

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

AUG 27 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, ex rel.  
James Lockyer; STATE OF HAWAII, ex  
rel. James Lockyer; JAMES LOCKYER,  
in his own behalf,

Plaintiffs - Appellants,

v.

HAWAII PACIFIC HEALTH GROUP  
PLAN FOR EMPLOYEES OF HAWAII  
PACIFIC HEALTH; KAUAI MEDICAL  
CLINIC; WILCOX MEMORIAL  
HOSPITAL; WILCOX HEALTH  
SYSTEM; WILLIAM A. EVSLIN, aka  
Lee A. Evslin,

Defendants - Appellees,

No. 07-17174

D.C. No. CV-04-00596-ACK/KSC

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Hawaii  
Alan C. Kay, District Judge, Presiding

Argued and Submitted February 13, 2009

---

\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Honolulu, Hawaii

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

James Lockyer, as relator for the United States and the State of Hawaii and in his individual capacity, appeals the district court's summary judgment on counts one and three of Lockyer's *qui tam* complaint against his former employer and related parties for alleged violations of the federal False Claims Act ("FCA") and related state laws. We affirm.

As to count one, Lockyer has failed to establish a genuine issue of material fact as to whether the defendants had the requisite scienter to support liability under the FCA, 31 U.S.C. § 3729(a)(1)-(3). Lockyer has presented evidence that raises genuine issues of fact as to whether the defendants violated the Medicare "incident to" rules. Nonetheless, "the FCA requires more than just a false statement—it requires that the defendant *knew* the claim was false." *United States ex rel. Oliver v. Parsons*, 195 F.3d 457, 464 (9th Cir. 1999). A defendant's good faith interpretation of a regulation does not give rise to liability, "not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met." *Id.* "For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *United States ex*

*rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995). Because the evidence produced by Lockyer, viewed in the light most favorable to him, suggests only that any noncompliance with the Medicare regulations was due to a good faith interpretation of the regulations or at worst to negligence in the clinic's compliance, the district court properly entered summary judgment for the defendants. *See* 31 U.S.C. § 3729(b) (requiring either "actual knowledge," "deliberate ignorance," or "reckless disregard"); *Oliver*, 195 F.3d at 464; *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1074 (9th Cir. 1998); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478-79 (9th Cir. 1996).

As to count three, Lockyer has failed to raise a genuine issue of material fact as to whether he engaged in protected conduct *and* that the defendants knew of that fact; both are necessary to support liability under the FCA's retaliation provision, 31 U.S.C. § 3730(h). Here, even if Lockyer were acting in the belief that the defendants had committed fraud against the government, there is no evidence that the defendants were aware that he had engaged in protected conduct. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996) ("the employer must have known"). In fact, Lockyer and his attorneys had expressly represented to the defendants that their records request was related only to Lockyer's

compensation; they “never gave any indication [he] was investigating the [defendants] for defrauding the federal government.” *Id.* at 1270.

Although counts one and three of Lockyer’s *qui tam* complaint also allege violations of the Hawaii law, no state law issues were raised in the briefs. Our analysis of the federal claims is therefore sufficient for the disposition of this appeal.

**AFFIRMED.**

**United States Court of Appeals for the Ninth Circuit**  
**Office of the Clerk**  
95 Seventh Street; San Francisco, California 94103

**General Information**  
**Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue seven calendar days after the expiration of the time for filing a petition for rehearing or seven calendar days from the denial of a petition for rehearing, unless the court directs otherwise. To file a motion for stay of mandate, file it electronically via the appellate ECF system or by paper with an original and four copies of the motion.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -4)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - ▶ Consideration by the full court is necessary to secure or maintain uniformity of the court's decisions; or
  - ▶ The proceeding involves a question of exceptional importance; or
  - ▶ The opinion directly conflicts with an existing opinion by another

court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- ▶ A petition for rehearing may be filed within fourteen (14) days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11.

- If a petition is filed electronically via the appellate ECF system, no paper copies are required.
- If filing a petition for panel rehearing by paper, submit an original and 3 copies.
- If filing a petition for rehearing en banc by paper, submit an original and 50 copies.

**Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information.

**Attorney's Fees**

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- All relevant forms are available on our website [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) or by telephoning (415) 355-7806.

**Petition for Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourtus.gov](http://www.supremecourtus.gov)

**Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court."

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Other	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b>				\$ <input type="text"/>



**Other:** Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

\* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

\*\* Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

---

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

Date

Name of Counsel:

Attorney for:

---

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk