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# Employers Fight Back Against Whistleblowers

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In 2013, the federal government recovered $3.8 billion from settlements and judgments under the False Claims Act (FCA). Whistleblowers—also called "relators"—can recover up to 30 percent of whatever a defendant pays in a suit. And in 2013, whistleblowers earned at least $387 million in these actions. It is clear that disgruntled employees have a huge monetary incentive to file whistleblower suits. Interestingly, more than 846 new FCA cases were filed in 2013, with 757 of those filed by *qui tam* whistleblowers. In the present FCA environment, employers are in the dangerous position of potentially facing false accusations by employee whistleblowers looking for a huge payday. Fortunately, employers are not without options against employees who make false accusations of wrongdoing. Employers may even have options against employees who have been successful in their FCA cases, but who have breached their employment agreements or who have stolen documents. Courts have recently been more willing to permit counterclaims against employee relators. Additionally, there is at least one case in which an employer filed suit against a whistleblower after *losing* a FCA case. And sometimes, employers can refer whistleblowers to law enforcement authorities for prosecution if the whistleblowers engaged in some criminal activity in obtaining the evidence for the FCA case. **Counterclaims**

*United States ex rel. Madden v. General Dynamics*, 4 F.3d 827 (9th Cir. 1993) made it possible for employers to file counterclaims in False Claims Act cases. Specifically in *Madden*, the court upheld counterclaims for, among other causes of action, breach of duty of loyalty, breach of fiduciary duty, libel, and misappropriation of trade secrets. The key factor justifying the counterclaim was that they were "not dependent on a qui tam defendant's liability." The *Madden* court further stated, "We believe that some mechanism must be permitted to insure that relators do not engage in wrongful conduct in order to create the circumstances for qui tam suits and to discourage relators from bringing frivolous actions. Counterclaims for independent damages serve this purpose." The case of *Cafasso v. General Dynamics C4 Systems, Inc.*, 2009 WL 1457036 (D. Ariz. 2009) is also instructive. Cafasso, the whistleblower, believed her employer was defrauding the U.S. government. She reported her concerns in vague terms and soon received notice of her termination as the result of what the court found to be a coincidental, non-retaliatory reorganization of her entire work group. Before leaving, Cafasso downloaded more than 10 gigabytes of her employer's data, including trade secrets belonging to the employer and third parties, propriety research and development

information, over 30,000 emails, and one patent application with sensitive national security implications. Cafasso never stopped to review individual files to determine their relevance. Cafasso brought a whistleblower action and added a claim for retaliation under the FCA. Her employer counterclaimed for breach of contract in the form of a confidentiality and non-disclosure agreement that Cafasso had signed. The court dismissed Cafasso's whistleblower claims for failure to state a claim, granted summary judgment to the employer on Cafasso's retaliation claim, and the court granted the employer's motion for summary judgment on its claim for breach of contract. The court rejected Cafasso's argument that the FCA, under the circumstances, protected her gathering of documents in her investigation of a potential qui tam case. The employer later sought sanctions and attorneys' fees from Cafasso and her counsel and was awarded $300,000 in fees from Cafasso in *U.S. ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, 2009 WL 3723087 at *1 (D. Ariz. Nov. 3, 2009). In addition to claims for breach of fiduciary duty and breach of contract claims, employers may be able to counterclaim alleging false and damaging statements by whistleblowers. In *Burch ex rel. U.S. v. Piqua Engineering, Inc.*, 145 F.R.D. 452 (S.D. Ohio 1992) for instance, Piqua was sued under the FCA by employees. The employees alleged that Piqua falsely certified that it met requisite testing and quality standards and that the contractor had retaliated against the employees who brought the suit. Piqua asserted several counterclaims, including defamation specifically related to the employees' alleged false and damaging statements about Piqua to the media. The employees' motion to dismiss was denied and Piqua was allowed to proceed. See also e.g., *Prabhu*, 1994 WL 761237, at *1. As these cases illustrate, employers sued in FCA cases should be alert to the possibility of counterclaiming against employee whistleblowers. Theft of trade secrets and theft of property are two potential theories for such counterclaims when whistleblowers take company materials and use them, particularly for their own personal gain. Trade libel, malicious prosecution, or other counterclaims based on employee whistleblowers' false allegations should also be explored and evaluated. A recent case is giving employers hope that even after being found liable for damages in a FCA case, an employer can initiate an action against a whistleblower. J-M Manufacturing, after being found liable for damages in a FCA suit initiated by a former employee John Hendrix, filed a complaint in the Superior Court of New Jersey. J-M Manufacturing alleges in its complaint that Hendrix and his counsel, Phillips and Cohen LLC, conspired to misappropriate confidential, proprietary, and trade secret information in furtherance of the qui tam lawsuit. The complaint specifically alleges that Phillips and Cohen repeatedly directed Hendrix to use his employee status to obtain information to support his FCA claims, in violation of his confidentiality agreement with J-M Manufacturing. The complaint further alleges that Phillips and Cohen directed Hendrix to pull evidence from the company's computers, tape conversations, and remove documents from company files. J-M Manufacturing alleges that Phillips and Cohen used the misappropriated information to develop Hendrix's own lawsuit and to recruit additional whistleblowers. This case has not been decided. **Conclusion**

Finally, although few whistleblowers have incurred criminal liability for acquiring and disseminating confidential documents without their employers' permission, such prosecutions are not unheard of. For instance, in 2008, Boeing employee Gerald Eastman blew the whistle on alleged quality

assurance and inspection problems by leaking documents to newspapers. As a result of his actions, Eastman was tried for felony computer trespass in April 2008, resulting in a hung jury. Upon Boeing's urging, prosecutors decided to try Eastman a second time. He was saved from jail time by promising to recover documents he had leaked and to cooperate in legal proceedings that arose from the company's efforts to retrieve documents. The IRS whistleblower, Bradley Birkenfeld, who reported unlawful tax sheltering by UBS and saved the government nearly a billion dollars was sentenced for 40 months for his role in the wrongdoing. Even though this case did not involved the theft of documents, it demonstrates that stepping forward and blowing the whistle on wrongdoing is no guarantee that prosecutors will forgive related wrongdoing on the whistleblower's part. Employers do have resources when against whistleblowers that act improperly and employers should not shy away taking action when the facts and circumstances warrant. *Originally published by InsideCounsel.*

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