Illinois Association of Defense Trial Counsel
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IDC Quarterly | Volume 24, Number 1 (24.1.18)

Feature Article

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Beware the Whistleblower: Whether Congress's Omission of the Term "Employer" from Section 3730(h) of the False Claims Act Was Intended to Extend Liability to a Whistleblower's Individual Supervisors

Since its inception in 1986, the anti-retaliation provision of the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.*, has protected employees who were subjected to retaliation from their employers as a result of their involvement in FCA enforcement claims. Recognizing that there were whistleblowers who were not technically "employees" but who were being retaliated against in conjunction with their FCA enforcement efforts, Congress amended the anti-retaliation provision of the FCA in 2009 to expand the class of protected whistleblowers to include "contractors" and "agents." Congress also eliminated from the statute the term "employer." Unfortunately, while providing explanations with respect to the additions of "contractor" and "agent," Congress left little to no guidance as to why it eliminated the term "employer." Accordingly, district courts across the country have struggled with determining whether, by eliminating the term "employer," Congress intended to extend liability to a whistleblower's individual supervisors.

The Genesis of the Anti-Retaliation Provision of the FCA

Of the 1986 Amendments to the FCA, 31 U.S.C. §§ 3729–3733, perhaps the most profound was the introduction of statutory protection for employees who encountered retaliation from their employers as a result of their assistance, initiation, or participation in an FCA enforcement claim. Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157-58. In passing the amendment, Congress sought "to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5266-67 (1986). Congress acknowledged that "few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." S. Rep. No. 99-345, at 35 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5299. Accordingly, Congress created the anti-retaliation provision of the FCA, which provides the following:

> Any **employee** who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment **by his or her employer** because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153, codified at 31 U.S.C. § 3730(h) (1986) (emphasis added) (current version at 31 U.S.C. § 3730(h)(1)–(2) (2010)).

Courts across the country routinely held that the plain language of the statute stated that Section 3730(h) applied to and protected *only* an "employee" who was retaliated against by his or her "employer." See, *e.g.*, *U.S.* ex rel. *Hancock v. Regan*, No. 98-2753, 1999 WL 594791, *1 (7th Cir. July 20, 1999) ("[T]o bring a retaliation claim against an organization, one must be an employee of that organization."); *Campion v. Northeast Utilities*, 598 F. Supp. 2d 638, 654 (M.D. Pa. 2009) ("By its terms, § 3730(h) applies only to an 'employee' who is retaliated against by his or her 'employer.'"); *U.S.* ex rel. *Watson v. Conn. Gen. Life Ins. Co.*, 87 Fed. Appx. 257, 261 (3d Cir. 2004) ("The retaliation provision of the FCA, 31 U.S.C. § 3730(h), is limited to employees and affords no protection to independent contractors."); *Vessell v. DPS Assocs. of Charleston, Inc.*, 148 F.3d 407, 411–12 (4th Cir. 1998) ("[T]he anti-retaliation provision is limited by its express language to employees. We must presume that Congress intended to so limit the anti-retaliation provision.").

The Fraud Enforcement Recovery Act of 2009 and Congress's Elimination of "Employer"

On May 20, 2009, Congress enacted the Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009), which in form and substance broadened the whistleblower protections of Section 3730(h) to include "contractor[s]" and "agent[s]." FERA's amendments to Section 3730(h) applied to conduct occurring on or after its effective date of May 20, 2009. Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (2009).

After Congress passed FERA, Section 3730(h) provided the following:

> Any **employee, contractor, or agent** shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

FERA, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624–25, codified at 31 U.S.C. § 3730(h)(1).

Recognizing the holdings from the United States Court of Appeals for the Third and Fourth Circuits that whistleblowers who worked as independent contractors were not protected by Section 3730(h), Congress sought "[t]o correct this loophole." The False Claims Act Correction Act of 2008, S. Rep. No. 110-507, at 26 (2008). According to the Senate Judiciary Committee's report on FERA, "it [was] necessary to include these additional terms to assist individuals who are not technically employees within the typical employer-employee relationship, but nonetheless have a contractual or agent relationship with an employer." *Id.* at 27. California Senator Howard L. Berman explained that Section 3730(h) was amended to "ensure that Section 3730(h)

protects physicians from discrimination by health care providers that employ them as independent contractors." 155 Cong. Rec. E1300 (daily ed. June 3, 2009) (speech of Rep. Howard L. Berman).

