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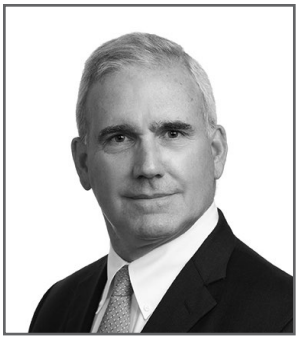
The False Claims Acts and the Public Policy Exception: A Match Not Made in Heaven

By David B. Chaffin and Jonah S. Levinson

Massachusetts law recognizes a public policy exception to the rule that at-will employment can be terminated at any time and for virtually any reason: Where an employer violates public policy in terminating an at-will employee, the employee may have a claim for wrongful discharge (a "public policy claim"). The exception has limits, one of which is that a public policy claim generally will not lie where the policy is covered by a statute that provides a remedy.[1] This article discusses whether this limit bars claims in which it is alleged that the employer fired the employee for complaining about false or fraudulent government claims or other similar conduct. The issue has been addressed, but not definitively, and there are some indications of a split in authority. This article concludes that the False Claims Act ("FCA") and its counterpart the Massachusetts False Claims Act ("MFCA") should — and must — preclude such claims because the claims are unnecessary and inimical to the important policies the FCA and MFCA promote.[2]



David B. Chaffin is a partner in the Boston office of White and Williams LLP.

Jonah S. Levinson is an associate in the Philadelphia office of White and Williams LLP.

Public Policy Claims

Historically, terminated at-will employees could recover only in limited circumstances, and these did not include where the employer had violated public policy in terminating.[3] That changed in 1986, with the Supreme Judicial Court's (SJC) decision in *DeRose v. Putnam Management Co.*[4] In *DeRose*, the plaintiff alleged that he had been wrongfully discharged in violation of public policy — in retaliation for his truthful testimony in a criminal trial.[5] The trial court accepted the view that an employee terminated in violation of public policy could sue for wrongful termination. The plaintiff prevailed on the claim at trial. On appeal, the defendant argued, based on extensive precedent, that an employee at-will can recover for wrongful termination only in "the case of overreaching for financial gain by" the employer, which the plaintiff had not alleged.[6]

The SJC ruled in the plaintiff's favor on the issue, establishing new Massachusetts law. The court began with a brief discussion of *Petermann v. International Brotherhood of Teamsters,* a California case that it described as "seminal . . . on termination in violation of public policy . . . ."[7] It then explained that "*most* courts which have considered the issue have permitted at-will employees to recover for wrongful terminations in violation of public policy," and cited numerous decisions and secondary sources.[8] Then, without elaboration, it said, "[w]e too conclude that, even in cases where the employer does not gain a financial advantage, an at-will employee has a cause of action for wrongful discharge if the discharge is contrary to public policy."[9]

Two years later, in *Mello v. Stop & Shop Cos.*,[10] the SJC considered the definition of the policies that would support a public policy claim, calling the task "not an easy one."[11] The plaintiff in *Mello* had worked for the Bradlees department stores. He reported to superiors that buyers for Bradlees had received rebate checks made payable

1. Another is that the public policy at issue must be one that will support such a claim. As discussed below, not all will.

2. This article does not address whether a public policy claim premised on behavior prohibited by the FCA is preempted under conventional federal preemption analysis, which involves consideration of, among other things, whether Congress intended to occupy a field and whether compliance with both federal and state law would be possible. *See, e.g.,* In re Zofran (Ondansetron) Prods. Liab. Litig., 368 F. Supp. 3d 94 (D. Mass. 2019). At issue here is a different, judge-made brake on public policy claims, and its application to claims in which the alleged public policy is the prohibition on false or fraudulent claims. This said, cases elsewhere indicate that public policy claims are not preempted. *See, e.g.,* Blanchard v. Impact Cmty. Action, 2020 U.S. Dist. Lexis 8369 (S.D. Ohio Jan. 17, 2020).

3. Recourse was (and still is) available where the termination was discriminatory or in retaliation for protected conduct, and where the employer terminated the employee to avoid paying earned compensation. *See* M.G.L. c. 151B; Gram v. Liberty Mutual Ins. Co., 384 Mass. 659 (1981); Fortune v. National Cash Register Co., 373 Mass. 96 (1977).

4. 398 Mass. 205 (1986). While the *DeRose* court formally recognized the public policy cause of action, there were hints in prior cases that the change was coming. *See, e.g., Gram*, at 659 n.6.

5. *DeRose*, at 205-06.

6. *Id*. at 208.

7. *Id.* at 208-09 (citing Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959)).

8. *Id*. at 209.

9. *Id.* at 210.

10. 402 Mass. 555 (1988).

