

How Should Courts Calculate FCA Double Back Pay Awards?

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A recent False Claims Act decision from the Eastern District of New York held that whistleblowers are entitled to double back pay *before* the court subtracts their earnings from new employment. The New York court's decision in *United States v. Americare, Inc.*, No. 06-CV-1806 (FB) (PK), 2016 WL 1237385 (E.D.N.Y. Mar. 28, 2016), ensures that the remedies afforded to whistleblowers are expansive, acknowledging that bad actors defrauding the government should not be able to easily escape liability.

About *US v. Americare*

Patricia Mooney, a former employee at a home healthcare services company, discovered that her employer was defrauding Medicare and Medicaid by accepting kickbacks in exchange for fraudulent referrals and submitting fraudulent documents for false reimbursements. After uncovering what she believes to be hundreds of thousands, if not millions, of dollars in fraud, she says that she voiced her complaints to her employer, Americare, and was fired.

Ms. Mooney filed her original complaint in court in 2006 and, by the time she finally received the verdict in her favor, sought years of relief from Americare. Under the False Claims Act, a victim of unlawful retaliation is entitled to all remedies that will make her "whole" again. In an effort to do that, the law entitles whistleblowers to *double* back pay, which is lost wages and benefits that the person would have continued earning if not for her retaliatory firing – times two. However, there is also the rule of mitigation, which means that if an employee gets another job during the period between their firing and the court's judgment, their new salary will offset their total back pay.

Calculating Whistleblower Compensation

The New York district court was tasked to address whether the whistleblower's new salary should be subtracted from her back pay *before* or *after* the back pay is doubled. While this question may sound trivial, it has large implications for the total amount of compensation a whistleblower may receive. For instance, if a plaintiff like Ms. Mooney had earned \$100,000 annually before her retaliatory firing and then began working in another position for \$50,000, then doubling her owed back pay after subtracting her new salary, as opposed to doubling before, is the difference of \$50,000 in damages for every year.

Recognizing that the purpose of the law was to make the whistleblower whole, the court ruled that back pay should be doubled prior to subtracting any interim salary. Not only does this formula more adequately compensate whistleblowers for what they've lost, it also lessens the extent to which bad actors escape liability from the sheer good fortune that their victims were able to find other work or by paying the undoubled amount in mitigation before the judgment.

Strengthening the FCA

This decision further strengthens the power of [False Claims Act whistleblower](#) cases in the Eastern

District of New York, both for the whistleblower and the employer. Employers are subject to significant exposure and costs by defrauding the federal government, and this decision ensures that they will have to pay a high cost in relief. This decision could also eventually extend to [Dodd-Frank whistleblower](#) claims, which similarly awards double back pay to individuals who are retaliated against for reporting violations of finance and securities laws.