

COURAGEOUS WHISTLEBLOWERS ARE NOT “LEFT OUT IN THE COLD”: Legitimate Justifications Exist for Collecting Evidence of False Claims Act Violations

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*Courage is rightly considered the foremost
of the virtues, for upon it, all others depend.*

—Winston Churchill

I. INTRODUCTION

It is the courage of whistleblowers, standing up in the face of great adversity and overwhelming pressure to “look the other way,” that enables the False Claims Act (“FCA”) to fulfill its primary purpose of combating fraud on the U.S. Treasury. By marshalling evidence and collecting company documents, the whistleblower provides the necessary proof to shed light on fraudulent and illegal FCA activities.

Many speculate as to whether an employee can gather or retain documents during the course of his or her employment to support a *qui tam* action under the FCA. The short answer is that an employee will generally not be liable for gathering or retaining an employer’s documents to support a *qui tam* action under the False Claims Act. While an employee owes a general duty of loyalty to his or her employer, this duty is qualified as the law offers a “safe-harbor” exception, so to speak, where the employee has a good faith reason to believe that the employer is engaged in fraudulent or illegal conduct. This exception is codified by the FCA and ensures that an employee cannot be retaliated against for exposing the employer’s fraudulent or illegal activity.

This article will briefly address an employee’s general duty of loyalty owed to his or her employer and its significant exceptions. It further examines the strong public policy and Congressional intent behind the FCA—encouraging exposure of fraudulent or illegal activity. Finally, this piece will address the typical claims pursued by employers seeking to assert liability against employees who have copied or retained the employer’s documents, confidential or otherwise, to support a *qui tam* suit.

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II. AN EMPLOYEE'S QUALIFIED DUTY OF LOYALTY

A. Generally, an employee has a duty to refrain from using or communicating confidential information acquired or compiled by his or her employer.

Generally, “unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency . . . unless the information is a matter of general knowledge.”¹ As a general proposition, a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit, but must account to his principal for any profits derived therefrom.²

“Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.”³ The Supreme Court has held that “even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.”⁴

B. There are several significant exceptions to the general duty of loyalty that an employee owes to his or her employer.

Courts have held, however, that there are certain situations where an employee's duty of loyalty is abrogated. For example, courts have held that employees with a good faith reason to believe their employer is engaged in unlawful conduct “[have] a legitimate interest in preserving evidence of [their employer's] unlawful employment practices.”⁵

1. RESTATEMENT (SECOND) OF AGENCY § 395 (1958).

2. RESTATEMENT (SECOND) OF AGENCY § 388 (1958).

3. William M. Fletcher et al., *Fletcher Cyclopedic of the Law of Private Corporations* § 857.1 at 260 (rev. ed. 1986).

4. See *Snapp v. United States*, 444 U.S. 507, 515, n.11 (1980) (upholding provisions of a written trust agreement prohibiting the unapproved use of confidential Government information relating to CIA operations). See also *Carpenter v. United States*, 484 U.S. 19 (1987) (upholding the conviction of a defendant for violating the mail and wire fraud statutes when he fraudulently misappropriated his employer's property and used the mail and wire services to commit these acts); *Buckley v. Valeo*, 424 U.S. 1, 25-28 (1976); *Cole v. Richardson*, 405 U.S. 676 (1972).

5. See *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (involving employer's unlawful age discrimination practices); see also *Kempeke v. Monsanto Co.*, 132 F.3d 442 (8th Cir. 1998) (holding that a reasonable fact-finder could conclude that an employee had a good faith reasonable belief that documents he found in his computer revealed an ongoing plan by Monsanto to weed out senior managers due to their age, in violation of the ADEA; therefore, retention of documents was lawful). But see *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746 (M.D.N.C. 2003) (finding that an employee who provided unsolicited confidential information to a former employee to aid his Title VII claim was not entitled to protection under the participation clause of Title VII because he offered no reasonable justification for disclosing the confidential information and did not engage in protected “opposition” himself; the court found the employer's justification convincing that Shoaf was terminated for the disclosure, not for his protected deposition testimony assisting another's Title VII claim).

