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July 12 **2013**

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7th Circuit Determines *Qui Tam* False Claims Act Case Against ITT Should Go Forward

This past week the Seventh Circuit handed down the lengthy – fifty-one pages – decision *Leveski v. ITT Educational Services, Inc.*, in which the court reversed the dismissal and imposition of sanctions against attorneys who brought a case against ITT Educational Services, Inc. for alleged violations of the federal False Claims Act. In concluding that neither were sanctions nor dismissal merited in the case, the court overturned the imposition of $394,998.33 in sanctions against plaintiff's counsel. Specifically, the court found that the relator's allegations were "sufficiently distinct from prior public disclosures" to permit jurisdiction over the matter.

In order for much, if any, of that opening paragraph to make sense, you must first understand the nature of a *qui tam* action under the False Claims Act. The False Claim Act explicitly prohibits the filing of fraudulent or false statements for the payment of money from the federal government. Even though the direct harm is to the federal government and not an individual, the Act permits for private citizens to bring actions against violators under certain circumstances. Specifically, the Act allows a private person to file a *qui tam* action to enforce the rights of the government. Though the action can be brought by a private citizen, it is not just any

private citizen who can stand in the place of the government in a *qui tam* action. The person, generally referred to as a relator, must have specific knowledge or information regarding the false claims. Where the information at issue has been previously disclosed publicly, then the relator must be shown to have been an original source of that disclosed information. For this reason, these kinds of actions are often called whistleblower actions.

Thus, the primary issue in the *Leveski* case was whether the information she was relating had been publicly disclosed. Of course, were this a simple determination then the case would not have resulted in a fifty-one-page opinion reversing the prior decision of another judge. To examine the issues more fully, we need to delve into the specific allegations of the case.

The relator's allegations claimed that ITT had violated the Higher Education Act of 1965 (HEA). "The HEA was originally passed in 1965 '[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.'" Title IV of the HEA provides for grants to students enrolled in higher education institutions. "Today, Title IV governs the administration of over $150 billion in annual federal financial assistance awards for higher education."

In 1992, Congress expressed concerns over abusive practices leading greed to dictate the registration of under qualified students for the sole purpose of absorbing the enrollment income money facilitated by federal coffers. This concern led to an amendment to Title IV that was intended to strike at the core of abusive practices. It "prohibit[s] institutions receiving federal financial assistance funding from 'provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.'"

In 2002, regulations were issued that created "safe harbors" for higher education institutions. One portion of the "safe harbors" permits:

> institutions receiving federal financial assistance award money to pay student recruiters and financial aid officers "fixed compensation, . . . as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid."

In 2011, after the *Leveski* case was filed, these regulations were repealed. The

current regulations "flatly prohibit institutions receiving federal award money from adjusting the salaries of student recruiters and financial aid officers 'based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid.'"

The relator, Miss Leveski, worked for ITT as a Recruitment Representative beginning in 1996. At the onset, ITT made it very clear to her that "numbers" of recruits were hugely important. It was made clear that to increase her pay she must increase her numbers. Indeed, ITT even published each recruitment rep's target goals in quarterly memoranda. Though ITT claimed to evaluate recruitment reps on numerous factors, Leveski claimed that all the other factors were a sham and the only thing that mattered were the number of recruits.

In 2002, Leveski transitioned into the position of Financial Aid Administrator – a salaried position. In that position the numbers game went from one of landing recruits to "packaging" students. That is, her job was to maximize the number of students receiving financial aid. She further alleged that the number of students that she managed to successfully package had a direct impact upon her pay. The numbers impacted whether her salary was to increase. Her employment came to an end in 2006 after resolution of a sexual harassment lawsuit she had filed against ITT.

After parting ways with ITT, she was contacted by an attorney who wanted to speak to her about her experiences with ITT. After researching the attorney and speaking with him about filing a potential False Claims Act case against ITT, she decided to retain the attorney and to file a *qui tam* action. As part of the procedure to filing such a claim, she filed her case under seal with the district court and with the Department of Justice. Once a *qui tam* action is filed with the Department of Justice, the DOJ has the choice to intervene and take the claim and prosecute it on its own or it can decline to intervene and let the individual pursue it as a private action. Whether the DOJ chooses to intervene or not can be hugely important to the individual. If the DOJ does not intervene then the relator is entitled to retain between 25% and 30% of the proceeds of the action. If the DOJ does intervene then the scale is dropped to a range of 15% to 25%. With the tremendous amounts of money that can be on the line the difference of even one percent can be millions of dollars.

