

## **Hicks v. D.C.: Retaliation Protections and the “Reverse False Claim”**

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Among the many laws that protect whistleblowing employees, the federal False Claims Act (FCA), and its counterpart state laws, are an important source of anti-retaliation protections. First enacted in 1863 to help prevent fraud against the Union Army, the law has been updated several times over the years, most recently in a series of amendments in 2009 and 2010. Washington, D.C., like many states, has its own False Claims Act (DCFCA) that mostly mirrors the federal version.

### **What Does the FCA Do?**

The FCA has two main components. First, it provides a way for private citizens to report fraud against the relevant government – the federal government for the FCA, the D.C. government for the DCFCA – and potentially receive a reward for doing so. Second, and relevant to this post, the law protects employees from employer retaliation for opposing fraud against the government or other conduct barred by the FCA. That opposition, for legal purposes, is known as “protected activity.”

A recent federal court decision in the United States District Court for the District of Columbia illustrates an employment retaliation claim under the FCA and DCFCA in a somewhat unusual context. In a traditional false claim situation, a person or entity fraudulently receives money from the government. In this recent case, *Hicks v. District of Columbia*, the plaintiff raised concerns over what he viewed as a cover-up to hide a company’s obligation to pay the government money. In legal jargon, when an entity is trying to hide – or otherwise avoid – a duty to pay the government money (as opposed to fraudulently receiving money from the government), that is known as a “reverse false claim.” This particular case has a few more twists to it, so I will provide some brief background before discussing the law further here. Also, note that the court was ruling on the D.C. government’s motion to dismiss. At that stage of litigation, a court generally assumes the allegations of the other side – here, the plaintiff – to be true for the purposes of deciding whether or not to let the case go forward.

### **Hicks v. D.C. Background**

In the *Hicks* decision, the court recounted the allegations of the plaintiff, Paul Hicks, as follows. Mr. Hicks had worked as the Director of Medicaid Audits for a D.C. government agency, the Office of the Inspector General (OIG). From 2011 to 2013, Mr. Hicks reviewed Medicaid payments that had been made to several area healthcare providers and found that several of those payments should not have been made, or should have been suspended, because of alleged fraud. When he reported this issue internally, Mr. Hicks claims that his supervisor told him to keep his findings out of an upcoming audit report and that his supervisor tried to “suppress” what Mr. Hicks had uncovered. In May 2014, Mr. Hicks’s supervisor wrote him up for poor performance, and then the OIG fired him a few months later with no reason given.

### **Analysis of Reverse False Claim in Hicks**

Mr. Hicks sued the D.C. government for illegal retaliation under the FCA and DCFCA. He pointed to the

fact that he engaged in protected activity – his opposition to his supervisor hiding a reverse false claim – and that the OIG fired him for doing so. To wade into the legal weeds briefly: the FCA and DCFCA use the following identical language in barring reverse false claims, which are where an entity:

knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

The court decision focused on this language, as well as recent language added in a 2009 amendment to the FCA and 2013 amendment to the DCFCA, defining an “obligation” as:

an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

These provisions define the alleged legal violation here: an obligation, now or in the future (“whether or not fixed”), to pay the government, and an entity then “knowingly conceals” that obligation.

Let’s look at how that applies in particular to Mr. Hicks’s situation. As the court emphasizes repeatedly, Mr. Hicks is *not* claiming that he should be protected for opposing the healthcare provider fraud he uncovered that should have led to a suspension of Medicaid payments to those providers. Instead, he opposed his supervisor’s push to hide that finding. In effect, that amounted to concealment of the healthcare providers’ obligation to pay back the government for money it should not have received. The court concluded that such a cover-up, even by a different entity than the one committing fraud on the government, would be as much a False Claims Act violation as defrauding the government in the first place.

## Takeaways

The court’s decision in *Hicks* illustrates some important features of the [FCA and its anti-retaliation protections](#):

First, the court describes the contours of a reverse false claim: Fraud in not fulfilling a payment obligation to the government, including the concealment of that obligation.

Second, the decision shows that a traditional false claim and a reverse false claim can be intertwined. Mr. Hicks sought to report purported fraud by healthcare providers leading to improper Medicaid payments, which itself could be a more traditional FCA violation. His employer’s concealment of that finding in turn would hide an obligation to repay the government, thus amounting to a violation of the FCA’s reverse false claim provision.

Third, it is *not* legally required for the entity concealing the payment obligation to be the same as the entity *with* the payment obligation. Here, Mr. Hicks claimed that the D.C. OIG acted to conceal the duties of private healthcare providers, and his opposition to that still qualifies as protected activity.