

# **Whistleblower Litigation ALI-ABA: Advanced Employment Law and Litigation - 2012**

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If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the employee may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. Pub. L. No. 111-353, §402(b)(4)(A). Section 402 expressly provides a right to a jury trial at the request of either party. *Id.*

#### **F. Available Remedies**

If the Secretary of Labor determines that a violation of Section 402 has occurred, the Secretary is directed to order affirmative action to abate the violation, reinstatement of the employee to his or her former position with back pay, and compensatory damages. Pub. L. No. 111-353, §402(b)(3)(B)(i)-(iii). Notably, Section 402 requires, at the request of the complainant, the Secretary to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. Pub. L. No. 111-353, §402(b)(3)(C).

If the complainant brings an action in District Court because the Secretary failed to issue a final decision within the statutorily required time, the FSMA allows the District Court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Pub. L. No. 111-353, §402(b)(4)(B).

### **V. DEFENSE CONTRACTOR WHISTLEBLOWER PROTECTIONS**

The wars in Afghanistan and Iraq have seen unprecedented levels of private defense contractors in prominent military support and reconstruction roles. This burgeoning niche is in addition to the multibillion dollar defense contracting industry already in existence prior to the most recent military operations. The lure of lucrative government contracts, combined with the lives and taxpayer dollars at stake in the performance of those contracts, necessitates whistleblower protections for defense contractors and their employees. This protection is found in 10 U.S.C. § 2409. There is very little case law interpreting the law's provisions.

#### **A. Protected Activity**

Under the defense contractor whistleblower law, an employee of a defense contractor is protected for making disclosures to one of several entities of misconduct by his or her employer. To be protected by the act, the employee must reasonably believe that she has information that evidences: (1) "gross mismanagement of a Department of Defense contract or grant;" (2) "a gross waste of Department of Defense funds;" (3) "a substantial and specific danger to public health or safety;" or (4) "a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." 10 U.S.C.A. § 2409(a).

Protection of reprisal is available to employees who disclose such information to “a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice.” Id.

### **B. Covered Employers**

The term “contractor” is defined broadly within the statute to mean “a person awarded a contract or a grant with an agency.” 10 U.S.C.A. § 2409(e)(4). Covered agencies include the Department of Defense, the Army, the Navy, the Air Force, the Coast Guard, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C.A. § 2303(a).

### **C. Prohibited Retaliation**

Under the statute, a contractor may not discharge, demote, or otherwise discriminate against an employee for engaging in any of the forms of protected activity described above. 10 U.S.C.A. § 2409(a).

### **D. The Litigation Process**

An employee alleging reprisal for protected activity under the law must file a complaint with the Inspector General (“IG”) of the Department of Defense in most cases or with the IG of NASA if the complaint concerns NASA. 10 U.S.C.A. §2409(b)(1). Unlike most whistleblower statutes, the defense contractor anti-reprisal law does not contain a statute of limitations for filing a complaint. If it does not find that the complaint is frivolous, the IG has 180 days to investigate it and submit a report to the complainant, the respondent contractor, and the head of the relevant agency with whom the private party contracted. 10 U.S.C.A. §2409(b)(1), (2)(A). If the agency denies relief or fails to file an order granting relief within 210 days after the filing of the complaint, the complainant may file in federal district court, without regard to the amount in controversy. 10 U.S.C.A. §2409(c)(2). Either the complainant or the respondent may request a jury trial. Id.

### **E. Available Remedies**

Within 30 days after receiving a report from an Inspector General regarding the whistleblower complaint, the head of the relevant agency may determine whether the employee was subjected to reprisal by the contractor and may deny or grant relief. 10 U.S.C.A. §2409(c)(1). There are several available forms of relief. The broadest is an order that the contractor “take affirmative action to abate the reprisal,” which is a general make-whole provision designed to restore the pre-retaliation status quo. 10 U.S.C.A. §2409(c)(1)(A). More specifically, the act mentions as possible remedies reinstatement, compensation (including back pay), employment benefits, and a restoration of pre-reprisal conditions of employment. 10

U.S.C.A. §2409(c)(1)(B). Additionally, a successful claimant may obtain reasonable attorneys' fees and expenses, including expert witness fees. 10 U.S.C.A. §2409(c)(1)(C).

## **VI. FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS**

The False Claims Act ("FCA") is a law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against the government. See 31 U.S.C. §§ 3729 - 3733. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government. See 31 U.S.C.A. § 3730(d). The Dodd-Frank Act also strengthened the FCA and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

Under the FCA, a person is liable for a fine and treble damages if that person:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.