ITT sought to have her case dismissed for lack of subject matter jurisdiction under the pre-2010 version of 31 U.S.C. § 3730(e)(4). That section provided:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a

> criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

This language has since been modified. To that end, ITT contended that Leveski's allegations had been publicly disclosed and that she was not the original source of the information. The trial court agreed with ITT. As part of its apparent victory, ITT sought sanctions against the attorneys who brought the case. The trial court, receptive in light of what it deemed to be abuses by one of the attorneys, granted the sanctions in an amount just less than $395,000. The case then went up on appeal.

In determining the merits of Leveski's claim, the key to overturning the trial court's dismissal and thereby the resulting sanctions was whether the information was "based upon [a] public disclosure," which the court had previously interpreted to mean "substantially similar to publicly disclosed allegations." If the information is not based upon "substantially similar" public disclosures, then jurisdiction exists and the case can be reinstated.

The crux of the matter was the substantial similarity between what Leveski was alleging and a previous case – *Graves*. In *Graves*, two former ITT employees had filed a claim under the False Claims Act for paying incentive payments to recruitment reps in violation of the HEA. On the surface, these two cases seem virtually identical. However, as the court wisely noted: "Certainly, the allegations in *Graves* seem very similar to Leveski's allegations on first impression. But first impressions can be deceiving." The court found that there were four important differences between the cases: (1) the relators in *Graves* had shorter tenures than Leveski; (2) the longer tenure permitted her to make claims that covered a wider timespan; (3) Leveski was able to provide information about ITT's practices with regards to Financial Aid Administrators; and (4) Leveski's claims about incentives for recruitment reps was actually substantially different than the blatant violations alleged in *Graves* – the likely product of being located at different campuses.

After examining two prior decisions for guidance, the court concluded that

the problem with the trial court's analysis stemmed from "viewing the allegations at too high a level of generality." The court also noted that it was of no import that the focus of her allegations shifted on appeal from the emphasis provided at the trial court level so as to appear more readily distinguishable from *Graves*. The court also noted that even though it need not determine whether she was an original source because the facts were not substantially similar, her claims still would have survived under the original source exception.

The court also saw fit to flatly reject the absurd position of ITT that "Leveski's knowledge of the . . . compensation schemes was neither direct nor independent since Leveski admitted at her deposition that she had not considered filing an FCA suit until [an] attorney [ ]contacted her." Recognizing the obvious and only just response, the court stated, "[J]ust because Leveski had never considered filing suit until an attorney contacted her does not necessarily mean that she lacked sufficient knowledge to bring suit. It could simply mean that Leveski did not know her rights under the law. And that appears to be the case here[.]" To further emphasize this point, the court pronounced: "[J]ust because a party first learns that she may have a valuable legal claim from an attorney seeking her business does not mean that the party's case is bogus."

Lastly the court rejected ITT's argument that Leveski was without sufficient independent knowledge because she never occupied a position of authority for setting employees 'compensation. The court recognized that no court has ever "required a relator to have previously occupied a position of authority," with many having found realtors "who were even greater outsiders than Leveski to possess direct and independent knowledge of their FCA claims."

Ultimately, the court found that there were sufficient reasons for the case to go forward and thus it was, by that mere reality, not a frivolous suit sufficient to support an award of sanctions. Thus, the court reinstated the claim and overturned the imposition of sanctions.

Join us again next time for further discussion of developments in the law.

Sources

- *Leveski v. ITT Educ. Servs., Inc.*, ---F.3d---, Nos. 12-1369, 12-1967, 12-1979, 12-2008 & 12-2891, 2013 WL 3379343 (7th Cir. July 8, 2013).

- False Claims Act codified at 31 USC § 3729 *et seq*.

- Higher Education Act (HEA) codified at 20 U.S.C. § 1001 *et seq*.

- *U.S. ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004).

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