

Representing Whistleblowers Under the False Claims Act

R. Scott Oswald
The Employment Law Group, P.C.
888 17th Street, NW, Suite 900
Washington, D.C. 20006
Phone: (202) 331-2883
Fax: (202) 261-2835
Email: SOswald@employmentlawgroup.com
Website: www.employmentlawgroup.com

When speaking to a potential client with a whistleblower retaliation claim, it is important to examine opportunities for additional claims. A whistleblower is often in an excellent position to bring a *qui tam* claim under the False Claims Act. This paper examines the most common retaliation claims that a *qui tam* relator might bring concurrently or in the alternative to a rewards claim, and offers practical advice for deciding whether or not to pursue both claims.

- I. There are numerous employment claims that a plaintiff may bring in conjunction with a *qui tam* claim. The plaintiff may also bring these claims in the alternative, if the potential reward for the *qui tam* is very small.

FCA Qui Tam Retaliation - The FCA prohibits an employer from retaliating against an employee “because of lawful acts done by the employee...in furtherance of an action” under the FCA. 31 U.S.C. §3730(h). Prohibited retaliation includes termination, suspension, demotion, harassment, and any other act that would dissuade a reasonable person from reporting a violation of the FCA. An employee must prove: (1) that the employee had engaged in protected activity; (2) that the employer knew that the employee was engaged in protected activity; and (3) that the employer discriminated against the employee because of his protected activity.

<u>Potential Qui Tam Claim</u>	<u>Potential FCA Qui Tam Retaliation Claim</u>
An employee with knowledge of his or her employer’s fraud committed against the federal government sues on behalf of the government	The employee engages in protected activity by, for example, bringing the fraud to the employer’s attention. With knowledge of the

to recover losses caused by the fraud.	employee’s protected activity, the employer retaliates by, for example, terminating the employee.
----------------------------------------	---------------------------------------------------------------------------------------------------

The FDIC Whistleblower Statute - The Federal Deposit Insurance Act states that, “No insured depository institution may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to any Federal Banking agency or to the Attorney General regarding (A) a possible violation of any law or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety by the depository institution or any director, officer, or employee of the institution.” **Note: The Act only protects disclosures made to a “Federal banking agency or to the Attorney General.”** See, e.g., *Lippert v. Cmty. Bank, Inc.*, 438 F.3d 1275 (11th Cir. 2006).

<p><u>Potential Qui Tam Claim</u></p> <p>An employee of <u>an FDIC insured depository institution</u> with knowledge of his or her employer’s fraud committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential FDIC Whistleblower Claim</u></p> <p>The employee engages in protected activity by bringing the fraud (<i>i.e.</i>, the violation of federal law or regulation) <u>to the attention of a federal banking agency or the Attorney General.</u></p> <p>With knowledge of the employee’s protected activity, the employer retaliates by, for example, terminating the employee.</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Whistleblower Statutes Administered by the Department of Labor

Corporate and Criminal Fraud Accountability Act of 2002 (The Sarbanes-Oxley Act) -

Provides anti-discrimination protection to employees of publicly traded corporations who report violations of the Securities Exchange Act or any other federal law relating to fraud against shareholders.

<p><u>Potential Qui Tam Claim</u></p> <p>An employee of <u>a publicly traded company</u> with knowledge of his or her employer's fraud committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential SOX Retaliation Claim</u></p> <p>The employee engages in protected activity by, for example, bringing the fraud (<i>i.e.</i>, the violation of the SEC Act) to the employer's attention. With knowledge of the employee's protected activity, the employer retaliates by, for example, terminating the employee.</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Example: A person may report that his employer was engaging in a scheme to defraud Medicare by failing to disclose rebates that it received from manufacturers, involving fraudulent use of the mail. *Blagrove v. Nutrition Mgmt. Services Co.*, CIV. A. 05-6790, 2008 WL 2682690 (E.D. Pa. July 8, 2008). The whistleblower may have both a *qui tam* claim and a SOX claim.

The Dodd-Frank Wall Street Reform and Consumer Protection Act - Employers are prohibited from terminating or discriminating against an employee who discloses information about fraudulent or unlawful conduct to the SEC. Employers are also prohibited from retaliating against employees who participate in a SEC investigation or any judicial or administrative proceeding that is related to a whistleblower's disclosure.

<p><u>Potential Qui Tam Claim</u></p> <p>An employee with knowledge of his or her employer's fraud committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential Dodd-Frank Retaliation Claim</u></p> <p>The employee engages in protected activity by, for example, <u>bringing the fraud to the attention of the SEC</u>. With knowledge of the employee's protected activity, the employer retaliates by, for example, terminating the employee.</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Example: A person employed by a student lender may report that his employer is underreporting the interest it collects and is simultaneously overcharging government for interest subsidy payments. The whistleblower may have both a *qui tam* claim and a Dodd-Frank claim.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980

(CERCLA) - Provides for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and for the cleanup of inactive hazardous

waste disposal sites. The Act protects employees who file or institute a complaint alleging a CERCLA violation or who testify or are about to testify in a proceeding under the Act. The Act also protects internal disclosures. *See Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994).

