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## Fifth Circuit Holds Non-Employee Agent is Protected By False Claims Act's Retaliation Provision

On March 9, 2016, the Fifth Circuit issued an important ruling addressing the type of relationship that is required between a relator and a defendant for the relator to have a right to bring a retaliation claim against the defendant under the False Claims Act (“FCA”). In *United States ex rel. Bias v. Tangipahoa Parish School Board*, 816 F.3d 315 (5th Cir. 2016), the Fifth Circuit reversed the district court’s dismissal of relator’s retaliation claim because the defendants had not been his employer. In its decision, the panel recognized that the 2009 amendments to the FCA’s anti-retaliation provision, 31 U.S.C. § 3730(h), expanded the class of defendants who can be sued beyond employers, and established a framework for how to determine what other kinds of “employer-like” relationships can bring a defendant within the scope of the provision. *Id.* at 324.

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### Background

Relator Ronald Bias is a retired lieutenant colonel in the United States Marine Corps who served as the senior Marine Corps Instructor for the Junior Reserve Officers’ Training Corps (“JROTC”) at Amite High School in Louisiana. Bias filed suit in September 2012 in the United States District Court for the Eastern District of Louisiana, alleging that the Tangipahoa Parish School Board and two Amite High School employees violated the FCA by misappropriating federal JROTC funds. Additionally, Bias brought a retaliation claim under § 3730(h), alleging that, after he complained about the misappropriations, the two employees had harassed him at work, made false complaints about his performance to the Marine Corps, and spread rumors about him, all collectively hindering his ability to carry out his JROTC duties and ultimately resulting in his transfer by the Marine Corps to a New Orleans school district an hour away from his home.

The district court dismissed the retaliation claim, holding that the complaint did not sufficiently allege that the school district or its employees had caused the Marine Corps to transfer/demote Bias. In so holding, the district court held that the Marine Corps, not the school district or its employees, was responsible for the terms and conditions of Bias’s employment. As a result, Bias had not pled the basic requirement for a retaliation claim—that defendants discriminated against him in the terms and conditions of his employment.

### The Fifth Circuit Reverses

The Fifth Circuit reversed the district court’s dismissal of the retaliation claim, finding that Bias and the school board had a relationship that was sufficiently “employment-like” to sustain a retaliation claim under the FCA. First, the court held that the 2009 amendments to § 3730(h) expanded the class of culpable parties beyond employers by adding protection against retaliation for “contractors” and “agents” as well as employees. Recognizing, however, that Congress had not intended “to grant a federal right of action against anyone and everyone,” the Fifth Circuit held that some employment relationship must still exist “as a continuing limiting principle.” *Bias*, 816 F.3d at 324. The Fifth Circuit framed this requirement as an “employer-type” relationship, following the three types of relationships listed in the statute (employee, contractor, agent). In addition, the panel required that the alleged retaliatory action be related to the terms and conditions of employment — or of the contract or agency relationship. *Id.* Because the FCA does not provide further gloss on these terms or on the scope or nature of the required relationship, the Fifth Circuit looked outside the text of the FCA to provide further guidance on what contractual, agency or employment

relationships might meet this standard. *Id.* at 325-326. Ultimately, the panel concluded that, although Bias's complaint left questions unanswered, it still plausibly alleged that Bias had had an agency relationship with the defendants and that the alleged retaliation by defendants was sufficiently related to the terms and conditions of that relationship to survive a motion to dismiss. Bias's performance of teacher-like functions, participation in meetings with school officials, and his evaluation and supervision by one of the employees were enough to plead "the kind of relationship required by the statute with the School Board." *Id.* at 325-26.

### Implications of the Court's Decision

The Fifth's Circuit's guidance on how to evaluate whether a non-employer defendant's actions may nonetheless violate § 3730(h) is instructive. Defendants who rely on independent contractors and other agents in their work should be mindful of their handling of whistleblower-type allegations by their agents and contractors, as well as by their employees, to avoid potential retaliation liability under § 3730(h). We will continue to monitor the development of this area of FCA law.

If you have questions, please contact one of the authors of this alert, or your usual Ropes & Gray attorney.