SOUTH CAROLINA LAWYERS WEEKLY

Evidence of payment needed to allege FCA violation

By: Matt Chaney January 9, 2019

Direct evidence of government payment or receipt of fraudulent services must be alleged for a False Claims Act lawsuit to survive a motion to dismiss, the 4th U.S. Circuit Court of Appeals has ruled, dismissing a former maintenance technician's fraud claims against United Airlines.

But the case has been sent back to South Carolina's federal district court for a rehearing on the employee's retaliation claim against the airline.

David Grant filed a *qui tam* lawsuit in 2015 alleging that United falsified repairs and reports on F117 U.S. Air Force transport plane engines. Grant claimed that regulations required United to use specific tools to test repairs before returning the engines to the Air Force for payment, but for months the airline certified that it had done the work even though his worksite didn't even have the requisite tools.

Grant claims that when he complained of the maintenance violations to management, explaining that such failures could lead to catastrophic engine failure and even death, he was fired.

Soon thereafter, he filed the action alleging that the company violated provisions of the FCA, including knowingly presenting false claims for payment or approval, using false records material to a false claim, and unlawfully terminating him for his efforts to stop the FCA violations. U.S. District Judge David Norton dismissed the complaint for failing to sufficiently allege that United presented a false claim for payment to the government or his activities were protected by the FCA.

Judge Allyson Duncan, writing for the 4th Circuit's majority, agreed that Grant did not make allegations with the "particularity" required under the heightened standard for claims of fraud under the FCA. Because Grant, as a maintenance technician, did not have access to evidence of how and if the government received or paid for the services, Duncan said Grant cannot state a claim under those sections of the law.

"While the allegations state with particularity that United engaged in at least some fraudulent conduct, the [complaint] fails to provide the last link which is critical for FCA liability to attach: namely, that this scheme necessarily led to the presentment of a false claim to the government for payment," Duncan said.

Judge Barbara Keenan dissented from that part of the court's ruling, arguing that sometimes, circumstantial evidence is enough to show that a false claim must have been presented to the government. Keenan contended that the majority's decision will "close the doors" to allegations of dangerous misconduct which otherwise might never be brought to light.

"The majority requires that a relator allege direct evidence of presentment at the pleading stage … without the benefit of discovery," Keenan said. "As a result, the majority effectively limits qui tam actions to whistleblowers in 'white collar' position with access to financial and other business records."

The judges agreed that Norton had relied on an outdated standard in dismissing Grant's retaliation claim, however, holding that such claims are not subject to the heightened particularity requirement. Instead, a worker must simply allege facts sufficient to support a reasonable inference that he engaged in protected activity and his employer knew about the protected activity and took adverse action against him as a result.

William Norton of Motley Rice in Mount Pleasant represented Grant. Norton did not respond to requests for comment before press time.

Keith Harrison of Crowell & Moring in Washington D.C. and Michael Cole & Erika Fedelini of Nelson Mullins Riley & Scarborough in Charleston represented United. Harrison directed Lawyers Weekly to speak with United's media relations team, who also didn't respond to requests for comment before press time.

Bill Nettles of Columbia, who was not involved in the litigation, reviewed the decision at Lawyer's Weekly's request. Nettles previously served as U.S. Attorney for the District of South Carolina, where he handled FCA cases before going into private practice. Nettles said that while the case represents a change in case law, it's not as drastic as it may appear.

"I do think that it probably makes it harder for people lower in the corporation to bring False Claims cases, but that's always been the case," he said. "It's easier for people at the top than people at the bottom because they don't have as much access to information."

Zachary Kitts of K&G Law Group in Fairfax, Virginia, also was not involved in the litigation but reviewed the opinion at Lawyers Weekly's request. He said he thinks Grant successfully pleaded all three claims, and that the new standard will make it "virtually impossible for anybody to prove a false or fraudulent claim in the procurement context."

"The majority appears to say that on one hand, you'd have to have boots on the ground knowledge that an airline mechanic would have, and the person would simultaneously need to have knowledge of fairly high-level contractual dealings," he said, "But it seems to me that they're requiring a level of knowledge that no one person would ever have."

The 26-page decision is *United States ex rel. David Grant v. United Airlines Inc.* (Lawyers Weekly No. 001-117-18.) The full text of the opinion is available online at sclawyersweekly.com.

Follow Matt Chaney on Twitter @SCLWChaney

Related

Tort/Negligence - False Claims Act – Insufficient 'Presentment' Allegations – Air Force Maintenance Contracts
September 18, 2017
In "Tort/Negligence"

Tort/Negligence - False Claims Act – Civil Practice – Pleading Requirements – Airline Technician – Air Force Contract
November 29, 2016
In "Tort/Negligence"

Tort/Negligence - Conspiracy – Anti-Kickback Statute & False Claims Act – Medical Services & Billing
November 13, 2017
In "Tort/Negligence"

Edit

Tagged with: FCA