

Qui Tam Whistleblower's Claims Barred by Her Own Prior Court Disclosures of Information

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In its September 21, 2004, opinion in *U.S. ex rel Reagan v. East Texas Medical Center Regional Healthcare System*, the Fifth Circuit upheld the Southern District of Texas' ruling that a qui tam relator's claim under the federal False Claims Act was barred by the public disclosure of information.¹ The decision is important because it demonstrates the extent to which a successful qui tam relator must unearth new information about a false or fraudulent claim.

The case involves a hospital (University Park Hospital) owned by the East Texas Medical Center, a subsidiary of the East Texas Hospital Foundation. The hospital was built in the early 1980s as the cooperative project of Mother Frances Hospital and East Texas Regional Health Care Facilities. In January 1983, the Texas Health Facilities Commission issued a Certificate of Need (CON) authorizing them to construct and operate the hospital. The CON stated that the hospital project costs must not exceed \$5,378,250 and that \$3,753,611 of the project costs must be financed through the issuance of revenue bonds (with the parent foundation promising to contribute \$2 million). Contrary to the CON, the parent foundation never contributed the \$2 million that it had promised. Instead, the project was financed through a bond issue of \$5.6 million. Thereafter, the hospital recognized that the project costs were going to exceed the anticipated amount and the CON was amended to require the completion costs for the hospital project not to exceed \$6,286,993. The hospital was completed in 1995 for a total

¹ *U.S. ex rel Reagan v. East Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004).

of \$6.2 million. The hospital leases its facilities from its parent foundation at an annual cost of \$726,000. The hospital also purchases other ancillary services from related parties, including laundry, maintenance, radiology, and laboratory services.²

In April 1991, the hospital hired Sally Reagan as its executive director. During her tenure at the hospital, Reagan became suspicious of certain “financial irregularities,” including false Medicare reporting.³ The hospital terminated Reagan in May 1992. Reagan believed her termination resulted from her investigation of such irregularities.⁴ Following her termination, Reagan reported her suspicions to the Health Care Financing Administration and to Blue Cross and Blue Shield of Texas. Reagan also sued the hospital, the Medical Center and others in Texas state court, alleging that she was terminated because she refused to go along with the defendants’ alleged illegal Medicare reporting.

While the state court lawsuit was still pending, Reagan filed the action in the instant case on behalf of the United States government under the qui tam provisions of the federal False Claims Act.⁵ The government chose not to intervene. Reagan’s qui tam complaint alleged three categories of false statements to the government.⁶ First, Reagan claimed that the hospital misrepresented its compliance with the CON requirements in reports filed with Blue Cross. Second, Reagan alleged that the hospital falsely certified that it was in compliance with applicable Medicare regulations. Specifically, Reagan argued that the hospital did not pay “reasonable” rates for goods and services purchased from its parent, and failed to keep proper records of its actual expenditures. Third,

² *Id.* at 171.

³ *Id.* at 171-72.

⁴ *Id.* at 172.

⁵ 31 U.S.C. § 3729, *et seq.*

⁶ *Reagan*, 384 F.3d at 172.

Reagan alleged that the hospital misstated its status as a “related party” to its parent foundation and, as a result, received reimbursements to which it was not entitled.⁷

The Southern District of Texas granted summary judgment in favor of the defendants, holding that Reagan’s qui tam suit was barred by the Act’s “public disclosure bar” and, alternatively, that Reagan’s claims under the False Claims Act failed on the merits.⁸ The Fifth Circuit affirmed the Southern District of Texas’ holding that the suit was barred because of publicly disclosed information.⁹ The “public disclosure bar” provides that:

No court shall have jurisdiction over an action ... 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 investigations, or from the news media, unless . . . the person bringing the action is an original source of the information.¹⁰

The purpose of the bar is to accommodate the primary goals of the False Claims Act, which include promoting private citizen involvement in exposing fraud against the government and preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud.¹¹

In determining that Reagan’s suit was barred, the Fifth Circuit examined whether: (1) there had been a public disclosure of allegations or transactions; (2) the qui tam action was based upon such publicly disclosed allegations; and, if so (3) the relator was the original source of the information.¹² The Fifth Circuit found that that Reagan’s information had been disclosed through her previously filed state court lawsuit (alleging

⁷ *Id.* at 173.

⁸ *U.S. ex rel. Reagan v. East Texas Med. Ctr. Reg’l Healthcare Sys.*, 274 F. Supp.2d 824 (S.D. Tex., 2003).

⁹ *Reagan*, 384 F.3d at 180.

¹⁰ 31 U.S.C. § 3730(e)(4)(A).

¹¹ *Reagan*, 384 F.3d at 173-74.

¹² *Id.* at 173-74.

she was terminated for refusing to go along with defendant's alleged illegal Medicare reporting), through audits and investigations conducted by Blue Cross and the Health Care Financing Administration, and through documents Reagan obtained through Freedom of Information Act requests. In determining that there had been a public disclosure of allegations, the Fifth Circuit reasoned that, "it is clear that the allegations disclosed there were publicly disclosed. Any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing . . ." ¹³ In determining that Reagan's qui tam action was "based upon" the publicly disclosed allegations, the Fifth Circuit relied on the fact that: (1) Reagan's state court lawsuit contained essentially the same allegations as the instant case; (2) Blue Cross and the Health Care Financing Administration had investigated and reported on essentially the same allegations made by Reagan (including noncompliance with the CON and the rules regarding reimbursements for related parties) before Reagan filed the instant lawsuit; and (3) Reagan attested that the information she obtained pursuant to Freedom of Information Act requests substantiated the allegations she made both in state court and her current claims under the False Claims Act. ¹⁴ Finally, the Fifth Circuit found that Reagan was not the "original source" of the information, reasoning that her information was neither independent nor direct because it was based on her research and analysis of public information. The Fifth Circuit thus concluded:

For the reasons discussed above, Reagan's investigation did not unearth important information about a false or fraudulent claim. Instead, Reagan took disclosures that had already been investigated and reported by BCBS and HCFA and, based on her own experience, claimed that they were fraudulent; this disagreement with the legal conclusions of BCBS and HCFA does not qualify as "information" under the original source

¹³ *Id.* at 174 (internal citations and references omitted).

¹⁴ *Id.* at 176.

exception. Thus, because we conclude that Reagan was not the original source of the information underlying her claims, we hold that the claims are jurisdictionally barred by 31 U.S.C. § 3730(e)(4).¹⁵

¹⁵ *Id.* at 179-80.