11. *Id.* at 557.

to them personally, and that managers of Bradlees stores had made false claims of damaged and shorted goods to the Bradlees warehouse and to manufacturers and suppliers. He subsequently was fired for violating company policy. He sued, asserting a public policy claim based on the allegation that he was terminated for "whistleblowing" about the payments and "false claims." He prevailed on the claim at trial.[12]

The SJC reversed. It noted that it had held in prior cases that a public policy claim will lie where the discharge was based on a refusal to testify falsely or on efforts to enforce safety laws, but had "not attempted in general terms to identify those principles of public policy that are sufficiently important and clearly defined to warrant recovery by an at-will employee who is discharged for engaging in, or for refusing to engage in, particular conduct."[13] The court reaffirmed that a mere discharge without cause of an at-will employee will not support a claim, nor will a discharge based merely on a false reason. It then proceeded to give with one hand and take away with the other. It wrote that "[a] basis for a common law rule of liability can easily be found when the Legislature has expressed a policy position concerning the rights of employees and an employer discharges an at-will employee in violation of that established policy . . . ."[14] But it concluded this sentence with a phrase that expresses the limitation under discussion here: "unless no common law rule is needed because the Legislature has also prescribed a statutory remedy."[15] The court did not cite anything to support the phrase, nor did it explain it. It appears to have its origins, however, in a 1985 decision by the Appeals Court, *Melley v. Gillette Corp*.,[16] which the SJC affirmed based on the opinion of the Appeals Court. The Appeals Court in *Melley* reasoned that the bar on public policy claims where there is a statutory remedy (a) reflects that the purpose of public policy claims is to provide a remedy where one otherwise would not exist, (b) avoids interference with the legislative intent and statutory scheme, and (c) avoids the possibility of duplicative remedies.[17]

In addressing Mello's claim, the SJC indicated that some of his alleged activities — his complaints about the false claims against the Bradlees warehouse — involved internal affairs and would not support a public policy claim. It then indicated that it did not need to decide whether the other alleged activities — the complaints involving false claims to manufacturers and suppliers — would suffice because the evidence was insufficient to show that those complaints were the sole reason for his termination. The court wrote:

> Because Mello's complaints about false claims were directed collectively against false claims within Bradlees and false claims against manufacturers and suppliers and because he also complained about rebate checks, there is no basis by which a jury would have been warranted in concluding that Mello would not have been discharged but for making that portion of his complaint about false claims that involved manufacturers and suppliers.[18]

Mello teaches that a plaintiff seeking to pursue a public policy claim must prove that his or her termination violated (and was based solely on) a public policy that is "important and clearly defined," which can be done by showing that the termination violated a legislatively expressed "policy position concerning the rights of employees."[19] The plaintiff's claim cannot be based, however, on a public policy covered by a statute that provides a remedy.

In *Lohnes v. Darwin Partners*,[20] then-Superior Court Associate Justice Ralph D. Gants considered a plaintiff's public policy claim that she had been terminated for complaining to her employer about a reduction in her commission rates and her statutory claim for earned commissions under the Wage Act, Mass. Gen. Laws c. 149, § 148. The plaintiff contended that the public policy that had been violated was the Wage Act's policy to ensure the payment of earned compensation.[21] The employer moved to dismiss both claims for failure to state a claim. As to the public policy claim, Justice Gants wrote:

> The more serious question is whether [the wrongful termination claim] can be brought as a common-law tort when there exists a statutory remedy for the retaliation alleged. . . . The retaliation alleged, if proven, would be in violation of [Mass. Gen. Laws c. 149, § 148A], which specifically prohibits an employer from penalizing any employee "in any way as a result of any action on the part of an employee to seek his or her rights under the wages and hours provision of this chapter." . . . An at-will employee may bring a common-law claim

12. *Id*. at 560-61.

13. *Id*. at 557.

14. *Id.*

15. *Id.* The court cited, in a footnote, several statutes that prohibit certain employment-related actions, noting those that provide for a remedy. *Id*. at 557 n.2. And it reaffirmed that a claim will lie if "the employer discharges an at-will employee for refusal to commit an unlawful act . . . , or for fulfilling her duty to assure the employer's compliance with the law involving public safety . . . ." *Id.* at 557-58.

16. 19 Mass. App. Ct. 511 (1985).

17. In *Melley*, the Appeals Court ruled that a plaintiff could not pursue a public policy claim premised on discrimination because the policy is protected by a statute, M.G.L. c. 151B, that provides for specific remedies. The court explained that public policy claims are recognized because "unless a remedy is recognized, there is no other way to vindicate such public policy." *Id.* at 512. This rationale has no application in the discrimination context, and recognizing a common law claim would have negative consequences:

> We think that where, as here, there is a comprehensive remedial statute, the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme. Not only would the legislative preference for an administrative solution be circumvented, but serious problems would be posed as to the extent of the remedy to be provided.

In addition, the court observed, the SJC had expressed that it disfavored the creation of duplicative remedies. *Id.* at 513.

18. *Mello*, 402 Mass. at 561.

19. *Id*. at 557.

20. No. 02-1299, 2002WL31187688 (Mass. Super. Ct. July 23, 2002).

21. *Id.* at *1-2.

