

Fifth Circuit Affirms: Res Judicata Bars FCA Retaliation Suit

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by Briana Al Taqatqa

Last week, the U.S. Court of Appeals for the Fifth Circuit considered an appeal from the Eastern District of Louisiana, which dismissed appellants' FCA retaliation claims based on res judicata. Res judicata, or "claim preclusion," is the principle that a matter may not be re-litigated once it has been decided on the merits.

Appellants had previously brought employment discrimination actions against Lockheed Martin alleging they were wrongfully terminated because of their race. Both actions were decided in favor of Lockheed at summary judgment. See *Javery v. Lockheed Martin Corp.*, No. 14-2644, 2016 U.S. Dist. LEXIS 55475 (E.D. La. Apr. 26, 2016); *DeJan v. Lockheed Martin Corp.*, No. 14-2731, 2016 U.S. Dist. LEXIS 37894 (E.D. La. Mar. 23, 2016).

While their employment discrimination actions were pending, appellants filed an FCA retaliation suit against Lockheed alleging they were terminated for engaging in "protected activity." Lockheed moved for summary judgment based on res judicata, asserting the claims arose out of the same facts that gave rise to the prior final judgments on the plaintiffs' discrimination claims. The district court agreed and granted summary judgment in favor of Lockheed. *Javery v. Lockheed Martin Corp.*, No. 17-5106, 2018 U.S. Dist. LEXIS 143447 (E.D. La. Aug. 23, 2018).

On appeal, appellants argued the district court incorrectly applied the "transactional" test and asked the Fifth Circuit to instead determine "whether the primary right and duty or wrong are the same in each action." In an unpublished decision, the Court of Appeals rejected appellants' argument and confirmed that the appropriate test in the Fifth Circuit for purposes of res judicata is the "transactional" test, which asks whether the claims in the second action arise out of the "same nucleus of operative facts" as the previous action. *Javery v. Lockheed Martin Corp.*, No. 18-31049, 2019 U.S. App. LEXIS 11305 (5th Cir. Apr. 18, 2019).

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This decision serves as a warning to plaintiffs who attempt two bites at the apple under different legal theories. Had the purported whistleblowers included their FCA retaliation claims in the original lawsuit, they may have had their claims decided on the merits.