFL-CIO, Local 374 v. Champion Int'l Corp.*,[66] the Eighth Circuit observed that substantial hostility, above that normally incident to litigation, is a sound basis for denying reinstatement. In *Standley v. Chilhowee R-IV Sch. Dist.*,[67] the same court noted that "the friction that precipitated this lawsuit and that would dog the employer if appellants were returned to their teaching positions makes reinstatement an ill-advised remedy in this case. In *Duke v. Uniroyal, Inc.*,[68] the Fourth Circuit noted that reinstatement may be inappropriate when the period of reinstatement was expected to be a relatively short one.

As noted, the whistleblower provision explicitly mandates compensation for any special damages claimed as a result of the discrimination. Courts have held that damages for emotional stress caused by employers retaliatory conduct plainly falls within this category as special damages.[69]

To prove emotional distress, medical or other expert evidence is not required.[70] Instead, a plaintiff's own testimony along with the circumstances of the particular case can suffice to sustain the plaintiff's burden in this regard.[71] However, a plaintiff must offer specific facts as to the nature of his or her claimed emotional distress and its causal connections to the allegedly volatile action.[72] Interestingly, §3730(h) is unusual as it relates to damages among fee shifting laws in that attorney's fees and litigations costs are characterized as a subset of damages instead of separate costs.

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[65] *Hammond v. Northland Counseling Ctr.*, 218 F.3d 886 (8th Cir. 2000).
[66] 81 F.3d 798 (8th Cir. 1996).
[67] 5 F.3d 319 (8th Cir. 1993).
[68] 928 F.2d 1413 (4th Cir. 1991).
[69] *Id.; see Neal*, 33 F.3d at 860.
[70] *See Kim v. Nash Finch Co.,* 123 F.3d 1046 (8th Cir. 1997).
[71] *Hammond, supra*.
[72] *Id.*; *see Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631 (8th 1998).

g. Comparison to Other Employment-based Statutory Retaliation Provisions

Employers should take heed that the *qui tam* provisions of the FCA are generally easier for an employee to prove than the retaliation provisions of the federal antidiscrimination statutes to which employers are typically accustomed, such as Title VII of the Civil Rights Act, the Americans With Disabilities Act, the Age Discrimination Employment Act and others. In general, the primary elements of a retaliation claim under the antidiscrimination laws are almost identical to those under the *qui tam* retaliation provisions. First, an employee must show that he engaged in protected conduct; second, that the employer is subject to adverse actions; and third, that the adverse action was casually linked to the protected conduct.[73]

However, in many circuits, the appellate courts have held that in order to establish the causal connection between the first two elements of the criteria set forth above in general retaliation claims, an employee must show that the protected conduct was a "determinative" factor in the employer's decision to take the adverse action against the employee. Therefore, the courts have created a "but for" standard, where the employee must show that had he not engaged in the protected conduct, he would not have been terminated or otherwise adversely affected. This is not the same standard under the *qui tam* prohibitions. Most of the courts have simply taken the position that the protected conduct was either "considered" in making the decision to terminate or take other adverse action against the employee or was only part of the basis for making the determination. This is a much lower standard than a "determinative factor" standard, and a must easier burden for an employee to overcome.

In general, the retaliation provisions in the whistleblower portion of the FCA are extremely broad. The provision basically prohibits any adverse employment action whatsoever.

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[73] *Carrington v. City of Des Moines*, 481 F.3d 1046 (8th Cir. 2007); citing *Higgins v. Gonzales*, 41 F.3d 578 (8th Cir. 2007).

While this is typically what is seen in Title VII cases, the whistleblower provisions of the FCA also include threats, harassment, and intimidation as adverse employment actions. Title VII implicitly covers these actions, but it is rare to see such behavior claimed as rising to the level of an actionable retaliation claim. The primary retaliation claims which arise are based upon an employee's discharge or demotion.