Several courts have also engaged in a balancing test, weighing the interests of the employer in protecting confidential information against the employee's interest in copying and disseminating confidential documents to expose wrongdoing.⁶

III. THE FALSE CLAIMS ACT: ENCOURAGING EXPOSURE OF FRAUD

"[T]he purpose of the *qui tam* provision of the Act is to encourage those with knowledge of fraud to come forward."⁷ In order to proceed with an FCA action, the FCA requires that relators disclose to the United States "substantially all material evidence and information the person possesses,"⁸ and ties relator's share to the importance of her participation in the action and the relevance of the information she provided.⁹

Courts continually recognize the importance of the FCA, the purpose of which is to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government."¹⁰ Achieving that goal requires the "coordinated effort" between private citizens and the government.¹¹ "From targeting massive contractor fraud during the Civil War to halting healthcare fraud today, the ability of individuals to serve as private attorneys general and to protect the interests of the government has and continues to serve vital purposes."¹²

As to one of the primary purposes of the FCA—encouraging the exposure of fraud—the "*qui tam* provisions seek to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files."¹³ The FCA provides that "[a]ny employee who is discharged . . . 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 sue to obtain make-whole relief.¹⁴

6. See *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("Courts have required that the employee conduct be reasonable in light of the circumstances, and have held that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare."). *But see Laughlin v. Metro. Wash. Airports Auth.*, 952 F. Supp. 1129, 1138 (E.D. Va. 1997) (court struck the balance in favor of the employer where the plaintiff was an informant (rather than a participant) supplying confidential information regarding a co-worker's Title VII claim she took from her boss' desk, copied, and provided to the co-worker who had filed a Title VII claim).

7. *Neal v. Honeywell*, 33 F.3d 860, 861 (7th Cir. 1994) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)).

8. 31 U.S.C. § 3730(b)(2).

9. *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995).

10. S. Rep. 99-345, at 1, U.S. Code Cong. & Admin. News 1986, 5266.

11. *Id.* at 2, U.S. Code Cong. & Admin. News 1986, 5266, 5266-67.

12. *United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 769-70 (N.D. Ill. 2004).

13. *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996).

14. 31 U.S.C. § 3730(h)(1986).

In regard to potential *qui tam* actions under the FCA, courts have held that Congress intended to “protect employees while they are collecting information about a possible fraud, before they have put all the pieces together.”¹⁵

Moreover, courts have found employees’ activities in collecting information protected although they may not have ultimately filed *qui tam* suits.¹⁶ Nor is it necessary that the employee “know” that the investigation he or she is pursuing could lead to a FCA suit.¹⁷

In *X Corp. v. Doe*,¹⁸ the court also dealt with the issue of whether a former employee could be compelled to return materials taken from the employer that might demonstrate fraud. The court responded in the negative, finding less onerous ways of preventing this information from being used to harm the employer, such as enjoining disclosure of allegedly confidential information.¹⁹

IV. FCA’S STRONG PUBLIC POLICY: OVERRIDING EMPLOYER’S EFFORTS TO SEEK LIABILITY FOR COLLECTION OR RETENTION OF DOCUMENTS

Employers sometime seek to assert claims against an employee who copied or retained confidential documents from the employer. The three claims are typically for: 1) breach of a confidentiality agreement; 2) breach of fiduciary duty; and 3) conversion.²⁰

At the outset, it is paramount to recognize that the duties of confidentiality and loyalty are qualified and must acquiesce to matters of public interest irrespective of whether those duties flow from an express confidentiality agreement or a common law fiduciary duty.²¹ Moreover, a claim for conversion cannot be found where the owner has not been deprived of title or right to use the property.²²

15. *Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998); see also *Neal*, 33 F.3d 860; *Lang v. Northwestern Univ.*, No. 04-C-3290, 2005 WL 670612, at *2 (N.D. Ill. 2005) (“there is nothing in the language of § 3730(h) that precludes a claim for retaliation in a situation where the employer learns that an employee has engaged in protected activity regarding a false claim”); *Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1260 (D.C. Cir. 2004) (“The FCA’s whistleblower protections entitle [a]ny 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, . . . to all relief necessary to make the employee whole.”).