Through the FERA amendments, Congress also eliminated the statutory reference to retaliation being perpetrated by the whistleblower's "employer." 31 U.S.C. § 3730(h), *as amended by* FERA, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624–25. Unfortunately, FERA's legislative history is devoid of any explanation as to why Congress eliminated "employer" from §3730(h). That is, unlike the explanation Congress provided for *adding* "contractor" and "agent" to the statute, Congress did not provide a similar explanation as to why it *deleted* the term "employer." As one might expect, there has been no shortage of judicial interpretations as to the intention and impact of Congress eliminating the term "employer." While courts agree that FERA expanded the class of whistleblowers who could *bring* Section 3730(h) enforcement actions, there has not been a clear consensus as to whether FERA expanded the class of individuals or entities, or both, that could be *liable* in Section 3730(h) enforcement actions.

Courts Disagree about Whether Congress's Elimination of the Term "Employer" Expanded the Class of Potential Defendants to a Whistleblower's Individual Supervisors

Since the enactment of FERA, there have been a handful of district courts across the country that have addressed whether Congress's elimination of the term "employer" was intended to subject a whistleblower's individual supervisors to Section 3730(h) liability. In general, there have been two approaches taken by courts addressing this issue: (1) Congress intended to expand the class of potential defendants subject to Section 3730(h); and (2) Congress intended to avoid confusion when one of the new classes of whistleblowers (for example, independent contractors) brought Section 3730(h) enforcement claims. Though a review of the applicable case law on this issue reveals that the latter appears to be the majority view, this issue has yet to be addressed by a circuit court of appeals. As a result, it remains unclear whether the majority view will gain precedential value.

Minority Approach: Congress Opened Pandora's Box as to Potential Defendants

In *Laborde v. Rivera-Dueño*, 719 F. Supp. 2d 198, 200 (D.P.R. 2010), the plaintiff, Janine Laborde-Sanfiorenzo ("Laborde"), was employed by the Puerto Rico Department of Health ("Department") as Director of the Office of Public Health Preparedness and Response. The defendant, Jaime Rivera-Dueño ("Rivera"), was employed as the Acting Secretary of the Department. During the course of her employment, Laborde alleged that she discovered that the Department engaged in conduct that contravened the terms of the Department's receipt of federal grant funds. Laborde claimed that, as a result of her reporting the federal grant issue to the Department's legal counsel, Rivera terminated her employment contract. Accordingly, Laborde brought a Section 3730(h) claim against Rivera in his individual capacity. *Laborde*, 719 F. Supp. 2d at 200–01.

In a brief analysis, the district court allowed Laborde to maintain her Section 3730(h) claim against Rivera. Without addressing the amendment's legislative history, the court simply acknowledged that Congress eliminated the statutory reference to a whistleblower's "employer" in 2009. Paramount to the court's decision was the absence of guidance from the Court of Appeals for the First Circuit on this issue and, as a result, whether individual liability now exists under Section 3730(h). *Id.* at 205.

In *United States* ex rel. *Moore v. Cmty. Health Servs., Inc.*, Civil No. 09-CV-1127(JBA), 2012 WL 1069474 (D. Conn. Mar. 29, 2012), the plaintiff, Gwendolyn Moore, was employed by the defendant, Community Health Services, Inc. ("CHS"), as a Medical Billing Manager. During her time with CHS, Moore alleged that she discovered that CHS established a fraudulent billing scheme that sought and received federal reimbursement from the Medicare and Medicaid programs to which CHS was not entitled.

Moore, 2012 WL 1069474, *1. Moore alleged that she reported her billing concerns to, among others, CHS's Chief Executive Officer Michael Sherman and Chief Financial Officer Dan Clemons. *Id.* at *3. As a result of these reports, Moore alleged that Sherman and Clemons verbally harassed her, hid promotion opportunities from her, and ultimately terminated her employment. Moore filed a Section 3730(h) claim against Sherman and Clemens in their individual capacities. *Id.* at *4.

The *Moore* court initially acknowledged that the term "employer" in the pre-FERA version of Section 3730(h) did *not* extend to a supervisor in his or her individual capacity. As a result, the court held that Moore's allegations stemming from conduct occurring prior to the enactment of FERA could not form the basis of a Section 3730(h) claim against Sherman and Clemens. *Id.* at 8. The court went on to note, however, that the term "employer" was conspicuously omitted from the post-FERA version of Section 3730(h). Based solely on the absence of "employer" from the post-FERA version of Section 3730(h), the court held that Moore could maintain a Section 3730(h) claim against Sherman and Clemens in their individual capacities for conduct occurring after the enactment of FERA. *Id.* at *9.