The potential damages a *qui tam* whistleblower can recover significantly less than that which a Title VII retaliation plaintiff can recover. The statute is primary equitable in nature, with the exception of a form of liquidated damages. While the *qui tam* whistleblower can recover up to twice his or her back pay, the Title VII claimant can recover punitive and/or compensatory damages, in addition to back pay, reinstatement and/or front pay.

The primary distinction which should be of concern to the employer of a *qui tam* whistleblower is the reduced burden of proof that the whistleblower has to sustain the action. All the employee must show is that the reason for the adverse action taken by the employer was simply "in some part" based upon the whistleblower's action. This is substantially different from Title VII's burden imposed upon employees, which is that their protected activity be a determinative factor in the employee's termination or demotion.

As a result, employers should ensure that when they take adverse action against an employee who has engaged in misconduct that there is some other basis for the adverse action that is well-documented. Evidence of an employer's concerns about an employee's performance prior to the employee's protected conduct may undercut a finding of causation.[74] Additionally, *post hoc* complaints do not, without more, raise a retaliation bar to the proposed discipline because the antidiscrimination statutes do not insulate an employee from discipline for violating

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[74] *Carrington, supra,* citing *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496 (8th Cir. 2005).

the employer's rules and disrupting the workplace. Indeed, complaining of discrimination in response to a charge of workplace misconduct is an abuse of the retaliation remedy.[75]

3. Defenses

a. Lack of Subject Matter Jurisdiction – The Public Disclosure Bar

The FCA limits jurisdiction over *qui tam* actions by erecting a jurisdictional bar for suits based on allegations of fraud that have already been made public. Specifically, the statute prohibits jurisdiction by a court over an action under the retaliation section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a Congressional, administrative, or government accounting office, reports, hearings, audits, or investigations, or from the news media unless the action is brought by the attorney general or the person bringing the action is an original source of the information.[76]

For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information upon which the allegations are based and who voluntarily provided the information to the government before filing an action under this section which is based on the information.[77]

Clearly, Congress never intended a *qui tam* claimant to benefit in whole or in part upon publicly disclosed allegations or transactions unless that plaintiff can demonstrate he was an original source as defined by statute.[78]

If an employer can show that a *qui tam* plaintiff is basing the claim upon information that has already been publicly disclosed pursuant to the definition of the statute above, the *qui tam* action may not lie. This does not mean, however, that any resulting retaliation claim which is then filed by the *qui tam* plaintiff is also dismissed. Clearly, this is a problematic issue which

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[75] *Id.*; *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004).
[76] 31 U.S.C. §3730(e)(4)(A).
[77] 31 U.S.C. §3730(e)(4)(B).
[78] *United States ex. rel Precision Co. v. Koch Indust., Inc.*, 971 F.2d 548 (10th Cir. 1992).

may arise with an employer. Simply because an underlying *qui tam* action is dismissed for lack of jurisdiction or some other defense such as public disclosure bar, if the employer has taken adverse action against the individual, that action may survive the actual whistleblower complaint.[79]

This jurisdictional scheme seeks "the golden means between adequate incentives for a whistleblower with the whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.[80] The courts will not exercise jurisdiction over a related *qui tam* claim when other sources have set the government squarely on the trail of alleged fraud without the relator's assistance.[81] Even where a *qui tam* action is based upon a public disclosure, §3730(e)(4) does not bar the action as a *qui tam* plaintiff is an "original source" of the information contained in the public disclosure.[82]

b. Performance of Normal Job Duties

Employers can assert as a defense that *qui tam* relaters did not provide adequate notice if the employee is actually assigned a task of investigating fraud within the company. Courts have held that the employee must make it clear that the employee's actions in reporting or complaining triggering notice go beyond the assigned task. In general, employees tasked with an internal investigation of fraud against the government cannot bring a §3730(h) action for retaliation unless the employee puts the employer on notice that the *qui tam* suit under §3730(h) is a reasonable possibility.[83]

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[79] *Neal, supra.*
[80] *United States ex. rel Springfield Terminal Railway v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).
[81] *Fines v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995).
[82] *Id.*
[83] *Eberhardt, supra.*

