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# Seventh Circuit Rejects False Claims Act and Retaliation Claims Premised on Purported Breach of Contract

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On October 11, 2016, the Seventh Circuit confirmed that there is no violation of the False Claims Act ("FCA") where the defendant allegedly violated a self-imposed requirement that was not mandated by its contract with the government, and affirmed the proper test for determining whether a purported whistleblower has undertaken a protected activity for purposes of a retaliation claim. In *United States ex rel. Uhlig v. Fluor Corp.*, 839 F.3d 628 (7th Cir. 2016), the panel held that Fluor had not violated the FCA, and that Uhlig could not claim whistleblower protections because at the time he raised the putative FCA issue, neither he nor a reasonable employee in his position could have believed that Fluor was in fact defrauding the government. The panel affirmed the district court's grant of summary judgment in favor of Fluor.

## Background

Relator Eric Uhlig filed suit in 2011 in the United States District Court for the Central District of Illinois, alleging that Fluor violated the FCA when it knowingly breached the terms of its contract with the U.S. Army by using unlicensed electricians as "journeymen" electricians and billing the government for those services. He also alleged that he was a whistleblower and was wrongfully terminated in violation of 31 U.S.C. § 3730(h). The government declined to intervene in the matter.

Fluor had contracted with the Army to provide electrical work and related services in Afghanistan, and the relator, an electrician, worked for Fluor. Soon after Fluor decided to change its qualification standards to require that journeymen — the position that was essentially equivalent to the relator's — possess state-issued United States electrician licenses, the relator was informed that unless he obtained a license before his existing one-year contract expired, he would be terminated. The relator then sent an email to the Defense Contract Management Agency Officer, copying his supervisor and enclosing his supervisor's contact information, complaining that he was losing his job while Fluor continued to pay unlicensed Afghan nationals to do the same work as journeymen "against government compliance." When pressed by his superior as to why he raised the issue directly to the government instead of pursuing available channels within the company, the relator clarified that he sent the email because he was "following a US taxpayer's obligation to report fraud waste and abuse from stiffing the US government." 839 F.3d at 632. Fluor then terminated the relator on the grounds that his initial email, which included non-public contact information for Uhlig's superior, violated the company's computer-use policy. Uhlig's complaint followed.

The district court granted summary judgment in Fluor's favor on August 6, 2014. The court dismissed the FCA claim on the grounds that Fluor's contract with the army did not, in fact, *require* that journeyman electricians be licensed, so Fluor did not breach the contract in its decision to use Afghan nationals who did not possess United States licenses as journeymen. Fluor's voluntary decision to impose the new licensure requirement on US-based electricians did not convert to a contractual obligation, and Fluor was under no contractual obligation to apply the same requirement to Afghan nationals in its employ. As to the relator's retaliation claim, the court concluded that the relator's email to the government and to his supervisor was not "protected activity" under the FCA because he did not have any objective basis for asserting that Fluor had defrauded the government at the time he sent the email. As a result, the district court concluded, he was not entitled to whistleblower protection.

## The Seventh Circuit's Holding

A unanimous panel of the Seventh Circuit agreed with the district court that Fluor did not violate the FCA, and likewise agreed that the relator was not entitled to any whistleblower protections for his actions. The Court's opinion reviewed the key provisions of Fluor's contract with the Army and concluded that it provided a set of options for establishing an employee's qualifications, "and licensing was not the exclusive method for doing so." 839 F.3d at 634. Relying on the plain language of the contract, the Court found that Fluor's decision to impose a licensing requirement on US-based electricians while using other standards for Afghan nationals was plainly permissible under the contract.

As to the relator's retaliation claim, the Court applied the Seventh Circuit's test to determine whether Uhlig's activity was protected, and maintained that the test includes an objective element: whether a reasonable employee in the same or similar position might believe in good faith that Fluor was committing fraud against the government. Here, the relator had not reviewed any of the relevant contract terms, and so lacked any firsthand knowledge of Fluor's contractual obligations to the Army. And his secondhand knowledge, which was received in the form of emails updating him on the new qualification requirements and informing him of how his own position would be reclassified, was insufficient to give rise to a reasonable belief that Fluor was defrauding the government. Even assuming the relator subjectively believed that Fluor was knowingly breaching its contract, the Court held, he could not satisfy the objective component of the test.

## Implications of the Court's Decision

While the Seventh Circuit's substantive FCA ruling did not break any new ground, its ruling on the relator's retaliation claim confirms that it will continue to join several other courts of appeals, including the Eighth, Ninth, and D.C. Circuits, in applying both objective and subjective components to inquiries into whether an employee's actions are protected by the FCA's anti-retaliation provision.

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.