ENVIRONMENTAL WHISTLEBLOWERS' RIGHTS

An introduction to the federal laws protecting the rights of environmental whistleblowers, prohibiting retaliation against whistleblowers, and giving whistleblowers the right to monetary and other relief

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The law protects those who blow the whistle on potential or actual threats to the environment. Whistleblowers have a right to report environmental violations and to be free from retaliation for doing so. They may also be able to obtain money damages and other relief from those who violate environmental laws or retaliate against whistleblowers. This paper provides an overview of federal laws that protect environmental whistleblowers, including major environmental laws (*e.g.*, the Clean Air Act), and the False Claims Act.

Please note that this paper is for informational purposes only and does not constitute the advice of counsel or create an attorney-client relationship. (For more information, please review our legal disclaimer, below.[*]) If an employee is concerned about potential or actual threats to the environment, has questions about environmental whistleblower protections, or would like more information, he or she can contact our firm for more information.

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What laws protect environmental whistleblowers?

Seven major federal environmental laws have special provisions protecting corporate whistleblowers: the Clean Air Act (CAA),[1] the Toxic Substances Control Act (TSCA),[2] the Federal Water Pollution Control Act (FWPCA) (a.k.a. Clean Water Act),[3] the Energy Reorganization Act (ERA) (also encompassing the Atomic Energy Act),[4] the Resource Conservation and Recovery Act (RCRA) (also encompassing the Solid Waste Disposal Act (SWDA)),[5] the Safe Drinking Water Act (SDWA),[6] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (a.k.a. Superfund).[7]

In addition, the False Claims Act offers environmental whistleblowers both a financial incentive to report wrongdoing in connection with federal contracts or

[1] 42 U.S.C. § 7622.

[2] 15 U.S.C. § 2622.

[3] 33 U.S.C. § 1367.

[4] 42 U.S.C. § 5851.

[5] 42 U.S.C. § 6901.

[6] 42 U.S.C. § 300j-9(i).

[7] 42 U.S.C. § 9610.

other benefits and protection from retaliation for investigating and filing suit under the False Claims Act.[8]

A variety of federal laws protect the rights of whistleblowers in other fields that come into contact with the environmental sector.[9] Many states have also enacted laws to protect whistleblowers. In addition, environmental whistleblowers may be protected under other provisions of law, such as 42 U.S.C. § 1983, from retaliation for environmental whistleblowing if the conduct is protected by the First Amendment.[10] However, liability under § 1983 may be more difficult to establish than under whistleblower laws. This paper focuses on the principal federal environmental whistleblower statutes and the False Claims Act.

I. ENVIRONMENTAL WHISTLEBLOWER STATUTES

Who is protected by federal environmental whistleblower laws?

Any employee (or, in certain circumstances, an employee's representative) who believes he or she has been discriminated against in retaliation for "blowing the whistle" on a safety problem or environmental violation, or for engaging in

[8] 31 U.S.C. §§ 3729-30.

[9] *See, e.g.*, 46 U.S.C. § 2114 (maritime whistleblower protection); 49 U.S.C. § 31105 (transportation safety); *id.* § 60129 (Pipeline Safety Improvement Act).

[10] *See, e.g.*, *Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607 (6th Cir. 2001) (holding that whistleblower provisions of the CWA and SDWA do not preclude employee from pursuing a First Amendment retaliation claim under § 1983).

other activity protected under the whistleblower law, may file a complaint. Under certain provisions (the CAA, TSCA, SDWA, and ERA), an employee may have "any person" file a complaint on his or her behalf.

Almost any private sector or state, municipal, or federal employee can be protected.[11] In addition, under certain environmental laws (CERCLA, SWDA and FWPCA), "authorized representatives of employees," which might include union officials, unions, or attorneys authorized to represent employees, may be protected as well.[12]

The ERA, SDWA, CAA and TSCA prohibit discrimination based on the protected activity of an employee "or any person acting pursuant to a request of the employee," but the discrimination must be directed toward the employee and under those laws it is the employee who may file a complaint.

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[11] *See Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1156-58 (10th Cir. 2005) (whistleblower action against Metro Wastewater Reclamation District, "a political subdivision of the State of Colorado . . . provid[ing] wholesale wastewater treatment to its members, which consist of over fifty municipalities and sanitation districts in metropolitan Denver"); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993) (whistleblower suit against "Passaic Valley Sewerage Commissioners, a corporate and political organization under New Jersey state law").

[12] *See Anderson*, 422 F.3d at 1175-82.

What activity is protected?

