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How Does the False Claims Act Apply to Service Members?

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9.0--Miscellaneous

United States ex rel. Conover v. Anthony, 781 F. Supp. 2d 257 (D. Md. 2011).

Robert S. Conover, a Captain (O-3) in the Maryland Air National Guard (MDANG) and a dual-status technician, sued 27 fellow members of the MDANG under the qui tam provision of the False Claims Act (FCA).³ Conover claimed that these 27 fellow MDANG members had submitted

¹ I invite the reader's attention to <https://roa.org/lawcenter/>. You will find more than 2,300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 44 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ 31 U.S.C. § 3730(b)(1).

false claims for payment by the United States for training missions that they did not complete.

This case was assigned to Judge Catherine C. Blake, who at the time was an active judge of the United States District Court for the District of Maryland. She took senior status on 4/2/2021, and she died on 3/4/2026.

Q: What is a qui tam lawsuit?

A: The term “qui tam lawsuit” has been defined as follows:

A Qui Tam lawsuit is a legal action filed by a private individual on behalf of the government to expose fraud, allowing the whistleblower to potentially receive a portion of recovered funds.

Definition and Purpose

How a Qui Tam Lawsuit Works

1. **Investigation by Whistleblower:** The whistleblower identifies fraud, often through insider knowledge, and gathers evidence.
2. **Filing Under Seal:** The lawsuit is filed confidentially in federal court, keeping the case hidden from the defendant while the government investigates.

3. **Government Review:** The Department of Justice (DOJ) evaluates the case and decides whether to intervene and take over prosecution.
4. **Case Proceeds:** If the government intervenes, it leads the case. If not, the whistleblower may continue independently.
5. **Potential Recovery:** Successful cases can result in the whistleblower receiving **15% to 30% of recovered funds**, along with attorneys' fees.⁴

As required by the FCA, Conover filed his lawsuit under seal, and then DOJ reviewed the case and decided not to intervene. Conover and his attorney then tried to proceed independently.

The FCA provides: “No court shall have jurisdiction over an action brought under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.”⁵ Based on this subsection, the defendants filed a motion to dismiss Conover’s lawsuit based on lack of jurisdiction, in accordance with Rule 12(b)(1) of the Federal Rules of Civil Procedure. Conover asserted that the intra-military immunity provision (section 3730(e)(1)) did not extend to members of the National Guard when they are not in the active service of the United States.

In her scholarly opinion, Judge Blake rejected Conover’s argument as follows:

⁴ <https://www.phillipsandcohen.com/what-is-a-qui-tam-case/>, See also Law Review 22051 (August 2022).

⁵ 31 U.S.C. § 3730(e)(1).

At least one circuit court has held that guardsmen training under section 502 serve in their federal capacities. See *Matreale v. New Jersey Dept'of Military & Veteran Affairs*, 487 F.3d 150, 156 (3d Cir. 2007). In *Matreale*, a member of the New Jersey Army National Guard attempted to bring a state law discrimination claim against the state agency overseeing his service. The plaintiff argued that the intra-military immunity doctrine announced in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), did not bar his claim because his injuries were sustained in the course of training conducted in his state status under 32 U.S.C. section 502. See *Matreale*, 487 F.3d at 154-55. According to the plaintiff, this made him a state, rather than a federal, employee to whom the *Feres* doctrine did not extend. The Third Circuit rejected this argument, explaining that the plaintiff was a federal employee, or at best a dual federal-state employee, because he was training under orders issued pursuant to federal law, specifically 32 U.S.C. § 502(f). *Id.* at 156-57 Our conclusion that a state guardsman serving under orders issued pursuant to Title 32, whether serving under § 502(a) or § 502(f), has and retains his federal status, along with his state status, even when he has not been called to active duty under Title 10, likewise recognizes federal supremacy over military affairs."⁶

Accordingly, Judge Blake dismissed Conover's lawsuit for want of jurisdiction. Conover did not appeal to the United States Court of Appeals for the 4th Circuit.⁷ This case is over.

⁶ *Conover*, 781 F. Supp. 2d at 263-64.

⁷ The 4th Circuit is the intermediate federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.



The qui tam action is an important tool to utilize to root out fraud in federal agencies and federal programs. This case demonstrates an important limitation on qui tam actions.

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