> of wrongful termination when, as here, she alleges that she was terminated in violation of a policy position expressed by the Legislature to protect the rights of employees, "unless no common-law rule is needed because the Legislature has also prescribed a statutory remedy." . . . Here, the Legislature has prescribed a statutory remedy for such retaliation — G.L. c. 149, § 150 specifically permits an employee to bring a private cause of action alleging a violation of § 148A with the approval of the Attorney General. With an adequate statutory remedy, there is no need for the common-law tort of wrongful termination to protect this public policy.[22]

Justice Gants concluded that the plaintiff had no public policy claim because she had a statutory remedy for the same wrong. But rather than dismiss the operative count, he opted to treat it as a claim of retaliation under Mass. Gen. Laws c. 149, § 150.[23]

Briones v. Ashland, Inc.[24] involved a discharged truck driver's public policy claim alleging that he had been fired for threatening to report the employer's refusal to use hazardous materials placards on trailers, which, according to the plaintiff, state and federal law required.[25] The employer moved to dismiss, arguing that the Surface Transportation and Assistance Act ("STAA") provided a specific and comprehensive remedy.[26] Judge Morris E. Lasker, sitting by designation in the U.S. District Court for the District of Massachusetts, rejected the employer's argument, explaining:

> The cases [the employer] relies upon do not establish an impenetrable rule mandating dismissal of state law claims alleging wrongful termination in violation of public policy simply because a federal or state statute relative to the subject exists. Rather, the Massachusetts courts have developed a logical preference that plaintiffs relying on a public policy already codified in a particular statute follow the procedures set forth in the statute, but only if the statutory remedies are comprehensive and adequate.[27]

The STAA, the court explained, did not provide a comprehensive and adequate remedy because it provided for only compensatory damages, not, apparently, emotional distress damages, which the plaintiff sought.[28]

U.S. District Judge Rya W. Zobel came to the opposite conclusion some years later in a similar case, *Carter v. Tropicana Products Sales, Inc.*[29] She more restrictively described the limitation on public policy claims:

> However, Massachusetts courts allow the [public policy] cause of action to proceed only where, "unless a remedy is recognized, there is no other way to vindicate such public policy." . . . This tenet applies whether the remedy is vindicated by a state or federal statute.[30]

She went on to conclude, disagreeing with Judge Lasker, that the STAA does not preclude damages for emotional distress, as they are considered compensatory damages.[31] She also indicated that a statutory remedy can be comprehensive and adequate and entitled to deference without providing the plaintiff with every remedy that might be available at common law.[32] Based on her different take on the brake on public policy claims that statutory remedies represent, Judge Zobel ruled that the STAA displaced the plaintiff's claim.[33]

The courts continue to wrestle with the definition of the policies that will support a public policy claim and with the contours of the preexisting-remedy limitation on such claims. In *Osborne-Trussell v. Children's Hospital Corp.*,[34] for example, the plaintiff asserted a public policy claim, alleging that she had been terminated for exercising her rights under the Domestic Violence and Abuse Leave Act, Mass. Gen. Laws c. 149, § 52E. The SJC reversed the Superior Court's dismissal of the plaintiff's claims under the statute, but affirmed the dismissal of her public policy claim, noting that the exception is narrow and does not apply where a statutory remedy exists.[35] The court ruled that the statute provides remedies in its nonretaliation and noninterference provisions, and these reflected "the Legislature's measured judgment with respect to the necessary relief for victims of abusive behavior . . . and the mechanisms of enforcement against employers who interfere with or retaliate against an employee's use of its statutory protections."[36]

Similarly, in *Meehan v. Medical Info. Tech., Inc.*,[37] the plaintiff asserted a public policy claim alleging that he had been terminated

22. *Id.* at *3 (citations omitted).
23. *Id.*
24. 164 F. Supp. 2d 228, 230 (D. Mass. 2001).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The court proceeded to address, and reject, the employer's federal preemption argument as well.
29. No. 07-10921-RWZ, 2008WL190791 (D. Mass. Jan. 4, 2008).
30 *Id.* at *2.
31. *Id.* at *3.
32. *Id.* at *3.
33. *Id.* at *4. One case seems to suggest that the statutory-remedy-based limitation is not as broad as other cases indicate. In Perez v. Greater New Bedford Voc. Tech. Sch. Dist., 988 F. Supp. 2d 105 (D. Mass. 2013), Judge Richard G. Stearns of the U.S. District Court for the District of Massachusetts wrote, "The cause of action for wrongful termination in violation of public policy does not apply where 'there is a comprehensive remedial statute, [and] the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme.'" *Id.* at 113 (quoting *Melley*, 19 Mass. App. Ct. at 513). He thus seemed to indicate that a public policy claim will fail due to a statutory remedy only where the statute provides for an alternative remedy and the pursuit of the claim would interfere with the operation of the statute's remedial scheme. If this is what the court intended to express, and it is not clear that it is, it appears to overstate the limitation. The federal court quoted *Melley*, but that decision says, "We think that where, as here, there is a comprehensive remedial statute, the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme." *Melley*, at 513. The court seems to have been indicating that pursuit of public policy claims presumptively interferes with remedial schemes based solely on the existence of the scheme, not that the limitation requires separate proof or a separate showing of interference. Judge Stearns' seeming injection, via the addition in brackets of the word "and," of the notion that there are two elements to the limitation does not appear to be consistent with *Melley*.
34. 488 Mass. 248 (2021).
35. *Id.* at 264-65.
36. *Id.* at 265.
37. 488 Mass. 730 (2021)