The actions of an employee who is assigned to investigate fraudulent activity is not sufficient under the statute because (1) it is not on behalf of the employee and therefore not a protected activity, and (2) it does not put the employer on notice that the employee is engaged in protected activity.[84] While an individual whose job entails the investigation of fraud is not automatically precluded from bringing a §3730(h) action, persons must make it clear that their intention of bringing or assisting in a FCA action in order to overcome the presumption that they are merely acting in accordance with their employment obligations.

c. No Fraud on Government Alleged

The retaliation provisions and subsequent court holdings make it very clear that an employee who blows the whistle on an employer must substantively notify the employer that they believe the employer has engaged in fraud or some illegal or unlawful activity.

d. At-Will Doctrine

Employers should always raise as a defense the "at-will" doctrine which may be effective in their respective states. To the extent an individual attempts to assert a wrongful discharge claim as opposed to a *qui tam* whistleblower claim, many states will support a pre-emption argument and properly dismiss a wrongful discharge claim if the employer assets that he or she was terminated in retaliation for having investigated a *qui tam* action.[85]

4. Other Statutory Actions

Employers should be cautious and aware that there may be applicable state statutes regarding *qui tam* actions in addition to the *qui tam* provisions of the False Claim Act. Many states have passed or are passing bills which penalize those who knowingly present or knowingly

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[84] *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d at 948.
[85] *Pease v. Pakhoed Corp.*, 980 F.2d 995 (5th Cir. 1993).

cause to be presented false or fraudulent claims for payment or approval to a state officer or employee. Violators in many states can be liable to the state for civil penalties and double and treble damages of that which results from the fraudulent act.

Other causes of action employees may assert based on the facts relating to a whistleblower situation would include wrongful discharge, violation of the policy, breach of contract, constructive discharge, intentional infliction of emotional distress, and other tort related claims, many of which may carry uncapped damages.

B. Best Employer Practices to Prevent and Defend Retaliation Claims

1. Appropriate Policies and Rules in Place

In order to provide a defense for what may appear to be retaliatory actions, employers should clearly communicate their expectations to employees regarding every facet of the employees' terms and conditions of work, to include attendance, performance, behavior, use of equipment, telephone and computers, and everything else related to their work-life. In doing so, employers should develop and communicate to employees such expectations in a variety of ways.

First, employers should develop appropriate policies and procedures outlining their clear expectations to employees regarding behavior. Such policies should define to employees the specific expectations, and the consequences to employees' for failure to meet the expectations. These policies should be communicated to employees upon their initial employment during an orientation program, which is well documented and signed off on by the employee. Additionally, policies should be made available and accessible through a company-wide intranet and/or posted on the company bulletin board.

Regulatory agencies such as the United States Department of Labor and the EEOC will regularly request copies of such policies as supporting documentation to substantiate the policy

which an employer purported followed in terminating an employee and that it was communicated to the employee.

Employers should have policies posted and communicated regarding their expectations of all employees, including and especially managers, to exercise and demonstrate honesty in all communications, reports, certifications, written and verbal; and that failure to do so will be cause for termination.

2. Consistent Application of Policies

While it is important to establish and communicate well-developed and well-defined policies and rules, it is even more important to ensure that the policies are administered and applied consistently throughout the workforce. Failure to do so can be fatal in the defense of a retaliation claim, and can even be used to establish the employee's burden of proof. For example, if an employer decides to terminate a whistleblower for poor attendance in accordance with a well-established and well-communicated attendance policy, if the employee can show that other employees who have similar attendance have not been counseled or terminated, the employee will likely be able to establish a causal connection between his or her protected activity and the adverse conduct.

Therefore, it is important for an employer to have one department or person to act as a "clearing house" for disciplinary actions and terminations to ensure that each supervisor or department is handling disciplinary situations in a similar manner to avoid such disparate treatment and ensure consistent application of policies.