<p><u>Potential Qui Tam Claim</u></p> <p>An employee with knowledge of his or her employer's fraud related to hazardous substance liability, compensation, cleanup, and emergency response committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential CERCLA Retaliation Claim</u></p> <p>The employee engages in protected activity by, for example, bringing the fraud related to hazardous substance liability, compensation, cleanup, and emergency response to the employer's attention. With knowledge of the employee's protected activity, the employer retaliates by, for example, terminating the employee.</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Example: A person may report that his employer is engaging in pattern of knowingly submitting false claims for payment under its contracts to perform hazardous waste treatment and disposal services at site of chemical plant. *Costner v. URS Consultants, Inc.*, 153 F.3d 667 (8th Cir. 1998). The whistleblower may have both a *qui tam* claim and a CERCLA claim.

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) – The Act provides anti-retaliation coverage to employees of air carriers, contractors, or subcontractors of air carriers who raise safety concerns.

<p><u>Potential Qui Tam Claim</u></p> <p>An employee with knowledge of his or her employer's fraud related to air carrier safety committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential AIR21 Retaliation Claim</u></p> <p>The employee engages in protected activity by, for example, bringing the fraud related to air carrier safety to the employer's attention. With knowledge of the employee's protected activity, the employer retaliates by, for example, terminating the employee. Note, however, that an AIR-21 complaint must raise safety concerns definitely and specifically. Complaints of fraud without a</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

	<p>safety component will not suffice. <i>Fader v. Transportation Security Administration, 2004-AIR-27 (ALJ June 17, 2004).</i></p>
--	-------------------------------------------------------------------------------------------------------------------------------------------

Example: A person may report a violation of 14 C.F.R. § 42.12, which prohibits fraudulent or intentionally false recordkeeping with regard to aircraft parts. If this report involves both a payment by the federal government and a safety issue, the whistleblower may have both a *qui tam* claim and an AIR-21 claim.

Other Whistleblower Statutes Administered by the Department of Labor:

- **Section 11(c) of the Occupational Safety and Health Act of 1970 (OSH Act)** - Provides protection against retaliation based on employee's exercising a variety of rights guaranteed under the OSH Act, such as filing a safety and health complaint with OSHA, participating in an inspection, etc.
- **Surface Transportation Assistance Act of 1982 (STAA)** - Provides specific safety and health discrimination protections for truck drivers and other employees relating to the safety of commercial motor vehicles. Coverage includes private-sector workers whose work affects the safety of vehicles with a gross vehicle weight rating (or a gross vehicle weight) of 10,001 pounds or more; vehicles designed to transport more than 10 passengers, including the driver; and vehicles transporting materials determined by the U.S. Department of Transportation to be hazardous and to require placarding.
- **Asbestos Hazard Emergency Response Act of 1986 (AHERA)** - Provides employee protection against retaliation for reporting violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or non-profit private.
- **International Safety Container Act of 1977 (ISCA)** - Provides specific protection for employees against retaliation for reporting the existence of unsafe shipping containers.
- **Energy Reorganization Act of 1978 (ERA)** - Provides occupational safety and health retaliation protections for employees of operators, applicants, contractors, and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission and for employees of contractors working under contract with the U.S. Department of Energy (so-called GOCO sites).

- **Clean Air Act of 1977 (CAA)** - Provides retaliation protection and provides for the development and enforcement of standards regarding air quality and air pollution. The Act protects employees from retaliation for reporting violations, or alleged violations, of the standards.
- **Safe Drinking Water Act of 1974 (SDWA)** - Requires that all drinking water systems in public buildings and new construction of all types be lead free. The Act protects employees from retaliation for reporting violations, or alleged violations, of the law.
- **Federal Water Pollution Control Act of 1972 (FWPCA)** - Also called the "Clean Water Act," prohibits any and all hazardous pollution of waters that provide a natural habitat for living things. The Act protects employees reporting such pollution, or alleged pollution, from retaliation.
- **Toxic Substances Control Act (TSCA)** - Regulates the manufacture, distribution, and use of certain toxic substances. The Act protects employees from retaliation for reporting violations, or alleged violations, of the Act.
- **Solid Waste Disposal Act of 1976 (SWDA)** - Also called the Resource Conservation and Recovery Act (RCRA), provides technical and financial assistance for the development of facilities for the recovery of energy and other resources from discarded materials and to regulate the management of hazardous waste. The Act protects employees from retaliation for exercising certain rights under the Acts.
- **Pipeline Safety Improvement Act (PSIA)** - Provides retaliation protection for employees who report violations, or alleged violations, of federal law regarding pipeline safety and security or who refuse to violate such provisions.