for exercising the right under Mass. Gen. Laws c. 149, § 52C, to file a rebuttal to be included in his personnel file. The trial court dismissed the claim on the basis that it involved internal matters of the employer and was not a matter of public policy. The Appeals Court affirmed. The SJC reversed, holding that the right to file a rebuttal is a "public policy employment right recognized by statute . . . ."[38] The court proceeded to address whether the remedy under the statute nevertheless barred the public policy claim. It concluded that it did not:

> Where the Legislature has provided a remedy for the statutory violation but not a remedy for discharge from employment for its exercise, the analysis is more difficult. In these circumstances we must discern whether the statutory remedy is meant to be comprehensive, or whether there is a gap to be filled by common-law protection.[39]

The court found a gap: While the statute provides for fines for violation, it does not "address termination or retaliation for exercise of the right itself." The court said:

> Given the limited nature of the remedy, the absence of any discussion of termination, and the lack of a private enforcement mechanism, the Legislature does not appear to have considered the possibility of an employer simply terminating an employee for exercising the right of rebuttal. Indeed, such a response would appear to be sticking a finger in the eye of the Legislature. It would also empower any employer who so desired to essentially negate the important policies served by the right of rebuttal. We conclude that the Legislature would not have permitted such a flouting of its authority, had it contemplated the possibility. Thus, we hold that recognizing a common-law wrongful discharge action for the termination of an at-will employee for exercising the statutory right of rebuttal would complement the remedial scheme.[40]

The Acts and Public Policy Claims Premised on Violations of the Acts

The False Claims Acts

The FCA, 31 U.S.C. §§ 3729-3733, was enacted in 1863 to remedy rampant fraud by suppliers of goods to the Union Army.[41] The purpose of the FCA is to "broadly protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made."[42] The statute imposes liability on anyone who knowingly submits a false claim to the government or causes another to do so, or knowingly makes a false record or statement to get a false claim paid by the government.[43] It also imposes liability for "reverse false claims," the improper avoidance of an obligation to pay money to the government.[44] The statute provides for civil penalties and multiple damages.[45] In the fiscal year ended Sept. 30, 2020, the Department of Justice recovered $2.2 billion in settlements and judgments from cases involving fraud and false claims against the government.[46]

The FCA contains unusual enforcement provisions. It permits private parties, known as *qui tam* relators, to bring actions on behalf of the United States for violation of the statute, and to share in any recovery, including by settlement, with the maximum share being 30% and the share depending on the relator's role in and contribution to the prosecution of the action and the underlying fraud.[47] To pursue such a claim, a relator must file his or her complaint under seal and serve the complaint and a written disclosure of all information known to the relator on the U.S. attorney for the district in which the complaint was filed and on the attorney general of the United States.[48] The complaint remains sealed for at least 60 days, to provide the government time to investigate the allegations of the complaint, which it must do.[49] Section 3730 provides that the "Attorney General diligently shall investigate a violation" of Section 3729's prohibitions against false and fraudulent claims and the like.[50] Section 3733 arms the government with a powerful investigatory device — the civil investigative demand, a pre-suit command

38. *Id*. at 737.

39. *Id.* (citations omitted).

40. *Id.* at 737-38.

41. 31 U.S.C. §§ 3729-33 (2010); *see* U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 547 (1943).

42. Rainwater v. United States, 356 U.S. 590, 592 (1958).

43. *See* 31 U.S.C. § 3729 (2009).

44. 31 U.S.C. § 3729(a)(1)(G) (2009).

45. 31 U.S.C. § 3729 (2009).

46. *See* "Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020," Department of Justice, Office of Public Affairs (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020.

47. 31 U.S.C. § 3730 (2010).

48. *Id.*

49. 31 U.S.C. § 3730 (2010). The Department of Justice has also published a very informative primer containing the general description of the requirements and operation of the FCA. *See* "The False Claims Act: A Primer," Department of Justice (Apr. 22, 2011), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

50. 31 U.S.C. § 3730 (2010).

that a party thought to have information bearing on potential violations provide documents, responses to interrogatories, and testimony.[51] The 60-day period for investigation may be, and frequently is, extended.