Employees participate in protected activity when they (1) report internally a violation of the environmental statutes;[13] (2) commence or are about to commence a proceeding for violation of federal environmental laws; (3) testify or are about to testify in any such proceeding; or (4) assist or participate in proceedings that may implicate violations of environmental regulations.

Are any employees excluded from federal whistleblower protections?

Yes. The federal environmental whistleblower laws do not protect any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of federal environmental law.

What is illegal discrimination?

The federal environmental statutes prohibit a wide range of retaliatory actions, including reprimands, termination, threats of discharge or layoff,

[13] *See, e.g.*, ERA, 42 U.S.C. § 5851(a)(1)(A)&(B); *Passaic*, 992 F.2d at 478-79 ("We believe that the statute's purpose and legislative history [of the CWA] allow, and even necessitate, extension of the term 'proceeding' to intracorporate complaints. . . . Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act. . . . Similarly, our sister courts of appeals have consistently construed those statutes to lend broad protective coverage to internal complainants, as well as other employees." (collecting cases)).

demotion, salary reduction, denial of promotion denial of benefits, refusal to hire or rehire, blacklisting, harassment, and any act that would dissuade a reasonable person from engaging in further protected activity.

What must a plaintiff prove to prevail?

To prevail under any of the environmental statues for unlawful discrimination, an employee must establish a prima facie case by showing that:

1. The employee engaged in protected activity;

2. The employer knew of the protected activity;

3. The employee was subjected to adverse action by the employer; and

4. The employee has sufficient evidence to raise at least an inference that the protected activity was the likely reason for the employer's adverse action.[14]

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[14] Sometimes courts phrase it differently or break the prima facie case into five rather than four elements, but the basic rule is the same. *Compare, e.g.*, *Anderson*, 422 F.3d at 1178 ("In order to establish a prima facie claim of discrimination under the employee protection provisions of the CERCLA, SWDA and FWPCA, [a plaintiff] must show: (1) she is an employee or authorized representative of employees, (2) she engaged in protected activity; (3) [the defendant] knew of the protected conduct; (4) the alleged discrimination occurred; and (5) a nexus exists making it likely that the protected activity led to the alleged discrimination." (citing *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995))), *with, e.g.*, *Passaic*, 992 F.2d at 480-81 ("[The plaintiff's] evidentiary burden to demonstrate a prima facie case of retaliatory discharge under § 507(a) consists in his showing that (1) the plaintiff was an employee of the party charged with discrimination; (2) the plaintiff was engaged in a protected activity under the Clean Water Act; (3) the employer took an adverse action against the plaintiff; and (4) the evidence created a reasonable inference that the adverse action was taken because of the plaintiff's participation in the statutorily protected activity." (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (ERA); *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989) (ERA and National Labor Relations Act); *De Ford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) (ERA)).

What is the employer's burden of production?

If an employee successfully establishes a prima facie case that the protected activity was the likely reason for the employer's adverse action, an employer may rebut the employee's prima facie case by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory, and nonpretextual reason for its action.

Where evidence of a "dual motive" exists, *i.e.*, where reasons other than retaliation may also account for the employee's termination, the employer has the burden to prove that it would have terminated the employee even if the employee had not engaged in the protected conduct.[15]

What can a prevailing plaintiff recover?

A prevailing employee will be made whole, *i.e.*, will be returned to the same position in which he or she would have been absent the retaliation. Depending on the federal environmental law at issue, a prevailing employee may be entitled to reinstatement, back pay with interest for lost wages, front pay, compensatory damages (for emotional distress and loss of professional reputation), restoration of

[15] *See, e.g.*, *Passaic*, 992 F.2d at 480-81 (CWA); *Consol. Edison Co. v. Donovan*, 673 F.2d 61, 62-63 (2d Cir. 1982) (ERA)). The *Passaic* court, applying the CWA and general principles from nonenvironmental cases, applied a preponderance of the evidence standard, 992 F.2d at 481, while the ERA provides that an employer must prove its defense by clear and convincing evidence, 42 U.S.C. § 5851(b)(3)(B) & (D).

seniority, sick leave, and other "privileges of employment," and litigation costs, which may include attorneys' fees, expert witness fees, and costs. In addition, some of the environmental whistleblower retaliation statutes authorize exemplary or punitive damages "where appropriate" (under the TSCA and the SDWA), and other "affirmative relief" (such as requiring a letter of apology and formal posting of the decision).

Where should I file a complaint?