State Whistleblower Protections:

Most states have “piecemeal” statutory whistleblower protections. Several states have full Whistleblower Protection Acts for public and private employees, including Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, New Hampshire, New Jersey, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, and Vermont.

<p><u>Potential Qui Tam Claim</u></p> <p>An employee with knowledge of his or her</p>	<p><u>Potential State Whistleblower Retaliation Claim</u></p> <p>The employee engages in protected activity by,</p>
----------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------

<p>employer’s fraud committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p>for example, bringing the fraud to the attention of a state regulatory agency. With knowledge of the employee’s protected activity, the employer retaliates by, for example, terminating the employee.</p>
------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Wrongful discharge in violation of public policy claims:

Although an employee is generally employed “at will” and can be discharged by an employer for any reason or for no reason at all, most states have adopted public policy exceptions to protect employees who disclose criminal, illegal, unethical or unsafe practices. In addition, the public policy exception to the employment-at-will doctrine protects employees who refuse to engage in illegal conduct. All states, except for Alabama, Georgia, Louisiana, Maine, Montana, New York, and Rhode Island recognize these claims.

Sources of public policy often include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, they may include professional codes of ethics. Common bases for these claims include refusing to engage in illegal activity, exercising a statutory right or privilege, or fulfilling a statutory obligation (*i.e.*, The employee must demonstrate a legal obligation or duty to report the employer’s unlawful conduct.).

<p><u>Potential Qui Tam Claim</u></p> <p>An employee with knowledge of his or her employer’s fraud committed against the federal government sues on behalf of the government to recover losses caused by the fraud.</p>	<p><u>Potential Wrongful Discharge Claims</u></p> <p>The employee engages in protected activity by, for example, refusing to participate in the fraud or fulfilling a statutory obligation (<i>e.g.</i>, in the employee’s professional code recognized by statute) by reporting the fraud. With knowledge of the employee’s actions, the employer retaliates by, for example, terminating the employee.</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Categories of False Claims

There are seven different categories of false claims recognized under the FCA, detailed below. When reviewing a FCA relation case, watch for *qui tam* opportunities.

1. **31 U.S.C. 3729(a)(1)(A) - knowingly submitting a false or fraudulent claim for payment to the Federal Government;** Example: Presenting fraudulent claims to the National Flood Insurance Program for payment after Hurricane Katrina with the knowledge that the claims were false. *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 668 F. Supp. 2d 780 (E.D. La. 2009).
2. **31 U.S.C. 3729(a)(1)(B) - knowingly making, using or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Federal Government;** Example: Creating documents that overstated the flood damage to submit to the National Flood Insurance Program. *Id.*
3. **31 U.S.C. 3729(a)(1)(C) - conspiring with another cause payment or allowance of a false claim;** Example: University employees acting in agreement to file false certifications with the U.S. government, resulting in federal grant to the university. *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151 (D. Mass. 2004).
4. **31 U.S.C. 3729(a)(1)(D) – possessing or controlling property or money used, or to be used, by the Federal Government and knowingly delivering, or causing to be delivered, less than all of that money or property;** Example: Food services contractor delivering substandard food to NASA concessions, constituting a delivery of less property than the amount for which the contractor received a receipt. *U.S. ex rel. Vargas v. Lackmann Food Serv., Inc.*, 510 F. Supp. 2d 957 (M.D. Fla. 2007).
5. **3729(a)(1)(E) - authorizing to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, making or delivering the receipt without completely knowing that the information on the receipt is true;** Example: Shipyard fraudulently certifying receipt of unseaworthy vessels on behalf of the U.S. Navy, stating in the receipt that the vessels were seaworthy. No published opinions address this provision.

6. **3729(a)(1)(F) - buying Federal Government property while knowing that the seller is not fully authorized to sell the property;** Example: County water agency presents for signature a contract based on false information with the U.S. Army Corps of Engineers to avoid certain allocated costs to the county. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996).
7. **3729(a)(1)(G) - making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Federal Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Federal Government;** Example: Commercial travel agency knowingly using nonprofit postal rates for mailings not eligible for that rate. *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436 (S.D.N.Y. 1999).

