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ALERT

2d Circ. Finds Former In-House Counsel Can't Be Whistleblower

November 26, 2013

A recent case involving a company's former in-house counsel has implications on the ability of attorneys to blow the whistle on their clients or employers. In *United States v. Quest Diagnostics, Inc.*, No. 11-1565-cv, (2d Cir. Oct. 25, 2013), the Second Circuit found that the former general counsel of Unilab Corp., a unit of Quest Diagnostics, violated New York attorney ethics rules by pursuing a *qui tam* suit that relied in part on Unilab's confidential information. The Second Circuit upheld the district court's order dismissing the case and disqualifying the general counsel, his co-plaintiffs, and their lawyers from bringing a similar *qui tam* suit.

Unilab's former general counsel, Mark Bibi, partnered with Unilab's former Chief Executive Officer, Andrew Baker, and former Chief Financial Officer, Richard Michaelson, to bring a *qui tam* suit under the False Claims Act. The former executives alleged that Unilab, a medical laboratory services company, charged doctor associations deflated rates to increase the number of Medicare and Medicaid patients those doctors would refer to Unilab.

Unilab argued that Bibi's participation in the *qui tam* suit violated attorney state ethics rules and required dismissal. Among other things, Unilab argued that Bibi violated his duty to maintain the confidentiality of Unilab's information. The plaintiffs countered that New York attorney ethics rules provide an exception allowing attorneys to disclose confidential information to the extent the attorney reasonably believes that the disclosure is necessary to prevent his client from committing a crime. Plaintiffs argued that as Unilab was continuing to commit a crime by charging deflated rates, Bibi was permitted to disclose the confidential information in his *qui tam* suit.

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The Second Circuit agreed with the district court and found that Bibi disclosed more confidential information than was reasonably necessary to prevent any alleged wrongdoing. The Second Circuit noted that the plaintiffs acknowledged that it was unnecessary for Bibi to even participate in the suit as Baker and Michaelson had sufficient knowledge to bring the claim. Accordingly, Bibi did not need to disclose any confidential information to bring suit and he violated ethics rules by disclosing such information.

After upholding the district court's ruling that Bibi had violated state ethics rules, the Second Circuit turned to the district court's remedy—dismissal of the case and disqualification of the plaintiffs and counsel. Once again the Second Circuit affirmed the holding of the district court. The Second Circuit found that the plaintiffs should be disqualified because it would be impossible to identify and distinguish each of Bibi's improper disclosures. As such, even if Baker and Michaelson proceeded with the suit without Bibi, the suit would still be tainted. The Second Circuit also upheld the dismissal of plaintiffs' counsel due to the possibility that confidential information was likely improperly revealed to plaintiffs' counsel.

Companies may take a measure of assurance from this case as the decision makes it harder for attorneys to blow the whistle on a client or employer using confidential information. An attorney-whistleblower who fails to maintain his duty of confidentiality, or otherwise fails to abide by ethics rules, could see his claim dismissed and all related parties disqualified. Such a dramatic remedy provides a powerful disincentive to lawyers seeking to blow the whistle on current or former clients.