

Employers Beware: Federal Court Upholds Aggressive Law Enforcement Tactics When Investigating False Claims Act Allegations



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Before the government decides whether to intervene in a *qui tam* action, it is obligated by statute to investigate a whistleblower's allegations. See 31 U.S.C § 3730(a). But, in the course of that investigation, may the government direct the whistleblower to gather evidence by surreptitiously recording conversations with other employees at the defendant company, even though the government knows that the company is represented by counsel? A Minnesota federal court recently answered yes.

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In *United States ex rel. Fesenmaier v. Cameron-Ehlen Group*, No. 13-cv-3003 (D. Minn. Mar. 2, 2020), a whistleblower filed a *qui tam* suit against a distributor of intraocular lenses, alleging that the distributor, and others,¹ violated the False Claims Act by offering kickbacks to doctors in violation of the Anti-Kickback Statute. During discovery, the distributor learned that, at the direction of the government, the whistleblower recorded, or attempted to record, conversations with company employees more than 100 times over the span of four years. At least 13 of those recordings took place after the whistleblower filed the *qui tam* action against the company and after the government knew that the distributor had retained legal counsel in connection with the allegations, but before the government intervened in the *qui tam* action. When counsel for the distributor questioned the legality of the recordings, the government responded that the recordings were authorized by law because they were made before the government intervened in the *qui tam* action.

The distributor and its founder filed a motion to dismiss, arguing that the government's conduct violated Minnesota Rule of Professional Conduct (MRPC) 4.2, which provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The court denied the motion to dismiss, finding that the government did not violate MRPC 4.2 because the whistleblower's communications with company employees were "authorized . . . by law." The court looked first to the commentary accompanying MRPC 4.2, which states that "[c]ommunications authorized by law may include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." MRPC 4.2, cmt. 5. The court then surveyed case law and found that the government's conduct was "authorized by law" as legitimate investigative activities undertaken prior to the commencement of criminal or civil proceedings. Critical to the court's holding was its conclusion that civil proceedings had not "commenced" for purposes of MRPC 4.2 when the whistleblower filed the *qui tam* action, but rather "commenced" when the government officially intervened in the case, after the recordings were made.

The court further found that the "authorized by law" exception in MRPC 4.2 only applies to governmental entities. Thus, unlike a government attorney, a whistleblower's attorney would not be permitted to direct his or her client to covertly record conversations with a

represented party about the subject matter of the representation. Applying that rule to the case before it, however, the court did not find a violation. Although the whistleblower's attorney "had some knowledge" that his client was communicating with represented parties, the court found that his "mere knowledge" of the conduct was insufficient to constitute a violation of MRPC 4.2.

The court did not address the legality of the recordings under federal or state law, though; presumably, the recordings would have been found to be legal under both. See 18 U.S.C. § 2511(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."); Minn. Stat. § 626A.02(2)(c) (same).

The court's decision in *Fesenmaier* serves as fair warning to any employer that finds itself under investigation for a potential False Claims Act violation. Employees and employers should be aware that the government may seek to gather evidence against the company by directing a current or former employee to covertly record conversations, even after the company has retained legal counsel in connection with the allegations. While counsel typically cautions employees against discussing allegations with anyone other than company counsel, the *Fesenmaier* decision should serve as a stark example of how such conversations could be used against the company and reinforces the gravity of that routine caution.

Endnote

- 1 Two other defendants, Sightpath Medical Inc. and TLC Vision Corporation, were dismissed from the case in September 2017 pursuant to a settlement agreement.