The federal environmental whistleblower laws are administered by the U.S. Department of Labor (DOL). Complaints must be filed in writing within 30 days of the date on which the discriminatory action was made and communicated to the employee (except for ERA complaints, which have a longer filing period), and should be mailed to:

U.S. Department of Labor
Office of the Assistant Secretary
Occupational Safety and Health Administration – Room S2315
200 Constitution Avenue
Washington, DC 20210
202-693-2000

The Secretary of Labor promulgated regulations imposing additional requirements and procedures for handling whistleblower complaints by employees under all seven of the federal environmental statutes named above. *See* 29 C.F.R. §§ 24.100-24.115.

How soon must I file a complaint?

A complaint under six of the environmental statutes just discussed must be filed with the DOL in writing within 30 days of the time an employee learns that he or she will be, or has been, subjected to discrimination, harassment or retaliation. For whistleblower actions under the ERA, complaints must be filed within 180 days.

As noted at the outset, many states have also enacted laws to protect whistleblowers. Many of these laws have a longer statute of limitations and other benefits unavailable under federal law.

II. FALSE CLAIMS ACT – PROTECTION FOR QUI TAM WHISTLEBLOWERS

What conduct is covered by the False Claims Act?

In addition to the environmental statutes just discussed, the False Claims Act (FCA),[16] also offers protection to environmental whistleblowers. The FCA is an important litigation tool to combat fraud committed against the federal government; its broad reach includes liability for misrepresenting compliance with the obligations of a government contract and "reverse" false claims to avoid the

[16] 31 U.S.C. §§ 3729-30.

payment of fines or other financial obligations to the government.[17] A "claim" is defined by the Act as "any request or demand, whether under a contract or otherwise, for money or property . . . if the United States Government provides any portion of the money or property."[18] The FCA imposes civil penalties and treble damages on any person who violates the Act, among other remedies.

Who may bring a False Claims Act suit?

The citizen suit (*qui tam*) provisions of the FCA empower private individuals to bring an action on behalf of the federal government against those who violate the Act.[19] If the plaintiff ("relator") succeeds, he or she is entitled to a portion of the proceeds of the suit.[20] The purpose of this provision is to encourage

[17] *Id.* § 3729(a)(2) & (a)(7). "In a reverse false claim suit, the defendants' action does not result in improper payment by the government to the defendant, but instead results in no payment to the government when a payment is obligated." *United States ex rel Bain v. Ga. Gulf Coast Corp.*, 386 F.3d 648, 653 (5th Cir. 2004).

[18] 31 U.S.C. § 3279(c). "[A] claim can be false or fraudulent for the purposes of FCA liability in three different ways. First, a claim is false or fraudulent if it is for goods or services that have not been rendered. Courts term these 'factually false' claims. Second, a claim is false or fraudulent if the contractor expressly certifies compliance with a contract term, statute, or regulation despite a breach or violation. These are legally false' claims based on an express certification. Third, some courts have held that a claim for payment itself implicitly represents material compliance with contract terms, statutes, or regulations. Where that implied representation is false, the claim is again termed 'legally false,' but now by virtue of an implied certification." Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 Pub. Cont. L.J. 1, 7 (2011) (footnotes omitted); *see also, e.g.*, *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 385 (1st Cir. 2011) (discussing distinctions).

[19] *Id.* § 3730(b)(1).

[20] *See id.* § 3730(d).

private individuals who are aware of fraud being perpetrated against the government to disclose that information.

What must an environmental whistleblower prove to prevail on an FCA claim?

To state a claim under the FCA, a plaintiff must allege: (1) a false statement or fraudulent course of conduct; (2) made or carried out knowingly;[21] (3) that was material;[22] and (4) that is presented to the federal government.[23] In addition, only the Attorney General or an "original source" of the information" may bring suit under the FCA.[24] "Original source" means an individual who either, before the information is publicly disclosed, voluntarily disclosed the information to the

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[21] The terms "knowing' and "knowingly" mean that a person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b)(1)(A)(i)-(iii)). Proof of "specific intent to defraud" is not required. *Id.* § 3729(b)(1)(B)).

[22] "[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property[.]" *Id.* § 3729(b)(4).

[23] *E.g.*, *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010).

[24] 31 U.S.C. § 3730(e)(4); *see Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007), *possible abrogation on other grounds by amendment to* 31 U.S.C. § 3730(e)(4) *raised by Ping Chen ex rel. U.S. v. EMSL Analytical, Inc.*, 966 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

government, or has independent knowledge that "materially adds" to the allegations.[25]

The FCA offers remedies to environmental whistleblowers in cases in which a company's operations involve contracts with or other benefits from the federal government.[26] For example, if a company is operating under an oil or gas lease

[25] 31 U.S.C. § 3730(e)(4)(B).