II. There are several practical considerations when deciding to bring both a rewards case and an employment case.

The Enforceability of Arbitration Provisions on FCA and SOX Claims

In 2000, the U.S. District Court for the Northern District of Ohio found that an inherent conflict exists between arbitration and the underlying purposes of the FCA. *Nguyen v. City of Cleveland*, 121 F.Supp.2d 643 (N.D. Ohio 2000). However, the Northern District of Ohio is the only court to come to this conclusion and other courts have uniformly rejected *Nguyen's* reasoning. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*; *United States ex rel. Godfrey*, No. 1:05cv1418, at 17-18 (E.D. Va. Nov. 13, 2007); *McBride v. Halliburton Co.*, 2007 WL 1954441, at *5 (D.D.C. July 5, 2007); *Orcutt v. Kettering Radiologists, Inc.*, 199 F.Supp.2d 746, 753 (S.D. Ohio 2002). In the 2008 *Wilson* case, the Fourth Circuit held that the anti-retaliation provision in the FCA did not prohibit relators from waiving their right to pursue such a claim in federal court rather than arbitration. *Wilson*, 525 F.3d at 381. The court reasoned that nothing in the text of the Act authorizing retaliatory termination claims under the FCA addresses the issue of arbitration. *See id.*

The U.S. District Court for the District of Massachusetts recently addressed the issue of arbitration of SOX claims in *Pezza v. Investors Capital Corp.*, 2011 WL 767982 (D. Mass. Mar.

1, 2011). In *Pezza*, defendants moved to compel arbitration of plaintiff's SOX retaliation claim. *See Pezza*, 2011 WL 767982 at *1. Defendants argued that the ban on pre-dispute arbitration agreements imposed by Section 922 of the Dodd-Frank Act regarding SOX whistleblower protection does not apply retroactively. *See id.* The *Pezza* court, after extensive analysis, held that § 922 applies retroactively and denied defendants' motion to compel arbitration. *See id.* at *8. The court concluded that it, not an arbitration panel, had subject matter jurisdiction over plaintiff's SOX claim. *See id.*

Bringing Employment Claim Separately or With Rewards Case Under Seal

Specific issues to consider:

1. If your client files a *qui tam* claim, how should he or she answer questions about this claim if asked while under oath?
2. What are the ethical implications of settling employment claims while a rewards case is pending?
3. What are the effects on your client's rewards case if he or she signs a release of his or her employment claims?

Reviewing Causation Standards

The whistleblower retaliation statutes enacted in the past decade all employ a very favorable causation standard for plaintiffs. To prevail, the plaintiff must demonstrate merely that protected conduct was a "contributing factor" in the employer's decision to take an adverse action. The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, slip op. at 17 (July 27, 2006). Close temporal proximity alone can support an inference of causation under the "contributing factor" standard. Some state common law wrongful discharge actions, however, require a plaintiff to meet a "sole cause" standard, a far more onerous causation standard. Accordingly, in selecting claims, it is important to consider adding a claim that employs the favorable "contributing factor" standard.

Maximizing Damages

In choosing claims, consider options to maximize damages. For example, including a claim with a fee-shifting provision is critical. The statutory whistleblower retaliation claims discussed in this article all authorize attorney fees and costs for a prevailing plaintiff. Additionally, statutory whistleblower retaliation claims generally do not authorize punitive damages. Consider bringing a common law claim under state law for wrongful discharge in violation of public policy or other tort claims that offer the opportunity to obtain punitive damages. Potential common law claims include defamation, promissory estoppel, breach of the covenant of good faith and fair dealing, intentional interference with contract, and breach of contract. Where an employer's conduct is outrageous, a jury may be motivated to award significant punitive damages.

Another advantage of adding a statutory whistleblower retaliation claim is the opportunity to obtain reinstatement. Most of the recently enacted DOL whistleblower retaliation statutes authorize preliminary reinstatement, *i.e.*, if OSHA finds for the complainant at the investigative stage (before the parties have litigated the case), the employer must reinstate the employee immediately. Preliminary reinstatement gives a complainant significant leverage in litigation (the whistleblower is back at the worksite while prosecuting his claim) and can lead to a favorable settlement. Under the leadership of Secretary Chao, OSHA was criticized for failing to enforce whistleblower protection statutes and for finding in favor of employers in most whistleblower retaliation investigations. The current leadership of OSHA is undertaking concrete steps to invigorate OSHA's Whistleblower Protection Program and OSHA has recently issued several favorable orders in whistleblower retaliation cases. Accordingly, plaintiff's counsel should not assume that it is best to forego pursuing a whistleblower retaliation claim with an administrative exhaustion requirement. To the contrary, pursuing a strong whistleblower retaliation claim before OSHA can provide an opportunity to obtain preliminary reinstatement. The OSHA investigative process also enables plaintiff to discover the employer's defenses and possibly obtain critical admissions prior to prosecuting related claims. Furthermore, since many of the whistleblower retaliation claims that must be initially filed with DOL contain a removal provision, the whistleblower can initially pursue the claim before DOL and later remove it to federal court.