Finally, in *Huang v. Rector & Visitors of the University of Virginia*, 896 F. Supp. 2d 524, 533–34 (W.D. Va. 2012), the plaintiff, Weihua Huang, was employed by the defendant, Rector and Visitors of the University of Virginia (the University), as a member of the University's professional research staff. In this position, Huang alleged that he discovered that his supervising professor of psychiatric medicine, Dr. Ming Li, was misappropriating federal grant funds. Huang alleged that he reported his suspicions to the chairman of the Department of Psychiatry and Neurobehavioral Sciences, Dr. Bankole Johnson. *Huang*, 896 F. Supp. 2d at 533–34. As a result of his reports, Huang alleged that he was retaliated against by Dr. Li and Dr. Johnson when his employment contract was not renewed. *Id.* at 540. Huang filed a Section 3730(h) claim against Dr. Li and Dr. Johnson in their individual capacities. *Id.* at 547.

Like the court in *Moore*, the *Huang* court held that the pre-FERA version of Section 3730(h) did not extend liability to a whistleblower's supervisors in their individual capacities. *Id.* at 556 n.16. By virtue of Congress omitting the term "employer" from Section 3730(h), however, the court ruled that FERA "effectively left the universe of defendants undefined and wide-open." *Id.* Citing a lack of specific guidance from the Court of Appeals for the Fourth Circuit, the court refused to dismiss Huang's Section 3730(h) claim against Dr. Li and Dr. Johnson in their individual capacities. *Id.*

These cases, particularly *Moore* and *Huang*, stand for the proposition that, unless or until there is guidance from Congress or the district court's respective circuit court of appeals, district courts should interpret Congress's omission of the term "employer" from Section 3730(h) as expanding the class of defendants liable under Section 3730(h) to include a whistleblower's supervisor in his or her individual capacity. Unfortunately, neither *Moore* nor *Huang* were appealed to their respective circuit courts of appeals. The absence of any reference to FERA's legislative history or a tangible reason (statutory construction, for example) for reaching their conclusions suggests that these cases will gain little traction in terms of support and remain the minority approach to this issue.

Majority Approach: Congress Desired to Avoid Confusion when Section 3730(h) Claims were Brought by Whistleblowers Classified as "Contractors" or "Agents"

In *United States* ex rel. *Abou-Hussein v. Science Applications International Corp.*, No. 09-CV-1858, 2012 WL 6892716 (D.S.C. May 3, 2012), the plaintiff, Alex Abou-Hussein, was employed by the Space and Naval Warfare Systems Command ("SPAWAR"), a civilian agency of the United States. Although admittedly not employed by defendants Science Applications International Corporation ("SAIC") or Sentek Consulting ("Sentek"), Abou-Hussein nevertheless brought a Section 3730(h) claim against these federal government contractors. *Abou-Hussein*, 2012 WL 6892716, *1. Abou-Hussein alleged that, after reporting fraudulent

misconduct by SAIC and Sentek to SPAWAR, SPAWAR acted on behalf of SAIC and Sentek when it retaliated against him. *Id.* at *2. SAIC and Sentek moved to dismiss Abou-Hussein's Section 3730(h) claim on the basis that Section 3730(h) only protects "an employee or a person in an employment type of a relationship, such as an independent contractor or agent." *Id.* at *3. Abou-Hussein responded by arguing that the post-FERA version of Section 3730(h) permitted Section 3730(h) claims against non-employers. *Id.* The district court agreed with SAIC and Sentek.

The *Abou-Hussein* court held that, in the years preceding FERA, the Court of Appeals for the Third and Fourth Circuits espoused that Section 3730(h) did not protect persons in "employment type relationships but who were technically independent contractors or agents." *Id.* The court explained that, in passing FERA, "[t]he 2009 amendments sought to correct what Congress viewed as the unduly narrow interpretation that the [Third and Fourth Circuits] had given to the term 'employee.'" *Abou-Hussein*, 2012 WL 6892716, *3. As such, according to the *Abou-Hussein* court, Congress added the terms "contractor" and "agent" to Section 3730(h) "'[t]o correct this loophole.'" *Id.* (quoting The False Claims Act Correction Act of 2008, S. Rep. No. 110-507, at 26 (2008)).