[26] *See, e.g.*, *Simoneaux v. E.I. du Pont de Nemours & Co.*, No. Civ. 12-219-SDD-SCR, 2014 WL 4352185, at *1 (M.D. La. Sept. 2, 2014) (allowing FCA case to proceed to trial against chemical company for its alleged failure to comply with its obligations under the TSCA to report the release of sulfur trioxide gas to the EPA, which imposes a mandatory penalty for each violation); *Abbott v. BP Exploration & Prod. Inc.*, 781 F. Supp. 2d 453, 461-62 (S.D. Tex. 2011) (denying motion to dismiss complaint alleging that BP violated the FCA by knowingly submitting documents to the federal government in connection with oil and gas contracts that falsely certified that BP was adhering to various safety and environmental regulations imposed by, among other authorities, OCSLA—"certifications without which BP was not entitled to produce oil and gas"); *see also, e.g.*, *Rockwell Intern. Corp. v. United States*, 549 U.S. 457 (2007) (FCA suit against government contractor operating nuclear weapons plant alleging, among other things, that contractor committed environmental violations by storing leaky blocks of "pondcrete," a form of processed toxic waste; vacating judgment for plaintiffs because relator was not "original source" of information); *United States ex rel. Marcy v. Rowan Cos., Inc.*, 520 F.3d 384 (5th Cir. 2008) (FCA case brought by offshore drilling worker alleging that he was ordered to illegally dump hazardous substances into Gulf of Mexico at night; affirming dismissal due to lack of specificity in plaintiff's pleading but leaving open availability of environmental whistleblower FCA suits), *abrogated as to materiality holding by United States ex rel. Longhi v. Lithium Power Tech.*, 575 F.3d 458, 470 (5th Cir. 2009), *as stated in Abbott*, 781 F. Supp. 2d at 464-65; *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003) (rejecting on, inter alia, specificity of pleading grounds, FCA claim premised on allegation that government contractors engaged in pattern of knowingly submitting false claims for payment under their contracts with EPA to perform hazardous waste treatment and disposal services at site of chemical plant); *United States ex rel. Comeaux v. W & T Offshore, Inc.*, No. Civ. 10-494, 2013 WL 4012644, at *1 (E.D. La. Aug. 6, 2013) (FCA suit brought by plaintiff against owner and operator of offshore oil production platform following oil discharges into the Gulf of Mexico alleging that defendant failed to record the discharges in its internal reports as required, and submitted false water samples and lab reports to the EPA, to enable defendant to continue its drilling operations pursuant to federal oil and gas leases and to avoid paying remediation costs,

and discharges oil or other hazardous substances into the environment and fails to report it as required, or makes a material misrepresentation in a federal oil or gas drilling permit application, that company may be liable under the FCA.[27]

How does the FCA protect whistleblowers?

The FCA contains an anti-retaliation provision, which protects employees from being "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 the employee investigated, reported or sought to stop an employer from engaging in practices that defraud the federal government.[28]

What must a plaintiff prove in an FCA retaliation suit?

To prove that an employer retaliated against an employee in violation of the FCA, an employee must demonstrate that: (1) he or she engaged in protected activity, *i.e.*, opposed the employer's attempt to get a false or fraudulent claim paid or approved by the federal government or conducted an investigation that

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civil fines, penalties, and royalties; court dismissed action with leave to amend complaint with more specificity as to whether certification of reports was a precondition to leases).

[27] *See Abbott*, 781 F. Supp. 2d at 462 (stating that a "false claim" under the FCA "comfortably encompasses misrepresentations in some permits that a lessee submits in seeking the right to drill for or develop oil on a federal OCS lease"); Jennifer Machlin & Tomme Young, Managing Environmental Risk: Real Estate and Business Transactions § 20:29 (2014) (failure to report a discharge or emission).

[28] 31 U.S.C. § 3730(h)(1).

reasonably could lead to a viable FCA action; (2) the employer had knowledge of the protected activity; (3) the employee suffered an adverse action that was motivated, at least in part, by the employee's engaging in protected activity. The FCA protects "[a]ny employee, contractor, or agent[,]" not just employees, but only "employers" may be held liable for retaliation.[29]

What remedies are available in retaliation suits?