FCA complaints can result in parallel criminal investigations, at times involving grand juries, and in charges, including under 18 U.S.C. 287, which criminalizes the presentation of false, fictitious or fraudulent claims, and provides for fines and imprisonment of up to five years. Department of Justice policies require that federal prosecutors give consideration to whether criminal charges should be pursued based on the conduct alleged in FCA complaints.[52]

At some point in a civil FCA matter, the government must notify the court that it is intervening in the case or declining to do so. If the government intervenes, it has primary responsibility for the case. If it does not, the relator can pursue the case, and his or her maximum share increases; in addition, a prevailing relator is entitled to recover from the defendant his or her legal fees and other expenses of the action.[53]

Under 31 U.S.C. § 3730(h), titled "Relief from Retaliatory Actions," any employee, contractor or agent who is discharged, suspended, threatened, etc., because of acts in furtherance of efforts to stop one or more violations of the FCA is entitled "to all relief necessary to make the employee, [etc.], whole." Available relief includes reinstatement, two times the amount of back pay, interest, and compensation for any special damages, including litigation costs and attorneys' fees.[54] Courts have held that "special damages" under § 3730(h) include damages for emotional distress.[55]

The Massachusetts analog to the FCA, the MFCA, Mass. Gen. Laws c. 12, §§ 5A-5O, is of more recent vintage, having been enacted in 2000. It is similar to the FCA, though it concerns itself with false claims involving the commonwealth, and its liability provisions (including those relating to whistleblower protection) are somewhat broader. The MFCA also permits individuals to pursue suits on behalf of the commonwealth, and to share in any recovery. And it also provides broad protections against retaliation, entitling any employee who is the victim of retaliation to, among other things, back pay and special damages.[56]

The D. Mass. Cases

The SJC has not ruled on whether a public policy claim will lie where the invoked public policy is prevention and punishment of false claims. A number of decisions by the U.S. District Court for the District of Massachusetts have addressed the issue, in varying degrees of detail. Most, but not all, hold against recognition of public policy claims premised on behavior that allegedly violates a false claims statute. The results elsewhere are mixed: In a number of California cases, for example, public policy claims have been allowed to proceed alongside FCA (or FCA-counterpart) retaliation claims.[57]

The plaintiff in *Hutson v. Analytic Sciences Corp*.[58] alleged that he had been terminated in violation of multiple public policies. In a decision titled "Memorandum on the Public Policy Issue," Magistrate Judge Robert B. Collings addressed two issues, apparently in the lead-up to trial: (1) whether federal law can provide the public policy for a Massachusetts wrongful termination claim, and (2) the scope of the public policy at issue.[59] On the first issue, the court had no trouble concluding that federal law can serve as a basis.[60] On the second, the court addressed the "four areas of public policy concern [that were] alleged to have been implicated in this case."[61] First addressed was the plaintiff's allegation that the defendant had improperly billed the federal government for time spent testing and implementing a technology for the Navy. The court noted that federal statutes criminalize fraud against the government, as does a Massachusetts statute, and thus "plainly express a public policy against defrauding the government . . . ."[62] The court addressed other similar allegations of wrongdoing, tying each to federal and state statutes and other law expressing implicated policies.[63] While false claims were at issue in the case, the FCA was not discussed in the decision, nor does it contain any discussion of whether the public policy claim was unavailable because the plaintiff had a statutory remedy.

In *Tighe v. Career Systems Development Corp.*,[64] decided two years later, the plaintiff, a former employee of a for-profit corporation that operated Job Corps centers, alleged that she had been terminated for cooperating with an investigation into the employer's activities by a federal agency pursuant to federal statutes and regulations.[65] The plaintiff alleged, for example, that she had informed the Department of Labor that the employer had been manipulating statistics to receive higher payments under its contract with the department.[66] She asserted a public policy claim, but no others. U.S. District Judge Nathaniel M. Gorton noted that the SJC had taught that the public policy exception is narrow, and applies only where the policy at issue is a well-defined, important one.[67] He explained that the cases indicated that the exception applies only where the termination was

51. 31 U.S.C. § 3733 (2009).

52. *See generally* Courtney G. Salesky, Jonathan W. Haray and Michael G. Lewis, "Parallel Proceedings under the False Claims Act: Key Considerations and Best Practices," DLA Piper (Apr. 23, 2019), https://www.lexology.com/library/detail.aspx?g=3aa4f64c-64cf-482c-8942-248241de55a0.

53. *See supra* note 47.

54. 31 U.S.C. § 3730(h)(2) (2010).

55. *See, e.g.,* Miniex v. Houston Hous. Auth., 400 F. Supp. 3d 620, 653 (S.D. Tex. 2019).

56. M.G.L. c. 12, §§ 5A, 5B, 5C, 5F, 5J.

57. *See, e.g.,* Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1105 (9th Cir. 2008).

58. 860 F. Supp. 6 (D. Mass. 1994).

59. *See id.*

60. *Id*. at 10.

61. *Id.*

62. *Id*. at 10-11.

63. *Id*. at 11-12.

64. 915 F. Supp. 476 (D. Mass. 1996).