16. See *Neal*, 33 F.3d at 864–65; see also *Childree v. UAP/GA AG CHEM., Inc.*, 92 F.3d 1140 (11th Cir. 1996); *Ramseyer*, 90 F.3d at 1522.

17. See *Childree*, 92 F.3d at 1143, 1145–46 (noting that employee never considered bringing FCA case and had not heard of the Act at the time of discharge); *United States ex. rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996) (finding that protected activity does not require “specific awareness of the FCA”); *Neal*, 33 F.3d at 864 (noting that plaintiff was not informed that she could file a *qui tam* action); *Yesudian*, 153 F.3d at 740 (“[I]t is sufficient that a plaintiff be investigating matters that reasonably could lead to a viable False Claims Act case”).

18. 805 F. Supp. 1298 (E.D. Va. 1992), *aff’d*, 17 F.3d 1435 (4th Cir. 1994).

19. *Id.* at 1304, 1311 (when it was determined that the materials did not establish ongoing fraud, however, the relator was ordered to return them).

20. *Grandeau*, 350 F. Supp. 2d at 772–74.

21. See generally Comments & Illustrations, RESTATEMENT (SECOND) OF AGENCY § 395 (1958).

22. See generally RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

A. Breach of Confidentiality Agreement

For strong public policy reasons, agreements that attempt to restrain a party from cooperating with criminal investigations or disclosing matters of public consequence are unenforceable.²³ Courts have refused to enforce private agreements that prohibit signatories from disclosing federally protected matters of public interest, including those addressed by the FCA.

In *Connecticut Light & Power Co. v. Sec’y of the U.S. Dep’t of Labor*, the Second Circuit found that a proposed settlement, which restricted a former employee’s cooperation with the Nuclear Regulatory Commission, violated Section 210 of the Energy Reorganization Act of 1974 (“ERA”), “a remedial statute intended to shield employees from adverse action taken by their employers in response to employees’ complaints of safety violations.”²⁴ The court also found that “[a]lthough the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.”²⁵

Additionally, the Tenth Circuit has refused to enforce a non-disclosure agreement against a “whistleblower” where honoring the contract might have allowed a civil wrong against a third party to go undetected.²⁶ The trial court had dismissed the action finding that public policy “will never penalize one for exposing wrongdoing . . .”, and the Tenth Circuit affirmed explaining that:

It is public policy . . . everywhere to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced by appellant would serve to frustrate this policy. . . . By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a

23. See *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (“a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement”); see also *Fomby-Denson v. Dept. of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (concluding that “the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the highest order and is indisputably well defined and dominant in the jurisprudence of contract law.”); *Palmateer v. Int’l Harvester Co.*, 421 N.E. 2d 876, 878 (1981) (“parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public”). But see *Turner v. Reynolds Ford, Inc.*, No. 97-6152, 1998 U.S. App. LEXIS 9552, at *34 (10th Cir. 1998) (unpublished) (“Whether reporting criminal activity falls within the public policy exception depends on who the victim is and what the crime is”—court found that plaintiff met her burden where she alleged termination of employment related to her reporting of sexual harassment in violation of Title VII and state law retaliatory discharge provisions).

24. *Conn. Light & Power Co.*, 85 F.3d 89, 95 n.5 (2d Cir. 1996).

25. *Id.* at 95.

26. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 851 (10th Cir. 1972) (defendant informed a third party of plaintiff’s possible misappropriation of certain oil and natural gas deposits belonging to the third party, and plaintiff sued for breach of the non-disclosure agreement).

crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.²⁷

Courts have also been motivated by public policy when deciding against the enforcement of private agreements that operated to interfere with the Government's ability to carry out its investigations. In *EEOC v. Astra USA, Inc.*, the First Circuit denied, on public policy grounds, defendant's request for the enforcement of non-assistance provisions in its settlement agreements with employees, which prohibited the employees from "assist[ing] in any way" the EEOC with its discrimination investigation.²⁸ The court reasoned that "if victims of or witnesses to sexual harassment are unable to approach the EEOC or even answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered."²⁹

Of particular relevance to this article, the Congressional intent in creating the 1986 FCA amendment for whistleblower protection is plain—to encourage the detection and exposure of potential frauds against the United States Treasury.³⁰ Thus, private agreements, whether entered into as a condition of employment, during the course of employment, or in settlement of claims outside of the FCA framework, that would frustrate this public interest and Congressional objective are generally unenforceable. For example, the Ninth Circuit, in *United States ex rel. Green v. Northrop Corp.*, considered whether a private pre-filing settlement agreement, entered into without the knowledge or consent of the government, releasing a relator's *qui tam* claims against the company for alleged double billing, was enforceable to bar a subsequent *qui tam* suit.³¹ The court refused to enforce that release because to do so "would impair a substantial public interest," and specifically "threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986."³² As the court pointedly explained:

If the prevailing legal rule were that pre-filing releases entered into without the government's consent or knowledge were enforceable,

27. *Id.* at 852–54; *but see* *United States ex rel. Hall v. Teledyne*, 104 F.3d 230 (9th Cir. 1997) (upholding enforcement of state court settlement and release against relator where the government was fully aware of and investigated charges prior to release). *But see also* *United States ex rel. Gebert v. Transp. Admin. Serv.*, 260 F.3d 909 (8th Cir. 2001) (the Eighth Circuit held that public policy issues actually militated in favor of enforcing a waiver and release of all known and unknown causes of action, claims or suits executed as part of a party of a bankruptcy proceeding where the Geberts possessed all information necessary to file the suit as of the date they filed for bankruptcy yet failed to disclose the potential *qui tam* FCA suit on the Schedule (B) listing of their assets—court determined they lacked standing and barred suit by the Geberts); *Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911 (4th Cir. 1997) (plaintiff enjoined from disclosing and ordered to return confidential materials where plaintiff had signed non-disclosure agreements in connection with employment and evidence revealed that plaintiff had voluntarily resigned and brought suit under the retaliation provision of the FCA only after learning that his resignation disqualified him from an enhanced separation package and unemployment compensation benefits).

28. *Astra USA*, 94 F.3d 738, 743–45 (1st Cir. 1996).

29. *Id.* at 744.

30. 22 CAUSES OF ACTION 2D 217 (2005).

31. 59 F.3d at 956–58.

32. *Id.* at 963.

then it stands that Green never would have filed his *qui tam* complaint in the first place. And . . . both the structure of the Act and the legislative history reveal that it is the *filing* of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations.³³

B. Breach of Fiduciary Duty³⁴

The same public policy arguments that preclude enforcement of a confidentiality agreement support dismissal of a claim for breach of fiduciary duty, as well. The duty of loyalty owed by an employee to an employer is a “qualified duty.” The agent may reveal confidential information “in the protection of a superior interest of himself or a third person.”³⁵ An agent, therefore, may reveal current or planned criminal conduct by the principal in service of the public interest.³⁶ There exists a “clear public policy favoring investigation and prosecution of criminal offenses,” and “the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.”³⁷ Similarly, the Ninth Circuit held that a party who cooperated with the Federal Government in a covert criminal investigation was immune from subsequent civil liability in an action by the target.³⁸

33. *Id.* at 966 (emphasis in original).