Remedies for retaliation against whistleblowing employees include reinstatement and restoration of seniority status, double back pay with interest, compensatory damages, and costs and attorneys' fees.[30] A civil action seeking damages for retaliation under the FCA must be brought within three years after the retaliation occurred.[31]

[29] *Id.* § 3730(h); *see, e.g.*, *United States ex rel. Golden v. Ark. Game & Fish Comm'n*, 333 F.3d 867, 870-71 (8th Cir. 2003) (only employers may be held liable); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 322 F.3d 738, 740 (D.C. Cir. 2003) (same); *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001) (same); *United States v. Kiewit Pac. Co.*, No. 12-CV-02698-JST, 2014 WL 1997151, at *12 (N.D. Cal. May 14, 2014) ("The 2009 amendment to the retaliation provision was meant only to broaden the category of 'employee' eligible for whistleblower protection to any 'employee, contractor, or agent,' not to broaden the class of persons subject to liability under the provision.").

[30] *Id.* § 3730(h)(2).

[31] *Id.* § 3730(h)(3).

What limitations does the FCA impose?

The FCA does not apply to some matters, such as claims made under the Internal Revenue Code, certain claims brought by members of the armed forces, certain suits brought against federal officials if the government already possessed the information at issue, and information sourced from civil proceedings in which the government was already a party.[32]

Most courts hold that federal employees may serve as FCA relators.[33] Other laws protect the rights of federal-employee whistleblowers as well.[34] However, FCA *qui tam* and retaliation claims may not be brought by federal employees against the United States government nor by state employees against the State or state entities due, among other considerations, to sovereign immunity.[35] By

[32] *Id.* §§ 3729(d), 3730(e).

[33] *See, e.g.*, *Little v. Shell Exploration & Prod. Co.*, 690 F.3d 282, 286-92 (5th Cir. 2012) (collecting cases); *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1208 (10th Cir. 2003) (en banc); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). However, other considerations, such as conflict-of-interest rules, may impede federal employees' ability to pursue and retain FCA awards. *See Little*, 690 F.3d at 289-90 & n.7.

[34] *See, e.g.*, 5 U.S.C. § 2302.

[35] *See, e.g.*, *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 142-43 (4th Cir. 2014) (holding that Arkansas Student Loan Authority was an arm of the State, and thus relator's FCA claim was barred by state's sovereign immunity); *United States v. Tex. Tech Univ.*, 171 F.3d 279 (5th Cir. 1999) (holding Medical resident's FCA *qui tam* and retaliation action against state university school of medicine, in which United States government had not intervened, was barred by state sovereign immunity); *Abou-Hussein v. Mabus*, 953 F. Supp. 2d 251, 263-64 (D.D.C. 2013) ("[A] claim under § 3730(h) against the Secretary in his

contrast, with respect to state officials, the better view is that they are not entitled to good faith ("qualified") immunity from retaliation suits brought against them in their individual capacities under the FCA.[36]

Where Can I Learn More?

Overall, protections in federal law for environmental whistleblowers are robust. If an employee is concerned about potential or actual threats to the environment, he or she has a variety of options to consider, each with its own set of protections, and can contact our firm for more information.

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official capacity is barred by sovereign immunity. . . . And given the existence of a remedy for the alleged conduct in the Civil Service Reform Act, a suit against the Secretary in his individual capacity pursuant to *Bivens* is not warranted." (citing, *inter alia*, *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461 (D.C. Cir. 1999) (holding Congress has not waived sovereign immunity of federal government and government corporations in the FCA)), *appeal dismissed*, No. 13-5251 (D.C. Cir. Feb. 21, 2014); *Daly v. Dep't of Energy*, 741 F. Supp. 202 (D. Colo. 1990) (holding same).

[36] *See Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998) (holding that defendant school district officials were not entitled to qualified immunity from relator's claims for retaliation under the FCA because granting government officials protection of qualified immunity would be inconsistent with goals of FCA and reasonable official would know that retaliation for blowing the whistle would be illegal); *United States ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654, 679-85 (S.D. Tex. 2013) (holding FCA defendants not entitled to qualified immunity), *aff'd on other grounds sub nom. United States ex rel. Parikh v. Brown*, No. 13-41088, 2014 WL 4854217 (5th Cir. Oct. 1, 2014) (unpublished); *but see, e.g.*, *Kaminski v. Teledyne Indus., Inc.*, 121 F.3d 708, at *5-6 (6th Cir. 1997) (unpublished table disposition) (suggesting in passing that government officials could raise qualified immunity defenses), *and United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276, 1280-81 (D.N.M. 2005) (holding qualified immunity is available under FCA), *aff'd on other grounds*, 548 F.3d 931 (10th Cir. 2008).

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