65. *Id*. at 483-84.

66. *Id.* at 485.

67. *Id*. at 483 (citation omitted).

(1) for asserting a legally guaranteed right, (2) for doing what the law requires, (3) for refusing to do what the law forbids, or (4) for cooperating with an ongoing law enforcement investigation concerning her employer under a clearly expressed statutory policy encouraging such cooperation.[68] The court proceeded to consider various federal statutes, including the FCA, and concluded that they expressed the policy the plaintiff alleged had been violated by firing her.[69] The court did not address whether the plaintiff was barred from pursuing the public policy claim because the statutes (including the FCA) provided a remedy. The decision does not indicate why this issue was not addressed. While agreeing that the plaintiff had invoked a cognizable policy, the court proceeded to find against her based on her failure to prove that the employer would not have discharged her but for her protected conduct.[70]

In *Smith v. Mitre Corp.*,[71] decided the next year, the plaintiff moved to amend her complaint to add a public policy claim that alleged she had been fired for insisting her employer comply with federal law prohibiting fraud and false claims in connection with federal government contracts.[72] U.S. District Judge Reginald C. Lindsay rejected the defendant's argument that the proposed claim was futile. Relying and expanding on the analysis in *Hutson* and *Tighe*, he concluded that the "SJC would hold that, as a matter of law, [the plaintiff's] complaints to [the defendant] about alleged fraud and false claims involve a sufficiently important public policy such that she, in her proposed amendment, states a claim for termination in violation of public policy."[73] The *Smith* court also did not address whether the claim would not lie because the FCA or some other statute provides a remedy.

In *Fauci v. Genentech, Inc.*,[74] the plaintiff had been fired by the pharmaceutical company Genentech. He alleged that while on a marketing team for an asthma drug, he had learned that other sales representatives were engaged in practices that resulted in the filing with Medicare of false or fraudulent claims for reimbursement for the drug. He alleged that he had complained about these practices, and that this, and certain other complaints, resulted in his termination. He sued, asserting a claim for retaliation under § 3730(h) of the FCA and a common law public policy claim.[75] Genentech moved to dismiss, arguing that the common law claim would not lie because "the common law does not authorize claims for wrongful termination in violation of public policy where a plaintiff has a statutorily-created means of vindicating the policy at issue."[76] Judge Richard G. Stearns mentioned the holding in *Melley*, and then quoted the *Briones* court's observation that "'the Massachusetts courts have developed a logical preference that plaintiffs relying on a public policy already codified in a particular statute follow the procedures set forth in the statute, but only if the statutory remedies are comprehensive and adequate.'"[77] He then proceeded to apply the test articulated in *Briones*, ruling that Fauci's public policy claim would not lie "[b]ecause the FCA provides a comprehensive and adequate remedial scheme for vindicating the public policy interests identified by Fauci . . . ."[78]

The next case, chronologically, is *United States ex rel. Provuncher v. Angioscore, Inc.*[79] The plaintiff — actually, the relator — had been a sales professional for a manufacturer and distributor of angioplasty catheters. He alleged that the defendant had acted improperly with respect to a defective catheter, including by concealing information from the Food and Drug Administration.[80] He was terminated, and he sued, asserting claims under the FCA, including a retaliation claim under § 3730(h), and a public policy claim.[81] The defendant argued that the public policy claim could not be asserted because the plaintiff had a "statutorily-created means of vindicating the policy at issue . . . ," the FCA's anti-retaliation provisions.[82] The relator avoided this argument, asserting that in addition to the FCA's anti-fraud policy, he had been promoting the public safety policies of the Food, Drug, and Cosmetic Act, which does not provide a remedy for retaliation. While Judge Stearns seemingly accepted this argument, he ruled that the relator in this regard had not articulated a public policy: His allegations were only "a complaint about internal corporate matters" — a disagreement over the marketing of the catheter.[83]

Two years later, then-Chief Magistrate Judge (and now-U.S. District Judge) Leo T. Sorokin issued *Dineen v. Dorchester House Multi-Service Center*.[84] The plaintiff alleged that she had been terminated for trying to prevent her employer from submitting false claims to the federal government.[85] She filed a two-count complaint, alleging a retaliation claim under the FCA and a public policy claim.[86] The defendant moved to dismiss the latter, arguing that the public policy claim would not lie because the employee had an adequate remedy under § 3730(h) of the FCA.[87] Judge Sorokin agreed and dismissed the public policy claim.[88] He assumed for purposes of his decision that the policy implicated by a termination for engaging in activities protected by the FCA or MFCA would support a public policy claim.[89] "Nonetheless," he wrote, the plaintiff's public policy "count must fail" because it invoked the same policy established by