Abou-Hussein also argued that, by removing the term "employer" from Section 3730(h), Congress intended Section 3730(h) to extend liability to non-employers. *Id.* at *2. The court disagreed and held that, by extending protection under Section 3730(h) to independent contractors and agents, the statute "by necessity . . . could no longer refer only to 'employers.'" *Id.* at *4 n.4. The court explained that:

> [T]he removal of the term 'employer' by the 2009 amendment to § 3730(h) was a device to accommodate the broader group of potential plaintiffs who are in employee type roles but who may not technically be employees and the broader group of potential defendants who are in employer type roles but may not technically be employers. There is no indication in the revised statutory language of the 2009 amendments or in the legislative history that indicate [*sic*] a Congressional intent to broaden the scope of § 3730(h) to include potential defendants who have no employer type relationship with plaintiffs.

Id.

In *Howell v. Town of Ball*, No. 12-CV-951, 2012 WL 6680364 (W.D. La. Dec. 21, 2012), the plaintiff, Thomas Howell, was a police officer for Ball, Louisiana. In 2008, Howell became a confidential informant to the Federal Bureau of Investigations (FBI) for purposes of the FBI's investigation into allegations that the Mayor, Roy Hebron, as well as other town officials and employees allegedly were fraudulently applying for and receiving Federal Emergency Management Agency (FEMA) disaster recovery funds for Ball. *Howell v. Town of Ball*, No. 12-CV-951, slip op. at 1–2. (W.D. La. Sept. 4, 2012). After the Ball Chief of Police resigned after being indicted for his role in the alleged FEMA-fraud scheme, Daniel Caldwell became the interim Chief of Police for Ball. *Id.* at 2. Howell alleged that Caldwell routinely harassed and inevitably terminated him for his role in the FBI's investigation. *Id.* at 2–3. Accordingly, Howell filed a Section 3730(h) claim against various city officials, including Caldwell, in their official and individual capacities. *Howell*, 2012 WL 6680364, at *1.

The individual defendants filed a motion to dismiss Howell's Section 3730(h) claim, wherein they argued that they were not Howell's "employer" in their official capacities and, as a result, should not be considered Howell's "employer" in their personal capacities. *Id.* The defendants cited to FERA's congressional record in arguing that Congress's omission of the term "employer" reflected its intention to expand the protection of Section 3730(h) to include contractors and agents who were not technically employees of the discriminating party. *Id.* at *2. In arguing that Congress's elimination of the term "employer" from Section 3730(h) gave rise to individual liability, Howell argued that the court "shirked its duty to give the words of the amended statute their plain meaning and effect." *Id.* The court disagreed and held that Congress's omission of the term "employer" does not necessarily lead to the conclusion that "Congress intended to grant a federal right of

action against anyone and everyone." *Id.* Principally, the court found that, in passing FERA, Congress was attempting to address courts that "limit[ed] the scope" of Section 3730(h) and lessened the effectiveness of the FCA. *Howell*, 2012 WL 6680364, at *2.

In *Aryai v. Forfeiture Support Associates, LLC*, No. 10-CV-8952 (LAP), 2012 U.S. Dist. LEXIS 125227, at *3 (S.D.N.Y. Aug. 27, 2012), the plaintiff, Brian Aryai, was employed as a Senior Forfeiture Financial Specialist by the defendant, Forfeiture Support Associates, LLC (FSA). FSA specialized in providing staffing and support to government agencies, including the United States Marshals Service (USMS). Among its responsibilities, USMS was responsible for managing and disposing of forfeited properties pursuant to the Asset Forfeiture Program (AFP) of the United States Department of Justice. *Aryai*, 2012 U.S. Dist. LEXIS 125227, at *3. Mr. Eben Morales served as the Acting Assistant Director of AFP. *Id*. During the course of his employment, Aryai alleged that he discovered that AFP was defrauding the United States Government. *Id.* at *4. Aryai eventually discussed his discovery with the Assistant United States Attorney for the Southern District of New York. *Id.* at *5. Aryai alleged that, when Morales discovered that Aryai had contacted the United States' Attorney's office, Morales retaliated against him through a pattern of harassment and abuse. *Id.* at *7. Aryai filed a Section 3730(h) claim against Morales in his individual capacity. *Aryai*, 2012 U.S. Dist. LEXIS 125227, at *8.

