

The Game Has Changed for Management: The Virginia Fraud Against Taxpayers Act and Its Applicability to State Entities

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In the wake of the tumultuous conclusion of former Governor Bob McDonnell's tenure, Virginia has a newfound focus on fraud and corruption among its state employees. However, efforts to root out fraud in state institutions go back further than the McDonnell controversies. One such example is the 2011 amendment to the Virginia Fraud Against Taxpayers Act (VFATA) that created a cause of action for whistleblower retaliation for state employees.

While in most cases, a state False Claims Act will allow an individual to bring suits against private individuals and organizations either for fraud against the state or retaliation for reporting it, it is not always clear how or whether a state False Claims Act applies to the state itself. It creates a sort of legal conundrum for an individual to sue an arm of the state on behalf of the state, but it is not an impossible theory, particularly as to retaliation. In the case of the Virginia Fraud Against Taxpayers Act (VFATA), however, the situation is clear. The state clearly waived its immunity to suit in VFATA retaliation cases. Va. Code Ann. § 8.01-216.8 (West) states:

This paragraph shall constitute a waiver of sovereign immunity and creates a cause of action by an employee against the Commonwealth if the Commonwealth is the employer responsible for the adverse employment action that would entitle the employee to the relief set forth in this paragraph.

It initially sounds odd to think that a state employee could sue for retaliation based on a disclosure that could not have been a legally viable action. However, consider the situation of a state university employee who discovers that the university is wasting taxpayer dollars by taking funds intended for research or teaching and spending them in other ways. When the employee raises the issue with his supervisor, he begins to suffer retaliatory actions. This results in a poor performance evaluation, a performance improvement plan, and ultimately a termination. The question is whether

a state False Claims Act would protect this individual and provide a legal remedy. Virginia's Fraud Against Taxpayers Act would protect this individual. Even though the individual could not have brought a fraud claim against the university, he is protected from retaliation.

Beyond intra-state government matters, state government employees may also be in a good position to know when contractors are engaging in fraud against the state. Contractors and their contracting officers within the state government often work very closely, and these close ties create opportunities for fraud. A subordinate government employee who notices that his supervisor is a beneficiary of or otherwise complicit in a contractor's fraud is, under the VFATA, protected from retaliation for exposing it, thanks to an amendment.

The Case for Change

The 2011 amendment legislatively overruled the existing case of *Ligon v. County of Goochland*.¹ In this case, Ligon, an employee of the County of Goochland, discovered that his supervisor, Cecil Youngblood, was using county property for personal gain, was liberally allowing employees to take care of personal errands during work hours, and was having his employees take care of his personal projects during working hours. Ligon reported the activity to the office of the sheriff, and later conducted an interview pursuant to the sheriff's investigation. As often happens following such investigations, the employer, the County of Goochland, began documenting Ligon's "bad attitude" in performance evaluations. The day after the sheriff's office interviewed Ligon, the county terminated him for "disruptive behavior and insubordination."²

The case was never heard on the merits, because the county filed a demurrer alleging that the suit was barred by the Commonwealth of Virginia's sovereign immunity. Ligon appealed the issue to the Supreme Court of Virginia, which

found in the county's favor, since the VFATA contained no explicit waiver of sovereign immunity.³

Legislative response to *Ligon*

Following the *Ligon* decision in 2010, the Virginia legislature took action. The legislature amended the VFATA in 2011 to include the statutory language waiving sovereign immunity for retaliation claims.⁵ Indeed, the legislative history of the amendment explicitly explains that the bill was passed in response to the *Ligon* decision.

Fraud Against Taxpayers Act; waiver of sovereign immunity. Provides that the Virginia Fraud Against Taxpayers Act creates a cause of action for an employee of the Commonwealth, its agencies, or any political subdivision against such entity if an adverse employment action is taken against the employee by his employer because the employee has opposed any practice by his employer prohibited by the Act or participated in an investigation, action, or hearing under the Act. **This bill is in response to the Virginia Supreme Court's decision in *Ligon v. Gochland*, 279 Va. 312 (2010).**⁵

This amendment opened the entire universe of employees of the state of Virginia as potential plaintiffs in a VFATA retaliation action. Just as importantly, it subjects all arms of the state—from the state capitol in Richmond, to the county sheriff in Roanoke, to a dean's office at William & Mary—to liability for retaliating against those who report what they reasonably believe to be fraudulent use of Virginia taxpayer funds.

The limits of the amendment

After the amendment, Virginia Attorney General Ken Cuccinelli sought to test its limits in the case of *Cuccinelli v. Rector, Visitors of Univ. of Virginia*.⁶ In this case, Cuccinelli sought to bring not a retaliation claim, but rather a substantive Virginia Fraud Against Taxpayers Act claim against the University of Virginia. The Supreme Court of Virginia held that the waiver of sovereign immunity as to retaliation did not apply to the other portions of VFATA.

There is an express waiver of sovereign immunity in FATA in Code § 8.01–216.8, in the context of discrimination protection from retaliation for employees of the Commonwealth who report violations of FATA. The express waiver there only serves to highlight the absence of such a waiver in other parts of the Act. In its 2011 amend-

ment, the General Assembly specifically chose to attach the sovereign immunity waiver only to the retaliatory discharge portion of Code § 8.01–216.8, and not to the other portions of the statute.⁷

In applying the doctrine of sovereign immunity to strike down a VFATA suit, the Court further affirmed its vitality with regard to retaliation claims. The Court also appears to leave open the opportunity for the legislature to further amend the VFATA to actually make state agencies liable to the state for violations.

Conclusion

The state of Virginia employs more than 160,000 people directly.⁸ Those providing management services within the Virginia government, as well as anyone who insures those managers and organizations, must be aware that this cause of action now exists in Virginia as it had not prior to 2011. Journalistic and voter focus on fraud in the Virginia state government will only sharpen following McDonnell's tumultuous tenure as governor and the persistent scandal accusations that dominated the 2013 governor's race. Employees of the state with knowledge of potential fraud can now freely report that fraud while maintaining a defense against the specter of retaliation.

Endnotes:

- 1 279 Va. 312, 318 (2010).
- 2 *Id.* at 315 (2010).
- 3 *Id.* at 318 (2010).
- 4 2011 Virginia Laws Ch. 651 (H.B. 1399).
- 5 Virginia Bill Summary, 2011 H.B. 1399 (emphasis added).
- 6 283 Va. 420, 429 (2012)
- 7 *Id.* at 430-31. (emphasis added).
- 8 2012 Census of Governments: Employment, Virginia, <http://www2.census.gov/govs/apes/12stva.txt>.



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