34. In *United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am.*, the District Court for the Northern District of Illinois addressed a “unique” factual scenario where the U.S. mailed a subpoena to an employee at the defendant’s business, addressed to her in her representative capacity as “QA Coordinator, PCI,” and requested production of documents necessary for the government investigation of FCA violations. 350 F. Supp. 2d at 768, 772, 775. According to the opinion, the government had taken no official steps to keep the subpoena secret from defendant, including an application of 18 U.S.C. § 3486(a)(6) providing that a district court may issue an *ex parte* order requiring nondisclosure of the subpoena. *Id.* at 772. In response to the subpoena, Grandeau collected and produced documents without informing her employer but also filed her own *qui tam* action. *Id.* at 768–69. Defendant counterclaimed on three grounds, one of which was breach of fiduciary duty for Grandeau’s failure to disclose receipt of and response to the subpoena to her employer, which was allegedly not done in good faith. *Id.* at 769, 771. The court noted that “[t]he FCA does [not] . . . condone or shield individuals who receive and respond to subpoenas that are not theirs to address.” *Id.* at 770. The court allowed the fiduciary duty counterclaim to survive a motion to dismiss, finding that the receipt of a subpoena issued to a company and not to Grandeau individually or with an order, if true, would obligate the relator to disclose the subpoena to her employer. *Id.* at 775.

35. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. F (1958).

36. *Id.*

37. *Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 826 (N.D. Ill. 2000).

38. *Caesar Elecs., Inc. v. Andrews*, 905 F.2d 287, 289 (9th Cir. 1990).

C. Claim of Conversion

The gravamen of the tort of conversion is the deprivation of the possession or use of one's property.³⁹ Section 222(A) of the *Restatement (Second) of Torts* defines conversion as “an intentional exercise of dominion or control over a chattel which *so seriously interferes* with the *right* of another to *control it*. . . .”⁴⁰ Thus, an owner generally cannot state a claim for conversion if he or she retains either originals or copies of the documents.⁴¹ The reason for this rule is that the possession of copies of documents—as opposed to the documents themselves—does not legally rise to an interference with the owner's property sufficient to constitute conversion.⁴² In cases where the alleged converter has only a copy of the owner's property and the owner still possesses the property itself, the owner is in no way being deprived of the use of his property . . . [t]he only rub is that someone else is using it as well.”⁴³

Even if the confidential documents constitute “property” of a type subject to conversion, holding the relators responsible for engaging in conduct for the purposes of pursuing an FCA claim would undercut a statutorily protected right and further undermine the pivotal purpose of the FCA to uncover false and fraudulent claims on the United States.

V. CONCLUSION

Whistleblowers are generally not liable for gathering or retaining an employer's documents to support a *qui tam* action under the False Claims Act. While an employee owes a duty of loyalty to his or her employer, there are exceptions for situations where the employee has a good faith reason to believe the employer is engaged in fraudulent or illegal conduct. This exception has been codified by the FCA and ensures that an employee cannot be retaliated against for exposing the employer's fraudulent activity. It is only by the whistleblower's courage to uncover fraudulent and illegal activities that the Congressional intent behind the False Claims Act is fulfilled.

39. See PROSSER & KEETON ON THE LAW OF TORTS ch. 3, § 15, at 102 (5th ed. 1984) (“The gist of conversion is the interference with control of the property.”); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) (“[c]onversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor”); *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969) (“where the intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property, the tort committed is not conversion. . . .”).

40. RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965) (emphasis added).

41. *Harper & Row Publishers, Inc.*, 723 F.2d at 201; *Pearson*, 410 F.2d at 706–08 (conversion claim not stated where originals were copied and returned to the original files, noting that owner was not substantially deprived of his beneficial use of the documents); *Furash & Co., Inc. v. McClave*, 130 F. Supp. 2d 48, 58 (D.D.C. 2001) (no conversion found where former employer received copies of the documents retained after employment upon demand of such); *but see FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 303 (7th Cir. 1990) (defendant was required to return originals to plaintiff; plaintiff did not have a copy, and thus defendant did not qualify as an additional user but was a converter).

42. *Harper & Row Publishers, Inc.*, 723 F.2d at 201.

43. *FMC Corp.*, 915 F.2d at 303.