Morales moved to dismiss Aryai's Section 3730(h) claim on the basis that only an "employer" can be held liable under Section 3730(h). According to Morales, because he was not Aryai's "employer," he could not be held liable under Section 3730(h). *Id.* at *19. The court agreed with Morales. Quoting to a section of a House Report on FERA, the court explained that:

> Congress intended for the amendment to "broaden protections for whistleblowers by expanding the False Claims Act's anti-retaliation provision to cover any retaliation against those who planned to file an action (but did not), people related to or associated with relators, and contract workers and others who are not technically 'employees.'" The Report contains no similar statement of intent to expand the scope of liability to include individuals. Where Congress expressly stated its intent to expand the definition of a whistleblower and added specific language to effectuate that intent, it strains common sense to read Congress's silence in the same sentence of the statute as effectuating an unexpressed intent to expand the class of defendants subject to liability under the statue.

Id. at *23 (internal citation and footnote omitted) (quoting H.R. Rep. No. 111-97, at 14 (2009)). The court went on to explain that, if Congress really wanted to expand the universe of potential defendants subject to Section 3730(h), it simply could have replaced "employer" with "any person." *Id.* at *24. Citing other federal statutes utilizing the phrase "any person," the court found that Congress's decision *not* to use the phrase "any person" suggests that "Congress deleted the word 'employer' not to provide for individual liability but to avoid confusion in cases involving a 'contractor or agent' rather than an 'employee.'" *Id.* at *25.

In *Russo v. Broncor, Inc.*, No. 13-CV-348, slip op. at 1–2 (S.D. Ill. July 24, 2013), the plaintiff, Mary Russo, a licensed audiologist, was employed by the defendant, Broncor, Inc., to provide intraoperative neurophysiologic monitoring ("IOM") services. During the course of her employment, Russo became concerned that Broncor was engaging in inappropriate billing practices relating to its IOM services, in violation of Medicare regulations. Among others, Russo raised her concerns to her supervisor, Brian Larson, the president of the company that was contracted by Broncor to bill Medicare for Broncor's IOM services. *Russo*, No. 13-CV-348, slip op. at 2. Russo alleged that, as a result of her investigation and refusal to participate in Broncor's fraudulent Medicare billing practices, she was terminated by Broncor. *Id.* Russo filed a Section 3730(h) claim against Larson in his individual capacity. *Id.* at 3.

In dismissing Russo's Section 3730(h) individual-capacity claim against Larson, the district court acknowledged that there was no applicable authority from the Court of Appeals for the Seventh Circuit addressing the impact of FERA's amendments to Section 3730(h). *Id.* at 8. Instead, the court relied on and adopted the statutory analysis set forth by in *Aryai*. *Id.* at 9–10. Relying on *Aryai*, the *Russo* court ruled that, though FERA undoubtedly expanded the class of individuals who could *bring* a Section 3730(h) enforcement action to include "contractors" and "agents," there is no evidence that Congress also intended to expand the class of individuals who could be *liable* in a Section 3730(h) enforcement action. *Id.* The court held that Congress most plausibly omitted the term "employer" to avoid confusion in cases where the Section 3730(h) enforcement action was being pursued by one of the newly protected classes of independent contractors and agents. *Russo*, No. 13-CV-348, slip op. at 10.

In further support of its conclusion that Congress did not intend Section 3730(h) to include supervisors, the *Russo* court noted that, although FERA significantly amended Section 3730(h), Congress chose not to amend the remedy component of the statute, because reinstatement remains as relief included under Section 3720(h). The court reasoned that the statutory remedy of reinstatement is one that *only* an employer, not an individual, could provide. The retention of this remedy, the court noted, provides further support that Congress did not intend to extend Section 3730(h) liability to a whistleblower's individual supervisors. *Id.*

In *Lipka v. Advantage Health Group, Inc.*, No. 13-CV-2223, 2013 WL 5304013, at *1 (D. Kan. Sept. 20, 2013), the plaintiff, Trina Lipka, was the Director of Nursing at The Gables at Overland Park Assisted Living Facility ("the Gables"). The Gables was financed and managed, in part, by Advantage Health Group, Inc., which was owned by Norm and Kathy Wilcox. During her time employed by the Gables, Lipka alleged that she discovered that the Gables was not complying with certain Clinical Laboratory Improvement Amendments of 1988 ("CLIA"). *Lipka*, 2013 WL 5304013, at *1. Lipka alleged that, after she reported her concerns to Kathy Wilcox in regard to CLIA compliance at the Gables, she was terminated. *Id.* at *2. Accordingly, Lipka filed a retaliatory discharge claim pursuant to Section 3730(h) against Norm and Kathy Wilcox. *Id.*

Although initially acknowledging that some district courts (*Laborde*, *Moore*, and *Huang*) have concluded that the post-FERA version of Section 3730(h) extended liability to a whistleblower's individual supervisors, the *Lipka* court noted that these district courts summarily came to their conclusions without consulting FERA's legislative history. *Id.* at *10. The court found that *Abou-Hussein*, *Howell*, and *Aryai* were far more persuasive, because these courts undertook a thoughtful analysis of FERA's sparse, but helpful, legislative history in regard to Section 3730(h). *Id.* at *11–12. Accordingly, the court held that it was siding with the "majority of courts" addressing this issue and ruled that Section 3730(h) liability does not extend to a whistleblower's individual supervisors. *Id.* at *12.