68. *Id*. (citation omitted).
69. *Id*. at 483-96.
70. Tighe v. Career Systems Development Corp., 915 F.Supp. 476, 483-96 (D. Mass. 1997).
71. 949 F. Supp. 943 (D. Mass. 1997).
72 *Id.* at 948.
73. *Id.* at 951-52.
74. No. 06-10061-RGS. 2007WL3020191 (D. Mass. Oct. 12, 2007).
75. *Id*. at *1-3.
76. *Id.* at *4-5.
77. *Id.* at *4 (quoting Briones v. Ashland, Inc., 164 F. Supp. 2d 228, 230 (D. Mass. 2001)).
78. *Id.*
79. No, 09-12176-RGS, 2012WL1514844 (D. Mass. May 1, 2012).
80. *Id.* at *1.
81. *Id.* at *7.
82. *Id.*
83. *Id.*
84. No. 13-12200-LTS, 2014WL458188 (D. Mass. Jan. 31, 2014).
85. *Id*. at *2.
86. *Id.*
87. *Id.* at *3-4.
88. *Id.* at *4.
89. *Id.* at 4-5.

the FCA, and the FCA provides a remedy for a retaliatory termination.[90] The plaintiff/relator argued that the remedy-based limitation on a public policy claim applies only "when the available statutory remedies are comprehensive and adequate."[91] The court saw "several problems with this position," including that the FCA does provide such a set of remedies, which the court proceeded to detail. The court also noted that the SJC in fact had never "imposed the term 'comprehensive' as a precondition."[92] It also distinguished (and to some extent criticized) the case on which the plaintiff/relator relied, *Briones, supra*, in favor of *Carter, supra*, which, as noted previously, adopted a less plaintiff-friendly approach to the remedy-based limitation.[93]

In a 2018 memorandum and order in *Elliott-Lewis v. Abbott Labs., Inc.*,[94] U.S. District Judge Indira Talwani denied a motion to dismiss a public policy claim. The plaintiff/relator asserted claims under the FCA, including a retaliation claim under § 3730(h). The defendant argued that the plaintiff's assertion of the FCA retaliation claim foreclosed the public policy claim.[95] Judge Talwani disagreed. She observed that the purpose behind public policy claims is to provide a remedy for a public policy violation where none otherwise would exist, and, accordingly, when a statute covers a policy and provides a remedy, a public policy claim will not lie. Turning to the plaintiff's claim, the judge observed that, if it were based on reporting of false claims, "it would be foreclosed."[96] But it was not: "Plaintiff argues that her state law claim relates to retaliation for her reports concerning public welfare, as protected by regulations prohibiting medical device off-label and pre-approval promotion . . . ."[97] The court cited a number of decisions recognizing claims based on safety regulations as implicating cognizable public policies. It concluded that the plaintiff had "sufficiently distinguished between the public policy vindicated by [the FCA] and a public policy for the promotion of public health and safety" to avoid the remedy-based limitation on a public policy claim.[98]

A year later, Chief Judge Patti B. Saris, to whom the case had been reassigned, granted summary judgment against Ms. Elliott-Lewis on her claim for retaliation under the FCA and her public policy claim.[99] As to the FCA claim, Judge Saris ruled that the plaintiff had not established that she had engaged in protected conduct under the FCA and therefore could not establish retaliation for protected conduct.[100] As to the public policy claim, the court rejected the defendant's argument that the claim did not implicate a sufficiently important policy: "Internal reporting of alleged violations of federal regulations intended to protect public health and safety, such as those forbidding off-label marketing and pre-approval promotion, implicate a sufficiently important public policy and constitute protected activity."[101] But Judge Saris agreed that the plaintiff had not shown causation: "The undisputed evidence is that her employment ended because she refused to return to work."[102]

In *Guilfoile v. Shields Pharm., LLC*,[103] the plaintiff asserted a claim under the anti-retaliation provisions of the FCA and a public policy claim, both based on allegations that he had been terminated for complaining about alleged kickbacks that violated the FCA. U.S. District Judge Denise J. Casper granted the defendants' motion for summary judgment on the FCA retaliation claim due to the plaintiff's failure of proof of conduct that could lead to an FCA action based on a false claim.[104] She granted the motion as to the public policy claim on the basis that the FCA provides a comprehensive remedy for the conduct on which the plaintiff's claim was based.[105] Just three months later, Judge Casper again rejected a public policy claim premised on alleged violations of the FCA. In *Naimark v. BAE Systems Information and Electronic Systems Inc.*,[106] the plaintiff alleged that the defendant had engaged in fraudulent billing practices. Judge Casper quoted Judge Zobel in *Carter* for the proposition that a public policy claim "may 'proceed only where, "unless a remedy is recognized, there is no other way to vindicate such public policy," [and] applies whether the remedy is vindicated by a state or federal statute.'"[107] She noted that the plaintiff's claim fell under the FCA, and the FCA contains anti-retaliation provisions that provide a remedy. She rejected the plaintiff's argument that the remedy is inadequate because of the FCA's requirement that the government have an opportunity to investigate and intervene, because nothing prevents "a private citizen from initiating such investigation and intervention by filing a relator action."[108]

Public Policy Claims Premised on Behavior Prohibited by a False Claims Act — Are They Permitted? Should They be?

