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Blowing the Whistle on a Breach of Contract? D.C. Circuit Addresses Scope of FCA's Anti-Retaliation Rules

By Evan R. Sherwood and Peter B. Hutt II*

In a split decision, in Singletary v. Howard University*, a panel of the U.S. Court of Appeals for the D.C. Circuit decided that if the employee reasonably believes that her employer is or "would soon" submit a false claim, then the False Claims Act's anti-retaliation provisions may apply. The authors of this article explain the decision and its limitations.*

The False Claims Act ("FCA") has long protected relators from retaliation for preparing a *qui tam* complaint. But what if an employee "blows the whistle" on a garden-variety problem—for instance, a laboratory that she believes is falling short of standards in a federal funding agreement?

In *Singletary v. Howard University*, a split panel of the U.S. Court of Appeals for the D.C. Circuit took on that issue. The outcome was this: If the employee reasonably believes that her employer is or "would soon" submit a false claim, then the FCA's anti-retaliation provisions may apply.[1] The court's decision was based on the Fraud Enforcement and Recovery Act of 2009, which amended 31 U.S.C. § 3730(h)(1) to forbid employers from discharging, demoting, or otherwise discriminating against an employee for "efforts to stop 1 or more violations of" the FCA.

Contractors and grantees should take note of this decision, which may give litigants a basis to broadly read the FCA's retaliation provisions. However, in a potentially crucial omission, the D.C. Circuit expressly did not decide whether the U.S. Supreme Court's decision in *Escobar* might affect its ruling, apparently because the issue was not raised during litigation. *Escobar* held that garden-variety breaches of contract or regulatory violations generally cannot support a

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[1] *Singletary v. Howard University*, No. 18-7158 (D.C. Cir. Sept. 20, 2019), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/5C241E494BCE80128525847B004EFBBF/$file/18-7158-1807331.pdf.

claim under the FCA, which would seem to be a powerful limit on whether an employee's concerns are reasonable.[2]

BACKGROUND ON *SINGLETARY V. HOWARD UNIVERSITY*

The case began when Singletary, who served as the university's attending veterinarian, became concerned about the living conditions of mice in one of the school's laboratories.[3] According to her complaint, she warned her superiors that the animal's living conditions did not comply with the terms of various grants from the National Institutes of Health ("NIH"), but her superiors were unresponsive.[4] Among other things, the grants allegedly required compliance with the Animal Welfare Act of 1966 and the Health Research Extension Act of 1985.[5] After raising the issue inside the university, Singletary found mice dead in the laboratory, which prompted her to email NIH's Office of Laboratory Animal Welfare ("OLAW") to report the issue.[6] OLAW requested a corrective action plan, and the university then fixed the issue.[7] In the weeks following Singletary's email, she alleges that her employer accused her of lacking professionalism and later reduced her appointment as attending veterinarian by

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[2] *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001–03 (2016). Prior to the 2009 amendments, employees could claim protection for actions taken "in furtherance of" an FCA claim. Courts generally approached that issue by inquiring whether an employee's actions "reasonably could lead to a viable False Claims Act case." *See United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 740 (D.C. Cir. 1998). Courts are beginning to take a similar approach to the "efforts to stop" standard and often cite pre-2009 case law for that proposition, and thus *Singletary* may be part of a growing trend. *E.g.*, *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 201–02 (4th Cir. 2019) (inquiring as to whether employee had objectively reasonable belief that his employer "is violating, or soon will violate" the FCA, citing case law under the False Claims Act Amendments of 1986); *see also Shi v. Moog, Inc.*, 19-cv-339 (W.D.N.Y. Sept. 19, 2019) (same). Notably, both *Grant* and *Shi* involved allegations that the employer had committed fraud, as opposed to allegations that the employer would in the future commit fraud. Neither *Grant* nor *Shi* cite *Escobar*. In addition, the First Circuit has held that even under the 2009 amendments, an employee's activities are protected only if they "reasonably could lead" to and FCA action. *United States ex rel. Booker v. Pfizer, Inc.,* 847 F.3d 52, 60 (1st Cir. 2017).

[3] *Singletary Majority Op.* at 7–8.

[4] *Id.* at 8.

[5] *Id.* at 4–5.

[6] *Id.* at 8–9.

[7] *Id.*

six months.[8] Importantly, her warnings to the university and her email to OLAW "did not accuse the University of fraud in terms."[9]

THE D.C. CIRCUIT'S SPLIT DECISION

The question for the D.C. Circuit was whether her complaint stated a valid claim of retaliation for attempting to stop fraud. Assuming that her allegations were true, the majority opinion found her claim was viable because she had a reasonable belief that (a) her employer "was or would soon" submit false claims and (b) her employer's certifications were necessary to receive federal grant money.[10] Although Singletary did not "accuse the university of fraud in terms," she alleged that the university was required to make annual certifications of compliance, and that her complaints "coincided" with the annual reporting period.[11] For the majority, that was enough.[12]

According to the dissent, that fell short. Because she "never told the University that she was concerned about possible fraud," the university had no reason to think she was attempting to stop fraud.[13] Further, Singletary's apparent goal was for the university to come into compliance with its grant terms, not to correct a prior false submission to the government.[14] On this point, the dissent noted *Escobar*'s instruction that mere violations of contract or regulation do not equate to fraud unless they are material to a false claim for money.[15] This instruction has led to the dismissal of many FCA matters.[16]

Escobar may have been the key difference between the majority's approach and the dissent's. The majority opinion expressly did not address *Escobar*, commenting in a footnote that defendant's counsel had not raised it.[17] But

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[8] *Id.* at 9.

[9] *Id.* at 18.

[10] *Singletary Majority Op.* at 16.

[11] *Id.* at 17.

[12] The court also found that she satisfied the remaining elements for stating a claim of retaliation.

[13] *Singletary Dissent* at 7.

[14] *Id.* at 8.

[15] *Id.* (citing *Escobar*, 136 S. Ct. at 2001).

[16] *See United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 842 (8th Cir. 2018) (allegation that defendant sold non-compliant products did not demonstrate fraud under *Escobar*); *United States ex rel. Scharff v. Camelot Consulting*, 13-cv-3791(S.D.N.Y. Sept. 28, 2016) (allegation that defendant violated Medicaid regulations was insufficient to show fraud under *Escobar*).

[17] *Singletary Majority Op.* at 14–15 n.3.

Escobar appears to cut strongly against the outcome here, given its statement that the FCA is not intended to cover garden-variety legal violations.[18] *Escobar* should affect whether an employee has an objectively reasonable belief that he or she is stopping false claims, and may mean that *Singletary* is limited to its facts.

KEY TAKEAWAYS

- *The FCA's retaliation provisions may cover an employee's reasonable belief that he or she is stopping fraud*. Employers should take a broad view of the FCA's provisions when handling internal complaints from employees.
- *The scope of this case remains to be seen, as the court did not consider Escobar.* Because the defendant did not raise *Escobar* as a defense, the majority opinion declined to consider its holding that the FCA does not apply to garden-variety breaches of contract or regulations.
- *Universities and research grantees should be cautioned—federal grants come with a wide spectrum of FCA compliance risks.* Grantees should carefully investigate allegations that they are not in compliance with grant terms. As this case shows, litigants may attempt to frame even basic non-compliance as a matter of fraud.

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[18] *Escobar*, 136 S. Ct. at 2001–03.