Finally, in *Wichansky v. Zowine*, No. 13-CV-01208, 2014 WL 289924 (D. Ariz. Jan. 24, 2014), the plaintiff, Marc Wichansky, and the defendant, David Zowine, co-founded an employee placement organization called Zoel Holding Company, Inc ("Zoel"). During all relevant times, Wichansky and Zowine each owned 50% of Zoel. During the time period of December 2010 through January 2011, Wichansky alleged that Zowine verbally and physically abused him and members of the Zoel staff. *Wichansky*, 2014 WL 289924, at *1–2. After a series of bizarre events that led to a divide in Zoel's staff, including members of the "Zowine-camp" allegedly absconding Wichansky's computer equipment and copying Wischansky's personal computer data, Wichansky petitioned to dissolve Zoel. *Id.* at *2. Zowine opted to buy Wichansky's 50% share in Zoel. During the buyout process, Wichansky discovered that one of Zoel's subsidiaries, MGA Home Healthcare LLC ("HHL") was engaged in a fraudulent billing scheme. Coincidentally, Wichansky alleged that HHL was intimately managed and operated by Zowine and that Zowine's violent and abrasive conduct was specifically designed to prevent him from discovering the existence of Zowine's fraudulent

scheme. *Id.* Wichansky filed a retaliatory discharge claim pursuant to Section 3730(h) against Zowine and Zoel.

Zowine and Zoel asserted that Wichansky's Section 3730(h) claim should be dismissed because, in part, neither Zowine nor Zoel were Wichansky's "employer." *Id.* at *3. Relying on *Laborde*, *Moore*, and *Huang*, Wichansky argued that, through FERA, Congress intended to expand Section 3730(h) liability beyond a whistleblower's "employer." *Id.* The *Zowine* court disagreed. Noting that the courts in *Laborde*, *Moore*, and *Huang* did not examine FERA's legislative history, the *Zowine* court relied upon the holdings in *Abou-Hussein*, *Howell*, *Aryai*, and *Lipka*. Specifically, the court held that FERA's amendments to Section 3730(h) "were intended to broaden the scope of those protected from violations of the FCA, rather than those who may be held liable for such violations." *Id.* at *3–4. Accordingly, the court ruled that, to be subject to Section 3730(h) liability, the defendant must have some employer-type relationship with the whistleblower. *Id.* at *4. Because Zowine and Zoel were not in an employment-type relationship with Wichansky, the court held that Wichansky's Section 3730(h) claim must fail. *Id.* at *5.

Employers and Employees Serving in Supervisory Roles Should Beware of Individual Liability Pursuant to Section 3730(h)

Although there have been a handful of district courts that have addressed FERA's impact on Section 3730(h) and Congress's omission of the statutory term "employer," there has yet to be a circuit court of appeals to address this issue. Accordingly, it remains unclear whether the view taken by the majority of district courts, such as *Abou-Hussein, Howell, Aryai, Russo, Lipka*, and *Wichansky* will gain precedential value. While *Aryai*, in particular, could provide the most helpful insight into the type of statutory analysis a circuit court of appeals could undertake when addressing this issue, it is uncontroverted that Congress did not explicitly indicate why it omitted "employer" from the amended version of Section 3730(h). As such, unless or until Congress provides clarification of its omission by virtue of a future amendment to Section 3730(h), individuals serving in supervisory capacities should be well-informed and appropriately trained with respect to the general provisions of Section 3730(h). Specifically, employers should implement training modules and develop specific policies relating to Section 3730(h) for those employees serving in supervisory positions who frequently encounter potential whistleblowers. By taking preventative steps to thwart potential Section 3730(h) claims, individuals and entities potentially subject to Section 3730(h) liability could avoid substantial exposure. *See* 31 U.S.C. § 3730(h)(2) (relief through a successful Section 3730 claim includes "reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees").

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