

New Whistleblowing Laws and Developments Expand Protections For Louisiana Whistleblowers

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Over 80% of fraud and waste in government is discovered by private employees—not by the government regulators, government auditors and regulatory agencies that are suppose to serve as our protectors from fraud and corrupt practices according to a recent report the of the U.S. Department of Justice. Whistleblowers are true modern day heroes. They are a critical link in the fight against fraud and waste in government and corporations. A recently reported whistleblower case illustrates this vividly.

On July 26, 2011, the National Whistleblowers Center and Bunnatine “Bunny” Greenhouse announced that the United States District Court in Washington D.C. gave its final approval of a settlement between Ms. Greenhouse and the U.S. Army Corps of Engineers. After a six year legal battle, the Army Corps agreed to pay Ms. Greenhouse \$970,000 representing full restitution for lost wages, compensatory damages and attorneys fees. Ms. Greenhouse was notified that she was going to be removed from her position as the Army Corps chief contracting and procurement executive after being demoted out of the Senior Executive Service when she strongly objected, during the award of a secret contract granting Halliburton subsidiary, Kellogg Brown & Root (“KBR”), a no-compete, sole source, cost-plus \$7 Billion contract as the invasion of Iraq was about to commence.

Ms. Greenhouse blew the whistle on KBR's self-dealing and the duration of the contract. With the invasion imminent, Ms. Greenhouse blew the whistle on KBR's self-dealing and the duration of the contract. With the invasion imminent, Ms. Greenhouse chose to handwrite directly above her signature, on the original approval document, a notation documenting her most pressing concern over the unprecedented duration of the contract before it was transmitted to the Department of the Army for award. Her objection was ignored and she was eventually disciplined for placing her hand-written note on the document.

When the seriousness of her concerns were made public the Bush Administration balked at removing Greenhouse and ordered that she remain in her position until a meaningful investigation of her allegations was completed by the DoD Inspector General. No meaningful investigation occurred. A whistleblower suit was filed and the matter recently settled after 6 years of litigation. The suit brought light to billions of dollars in extra costs that were planning on being billed to taxpayers. Ms. Greenhouse’s award is miniscule when compared to the billions saved due to her heroic whistleblowing. She paid for it with her career.

The National Whistleblowing Foundation has been successful in educating lawmakers, the public and the courts through amicus briefs in selected cases about the need for expansion of protection of whistleblowing. The results are impressive.

I recently had the privilege of having the National Whistleblowing Foundation file an amicus brief in one of my whistleblowing cases recently argued in the U.S. 5th Circuit Court of Appeals involving a federal credit union whistleblower. I expect new

expansion of protection for federal credit union whistleblowers will result.

The exciting thing about this area of the law is it is evolving every day. Every whistleblower case you handle will make new law. I had another federal credit union whistleblower case that held the state whistleblower act applied for state acts of fraud that was upheld in the La. 1st Circuit Court of Appeal.

In another recent whistleblower case I was counsel in, the court decided the novel issue of what pleading requirements apply to a 31 U.S.C. § 3730(h) claim involving a teacher at a for profit university in Louisiana who refused to raise failing grades of students so the institution could receive more federal and state funds that pay for tuition by taxpayers. (*Thomas v. ITT Educational Services, Inc.*, USDC EDLA, CA No. 2:11-cv-00544-MLCF-DEK 8/11/11). After Ms. Thomas was terminated, another faculty member raised all the low and failing grades she refused to raise above 2.5 GPA. Interestingly, Thomas's immediate supervisor who also refused to raise all the grades after reviewing them was also terminated on pretext grounds. One novel issue was the issue of what pleading requirements were to be applied in a FCA *qui tam* retaliation claim (not a *qui tam* claim), Federal Rule 9(b) or the more liberal 8(a). The federal district trial court had initially dismissed the suit without prejudice before any discovery was had citing *Twombly*, 550 U.S. at 577 where ITT argued the pleadings were defective under F.R. 9(b) although the claim was not a *qui tam* fraud claim but a *qui tam* retaliation claim to which F.R. 9(b) did not apply. The court noted all federal courts of appeal have determined that 31 U.S.C. 3730(h) claims only have to meet the lesser F.R. 8(a) standard. *Mendondo v. Ceninela Hosp. Med. Ctr*, 521 F. 3d 1097, 1103 (9th Cir. 2008) (stating the False Claims Act pleading requirements do not apply to FCA retaliation claims). (Thomas did not file an FCA claim since another employee/reporter has a prior suit filed in Iowa federal court and could not be a originator of the FCA claim, so Thomas filed a 31 U.S.C. 3730(h) retaliation claim and under La. state law R.S. 23:967.)The trial court held Thomas had a valid La. R.S. 23:967 (A)(2) claim for reporting state and federal violations to a regulatory agency and thus had plead sufficiently citing *Iqbal*, 129 S.Ct. at 1949.

If there is grade and attendance falsification by such commercial for profit schools, the taxpayers foot the bill for any wrongdoing by the educational institution. Those students will not get jobs to pay the loans back. Such for profit universities that charge substantial tuitions have a higher student failure rate than not for profit accredited universities. This results in a high federal and state student loan default rate that is paid for by loan guarantees (i.e. taxpayers). There is talk by the Obama administration of new legislation proposed requiring a certain pass rate for students of such institutions to be paid by the government student loan programs due to massive student loan default losses paid by the government.

Recent Louisiana Whistleblower Acts

There are two other relatively new Louisiana whistleblower statues. One was passed in 2006 that deal with civil actions being authorized under La. R.S. 39:2155 et al. entitled the "Hurricane Relief Programs Integrity Act". The state law *qui tam* style act at La. R.S. 39:2154 prohibits false or fraudulent claims for use of property or other compensation for hurricane relief programs. Interestingly La. R.S. 39:2163 provides for treble damages and attorney fees. Acts 2006, No. 479, §1, eff. June 22, 2006. There are no reported cases using this act as of date.

A 2010 act, La. R.S. 39:2165 et al is entitled the “Oil Spill Relief Programs Integrity Act” in response to the BP disaster. It provides protection for any employee because of any lawful act engaged in by the employee or on behalf of the employee engaged in furtherance of any action taken pursuant to this Chapter in regard to a person who reports fraud and files a *qui tam* from whom recovery is or could be sought under state or federal law. There are no reported cases using this act as of date. It provides for *qui tam* rewards and for treble damages and attorney fees and allows a private cause of action to be filed. There is also an Oil Spill Relief Programs Integrity Act La. R.S. 39:2165.11 that allows up to \$2000 per individual per action as rewards for such reports.

Whistleblowing cases are a challenge. They are becoming easier to win due to changes in the law and jurisprudence on both state and federal levels.