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## Fifth Circuit Affirms False Claims Act's Anti-Retaliation Provision Cannot Be Used Against Individuals Who Did Not Employ Plaintiff

### Summary

On July 1, 2016, the Fifth Circuit affirmed the district Court's dismissal of Plaintiff's False Claims Act ("FCA") retaliation claim against all individual defendants in the case. In *Howell v. Town of Ball*, 827 F.3d 515, 521 (5th Cir. 2016), the Plaintiff had brought claims under the FCA against his employer (the town of Ball) and several individuals with roles in town governance. In upholding the lower court's decision, the panel held that the FCA's retaliation provision, 31 U.S.C. s. 3130(h), applied to employers, and not to non-employer individual defendants. The decision addressed the 2009 amendments to Section 3130(h) of the FCA and held that they did not alter this long-standing limiting principle.

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### Background

Plaintiff Thomas Howell ("Howell"), a former police officer for the town of Ball, Louisiana, asserted two claims against the town of Ball and various individual defendants: (1) a claim under 42 U.S.C. § 1983, on the grounds that he was terminated in violation of the First Amendment for cooperating with an FBI investigation of public corruption, and (2) a retaliation claim under the FCA, on the grounds that he was terminated in violation of the Act's whistleblower protections.

Howell allegedly learned that the town of Ball's mayor had fraudulently obtained funds from the Federal Emergency Management Agency, and that other town officials, including Ball's police chief, were involved in the scheme. He shared this information with the FBI. After investigation, Ball's mayor, police chief, and others were indicted. Afterwards, the new police chief, Daniel Caldwell, heard about Howell's involvement in the investigation and allegedly began to harass him. Caldwell asked Howell in more than one conversation whether he was "wearing a wire," and on one occasion insisted that Howell unbutton his shirt to prove he was not. Howell heard rumors that Caldwell was investigating whether he had stolen a flash drive from a coworker's locker, and Howell confronted Caldwell at his home. Caldwell raised this to the attention of the Board of Aldermen, which held a hearing on Howell's employment status and then voted to terminate him. Howell sued the town, the former police chief, the mayor, Caldwell, and the Aldermen, alleging the claims described above.

The district court dismissed Howell's FCA claims against the individual defendants in 2012, and subsequently granted summary judgment to the town and to the individual defendants on Howell's Section 1983/First Amendment claims. The district court denied summary judgment to the town on Howell's FCA claim against the town. Howell appealed. The Fifth Circuit affirmed the decisions of the district Court with respect to all claims brought against the individuals, but reversed the grant of summary judgment to the town of Ball on the Section 1983/First Amendment claim.<sup>1</sup>

### Decision Affirming Dismissal of the FCA Retaliation Claim Against the Individual Defendants

The district court had dismissed Plaintiff's FCA retaliation claims against the individual defendants because it concluded that § 3730(h) creates a cause of action only against a plaintiff's employer, not against individuals who

did not themselves employ the plaintiff. Howell argued that 2009 amendments to the section altered this long-standing principle, but the district court was not convinced. In analyzing this issue, the Fifth Circuit acknowledged Howell's argument that the 2009 amendments removed any express reference to retaliatory acts *by an employer*. The Court found, however, that this removal on its own was insufficient to demonstrate a legislative intent to expand the class of FCA defendants. In reaching this conclusion, the court relied on its review of the amendments as a whole, finding that the changes were part of the clear expansion of the class of plaintiffs to include contractors and agents. *Howell*, 827 F.3d at 529. Furthermore, the Court reasoned that if Congress had intended to overturn the vast line of precedent interpreting the FCA's prohibition of retaliation against whistleblowers as only applying to a plaintiff's employer, they would have done this expressly, not "only by mere implication."

### Implication

The Fifth Circuit made clear in this case that FCA claims can be brought only against employers, not against individual non-employer defendants. With this decision, the Fifth Circuit confirmed that the expansion of the class of plaintiffs who may seek redress under section 3730(h) did not throw away by implication long-standing principles limiting the class of defendants who may be subject to suit. We will continue to monitor developments in the law in this area.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.