3. Counsel Employees Appropriately and Document Everything

While it is critical for employers to communicate their expectations to employees, inherent in this is to counsel employees when they are not meeting the expectations of the employer. This is a pitfall into which many employers sink and ultimately drown because they

have failed to appropriately counsel with employees and document that they have counseled with the employees. Counseling and evidence that an employer has counseled with an employee prior to the employee engaging in protected activity can undercut the employee's retaliation claim. If an employer can show that an employee has demonstrated inappropriate behavior and the employer has counseled the employee for that behavior before an employee engages in protected activity, when the employer ultimately terminates the employee, the counseling and the documentation thereof both destroy the causal connection between the protected activity and the adverse action that the employee seeks to establish.

4. Job Descriptions in Place and Updated

Employers should take steps to develop, maintain and update job descriptions which adequately and accurately reflect employees' job duties. This serves the additional purpose of clearly communicating to employees an employer's expectations of them. The job description should be reviewed with each employee at the initial employment interview, as well as upon initial employment. The job description should be updated annually and reviewed and amended as necessary at the employee's annual performance review.

Additionally, to the extent that an employee's job duties may include investigation or review of any fraudulent activity, this should be included in the job description and may be used as a defense for employees engaging in whistleblowing activities. If an employer can show that such investigations are a part of the employee's normal job duties, then the employee would have to make additional efforts to show that he or she was engaged in protected activity and provide additional notice to the employer of the activity rather than a simple investigation.

5. Communications Tools

Employers should develop adequate communication tools in order to assess employees' morale and attitude toward the employer. Handling of employee issues through open

communications goes a long way to limiting disgruntled employees and their thoughts of "ratting the employer out" to the government. To the extent an employer demonstrates care and concern regarding the employees, their ideas, thoughts, feelings and perceptions of the employer and their work-life, employees are less likely to become disgruntled and aggravated with the company, and turning to the government for help.

Such communication tools may include regular departmental or facility/plant-wide meetings; face-to-face communication from "higher ups;" safety meetings; morning or weekly supervisory meetings; brown bag lunches with the boss; newsletters; postings; virtually anything that opens the channels of communication and provides employees an outlet to offer their input, ideas and concerns.

6. Attitude/Opinion Surveys

Anonymous attitude or opinion surveys are an excellent method of accumulating useful information for employers to determine morale of their employees and avoid ugly situations which may be brewing. Importantly, employers should emphasize to employees that such surveys are anonymous and there will be no retaliation against employees for their input. Equally as important is the way the surveys are used once the information is compiled. Employers lose the value of the surveys and the employees' input if they fail to follow up with employees in groups to share the results of the survey and create focus groups to work on improving areas of concern which have been communicated to the employers through the surveys.

In such surveys, employers should specifically ask what employees' perceptions are regarding employer practices, honesty and integrity of the employer and its managers and supervisors.

7. Train Managers and Supervisors

Employers should train managers and supervisors to recognize "protected conduct." Since such conduct is an essential trigger of a retaliation action, employers must be cautious regarding any employment action which is taken with regard to the employee once he or she engaged in protected activity. First line supervisors must be trained to recognize such behavior and be cautious with the supervisory behavior once the protected activity occurs.

8. Employers Should Be Cautious of Traps

Finally, employers should watch for setups created by employees who feel that they are ready to be terminated and engage in protected conduct specifically to insulate themselves from termination. On many occasions, employees are well-versed in the law and recognize that while any underlying discrimination claim they assert may not have any merit, they will have a much greater chance of success on a retaliation claim when the protected conduct immediately precedes their termination or demotion.

C. Conclusion

In conclusion, in order for employers to avoid liability for their actions pursuant to the provisions of the *qui tam* protections of the False Claims Act, it is important for them to understand what triggers the protection initially, and to take care not to demonstrate any behavior which appears to be retaliatory in nature. Creating and implementing consistent policies and practices with regard to expectations, communications, and consequences will go a long way in helping employers not only to prevent whistleblowing from occurring, but also to put them in the best position possible when it does occur. Such practices will not only be helpful from a whistleblowing standpoint, but will also provide a double benefit of creating an environment which lends itself to the most optimal conditions for both management and employees.