

Tread Carefully: District of Utah Grants Motion For Attorneys' Fees After Unsupported FCA Claim

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by Samuel F.B. Audley

On February 3, 2020, the U.S. District Court for the District of Utah granted a motion for attorneys' fees against Plaintiff Kelly Sorenson ("Sorenson"), finding that the claims Sorenson asserted against his former employer under the False Claims Act ("FCA") were "clearly frivolous" and compensable under 31 U.S.C. § 3730(d)(4). *United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, No. 2:16-cv-875, 2021 U.S. Dist. LEXIS 21561 (D. Utah Feb. 3, 2021). In its decision, the Court emphasized that Sorenson's claims were "conclusory, unsupported, and/or baseless," entitling Defendant Wadsworth Brothers Construction Company, Inc. ("Wadsworth") to "reasonable attorneys' fees and expenses" incurred over the course of the four-year litigation, including both motion to dismiss and summary judgment briefing. *Id.* at *3-5. Although courts have long been reticent to deem FCA claims frivolous, this decision may indicate a shift in judicial decision-making with respect to the FCA.

In August 2016, Sorenson filed a *qui tam* complaint alleging that Wadsworth violated the FCA by failing to comply with the Davis-Bacon Act—which requires employers to pay certain wages to laborers on government contracts—when paying his wages on a federally-funded project for the Salt Lake International Airport. Sorenson further alleged that Wadsworth violated the FCA's retaliation provisions by cutting his hours and terminating him when he raised wage-related concerns to his supervisors. The government declined to intervene.

Wadsworth moved to dismiss the complaint in its entirety, arguing that Sorenson had already litigated his wage claims in state court and that the FCA claims lacked the factual allegations necessary to satisfy the Rule 12(b)(6) and heightened Rule 9 pleading standards for fraud claims. The Court largely granted Wadsworth's motion, dismissing the fraud, false record, false receipt, and conspiracy to defraud claims brought under the FCA. Emphasizing the need for "knowingly" presenting a false or fraudulent claim for approval under the FCA, the Court concluded that a certification of compliance with the Davis-Bacon Act alone was not a material misrepresentation. In so doing, the Court recognized that the FCA is not an "all-purpose antifraud statute" or a statute to be used

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to punish garden-variety contract or regulatory violations. Similarly, the Court dismissed Sorenson's claim for conspiracy to defraud because Sorenson did not establish that Wadsworth had made fraudulent misrepresentations under the FCA, and therefore could not establish that Wadsworth had acted with other actors to defraud the government.

Sorenson continued to pursue the sole surviving claim—retaliation—and Wadsworth filed a motion for summary judgment in May 28, 2020. The Court granted Wadsworth's motion, concluding that Sorenson never put Wadsworth on notice of his protected activity and was laid off for normal business reasons.

Wadsworth did not stop there, however. Instead, Wadsworth also filed a motion for attorneys' fees in December 2020 as allowed under Section 3730(d)(4) of the FCA, which provides:

If the Government does not proceed with the action and the person bringing the action conducts the action, the *court may award to the defendant* its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action *was clearly frivolous*, clearly vexatious, or brought primarily for purposes of harassment.

31 U.S.C. § 3730(d)(4) (emphasis added); *see also* Docket No. 45 at 4. Although this bar is high, the Court concluded that Sorenson's suit was "clearly frivolous" because of Sorenson's failure to fulfill basic elements of an FCA claim, including alleging more than conclusory statements, presenting evidence that Sorenson communicated to Wadsworth that he was accusing them of violating the FCA, and showing some form of retaliation. On those grounds, the Court granted Wadsworth's motion and ordered that Sorenson pay "reasonable attorneys' fees and expenses" under Section 3730(d)(4).

This decision illustrates that if the claim does not fit within the specific parameters established under the FCA, a court will not hesitate to dismiss the action as insufficient and unsupported. And if the relator has clearly failed to fulfill basic requirements for an allegation of fraud under the FCA, the relator runs the risk of paying defense fees if the Court finds the claims to be either frivolous or harassing. As made clear in Sorenson, the consequences can be expensive.