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Seventh Circuit Interprets "Reasonable Belief" in FCA Retaliation Claim

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Although the amendments to the 2009 Fraud Enforcement and Recovery Act (FERA) expanded the scope of the False Claims Act's (FCA) retaliation protections, this expanded scope was of no help to Eric Uhlig in his recent suit against his employer. *See United States ex rel. Eric Uhlig v. Fluor Corp*, 2016 WL 5905714 (7th Cir. Oct. 11, 2016).

FERA clarified that efforts to stop violations of the FCA are protected, as well as actions taken in furtherance of a *qui tam* action. The flaw in Uhlig's case was that, although his actions were in furtherance of a *qui tam* action – and were efforts to stop what he believed were violations of the FCA – according to the Seventh Circuit, he lacked a reasonable belief that his employer was committing fraud against the government. Thus, his actions were not protected opposition within the meaning of the anti-retaliation provision.

The reasonable belief requirement is not a new standard, but its application in this case provides useful guidance for analyzing the reasonableness of a belief that is also the predicate for a substantive FCA claim. Although the Supreme Court has strongly endorsed the view that proving a violation of the FCA is not an element of a retaliation cause of action under the FCA – *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 416 n.1 (2005) – the *Fluor* case illustrates the connection between a losing FCA merits claim and a losing FCA retaliation claim.

Case Background

Eric Uhlig's former employer, Fluor Corporation, contracted with the United States Army in 2007 to provide electrical engineering work in Afghanistan. Fluor hired employees of the prior contractor, KBR, who were all American and British, and also hired a number of people who were not citizens of the United States or Great Britain, who were designated as other-country nationals. Uhlig was an American who had worked for KBR as a journeyman, and Fluor hired him as a foreperson because it did not yet have a classification called journeymen.

Fluor's initial contract with the Army said nothing about personnel qualifications, but the contract was modified in 2008 to say that Fluor would ensure all personnel possess a license, certification, training, and/or education commensurate with the level of duties they perform, and that Fluor would develop a certification and validation plan to be approved by the government. The government in 2009 approved Fluor's plan, creating classes of helpers and journeymen and describing the latter as skilled workers who possess minimum experience and/or hold a universally accepted certification, license and/or degree.

Fluor reclassified all employees who lacked an electrician's license, including all of the other-country nationals, as helpers even though they possessed the education and experience to qualify as journeymen. Uhlig had completed an apprenticeship but did not have an electrician's license because his home state of Missouri did not license electricians. So Fluor reclassified him as a helper. Fluor then notified Uhlig that he would be terminated if he did not obtain a license by January 2011, which he

was not able to do. Other-country nationals who lacked licenses were permitted to remain as helpers, and Uhlig was upset that they got to stay while he was losing his job.

Uhlig was required to perform unsupervised journeyman work even though he was classified as a helper. Uhlig believed that Fluor breached the terms of its agreement with the Army by using unlicensed electricians as journeymen and billing the government for their services at the journeymen's higher rates.

He sent an email in early December 2010 to a human resources supervisor and to a defense contract management agency officer saying he is a "US tax payer" who is losing his job and "US tax dollars" are being used to pay "unlicensed electricians" in violation of "government compliance." Uhlig reiterated these allegations in further emails to Fluor officials, to an attorney and to a website hosted by Ms. Sparky, a former KBR employee whose stated purpose was to expose "corporate greed among [defense] contractors."

When a Fluor official asked Uhlig why he notified the government directly instead of pursuing his complaint internally, he said he was just following his obligation to "report fraud waste and abuse from stiffing the U.S. government." Fluor fired Uhlig a week after he sent the emails.

Uhlig filed FCA and retaliatory discharge claims against Fluor in 2011, and the government declined to intervene as plaintiff on its own behalf. The district court granted Fluor's motion for summary judgment, holding that Fluor did not violate the FCA because it had not breached its contract with the Army and that Uhlig's retaliation claim failed because he had no objective basis for asserting that Fluor had defrauded the government.

Seventh Circuit Rejects the FCA Claim

Uhlig asserted that Fluor violated the False Claims Act by knowingly employing unlicensed electricians in breach of its contract and submitting invoices for the unlicensed services to the government for payment. The court rejected this claim on the ground that the contract did not require licensing of electricians; rather it provided a set of options for establishing qualifications, and licensing was not the only method for doing so. Although Fluor imposed its own requirement that journeyman hold a license, the contract did not require this. Thus, Fluor did not breach its contract when it submitted invoices for electrical work performed by unlicensed electricians.

Uhlig argued that the contract's specification of various methods of verifying qualifications made it an "alternative contract," and once Fluor chose the licensing method, it was then bound to abide by that choice. The court rejected that argument, holding that the options in the Army contract with Fluor did not create an alternative contract within the meaning of *Eagle Star Ins. Co. v. Seneca Ins. Co.*, 1995 WL 733642, at 3 (S.D.N.Y. Dec. 12, 1995), because such a contract must specify mutually exclusive performance options while the Fluor contract contemplated compatible choices, indicated by the use of "and/or" in describing the options.

Because the court found no breach of contract, there were necessarily no false statements to the government and no FCA violations.

Seventh Circuit Rejects the Retaliation Claim

Uhlig's retaliation claim also failed. The court noted that there are two prongs to such a claim: that the employee in good faith believes, and a "reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." While Uhlig might have subjectively believed Fluor was committing fraud, the court determined that his claim flunked the second test.

To determine the objective reasonableness of an employee's belief, the court focused on "the facts known to the employee at the time of the alleged protected activity." According to the court, Uhlig did not show that when he sent the December 4 email, a reasonable employee would have believed Fluor was defrauding the government because he admitted he had not read the contract or Fluor's certification and validation plan. Thus he lacked firsthand knowledge of Fluor's contractual obligations.

The information Uhlig relied on was derived from two emails he received in November 2010, but the court found the information insufficient. One email explained the decision to reclassify unlicensed electricians as "bring[ing] Fluor into better alignment with [its] contractual requirements" and the other told Uhlig he was being reclassified "to align [Fluor's] job titles and basic job responsibilities with the appropriate license, in accordance with our contract with the client."

Because the emails did not state Fluor's contractual obligations they were insufficient to cause a reasonable person to suspect fraud. Thus, according to the Seventh Circuit, a layperson's understanding that when an employer says it is making changes to align its conduct with its contractual obligations that must mean the contract obliges it to do so, is insufficient to meet the reasonable person standard.

The Seventh Circuit's stringent requirement of precise knowledge of contractual obligations seems to equate the protected activity prong with proof of the existence of an actual FCA violation, at least in a situation such as this where the alleged fraud is tied to a perceived breach of contract.