The Massachusetts (state and federal) decisions involving public policy claims premised on behavior prohibited by the FCA fall into three categories. Some, like *Tighe*, indicate that such a claim

90. Dineen v. Dorchester House Multi-Service Center, No. 13-12200-LTS, 2014WL458188 (D. Mass. Jan. 31, 2014).
91. *Id*. at *5.
92. *Id.*
93. *Id.*
94. No. 14-CV-13155-IT, 2018WL1122359 (D. Mass. Mar. 1, 2018).
95. *Id*. at *1.
96. *Id.*
97. *Id.*
98. *Id.*
99. Elliott-Lewis v. Abbott Labs., Inc., 411 F. Supp. 3d 195 (D. Mass. 2019).
100. *Id*. at 208.
101. *Id.* at 209.
102. *Id.* at 210.
103. No. 16-CV-10652, 2021WL4459515 (D. Mass. Sept. 29, 2021).
104. *Id*. at *6.
105. *Id*. at *7.
106. No. 20-CV-10138-DJC, 2021WL6098782 (D. Mass. Dec. 23, 2021). One of the authors of this piece is counsel for BAE Systems in the case.
107. *Id*. at *7 (citations to quoted cases omitted).
108. *Id*. (citations omitted).

will lie, but do not address the statutory-remedy limitation on such claims. Others, like *Fauci*, indicate that such a claim will not lie due to the existence of a statutory remedy. In the third category are cases like *Elliott-Lewis*, in which the statutory-remedy limitation was recognized, but the public policy claim survived because, and to the extent that, the plaintiff alleged that the claim was premised also on a policy other than (or in addition to) the policy promoted by the FCA. The *DeRose* court did not go into detail on the basis for its decision to recognize public policy claims, but it cited, and called "seminal," the California Court of Appeal decision in *Petermann v. International Brotherhood of Teamsters*.[109] The *Petermann* court did detail its rationale, focusing nearly exclusively on the preservation or promotion of public policy — not the provision of a remedy for an employee harmed by a violation of policy.[110] While the *DeRose* court may have intended to indicate, by emphasizing *Petermann*, that public policy claims should be recognized in order to promote public policy, the rationale has evolved, with Massachusetts courts emphasizing that such claims also are desirable in order to ensure a comprehensive remedy for employees harmed by terminations that flout some public policy.[111] The reasons for the limitation on such claims based on the availability of a statutory remedy include: to avoid creating a remedy where none is necessary, to avoid (similarly) duplicative remedies, and (according to some courts) to avoid interference with a legislative purpose and remedial scheme.[112]

Declining to recognize public policy claims premised on behavior proscribed by the FCA or MFCA based on the existence of remedies in the statutes does not undermine the rationale — even the broad articulation view of the rationale — behind the recognition of public policy claims. The policies behind the acts — avoiding and punishing false and fraudulent government claims and recovering the fruits of such misbehavior — are promoted via government civil, criminal and administrative claims and *qui tam* claims. Indeed, given the investigatory and enforcement mechanisms in the FCA and MFCA and their criminal analogs, statutory claims do a far better job of promoting the statutory policies than public policy claims. Public policy claims provide no added advantage with respect to deterring, punishing and remedying false and fraudulent claims. Likewise, redress for the employee is available via retaliation claims under § 3730(h) and its Massachusetts counterpart, as well as the bounty provisions of the acts. Given the broad remedies available under § 3730(h) and its Massachusetts counterpart, including reinstatement, multiple damages, and fees, and the opportunity to share in any recovery, statutory claims do a far better job of offering redress to the employee fired for whistleblowing. They offer the "comprehensive and adequate remedy," including the right to pursue reinstatement, that is required.[113]

While little would be gained by permitting public policy claims premised on behavior prohibited by the FCA or MFCA, a good deal would be lost. First, to recognize such claims is, as the *Fauci* court recognized, to undermine legislative preference.[114] Congress and the General Court have said, via the FCA and the MFCA, how false claims should be addressed, and it is not via common law public policy claims.

Second, permitting a public policy claim could lead to duplicative remedies. As the Appeals Court said in *Melley*, this the SJC disfavors.[115]

Finally, if public policy claims based on conduct prohibited by the FCA or the MFCA were permitted, the statutory enforcement scheme could be disrupted, and the statutory policies undermined. A prototypical FCA or MFCA case by a former employee can combine claims based on violations of the substantive prohibitions relating to false claims and a claim for retaliation. In accord with the statute, the complaint is filed under seal.[116] The important purposes of the sealing requirement were described by the Supreme Court in 2016:

> The seal provision was enacted in the 1980's as part of a set of reforms that were meant to "encourage more private enforcement suits." . . . At the time, "perhaps the most serious problem plaguing effective enforcement" of the FCA was "a lack of resources on the part

109. 344 P.2d 25 (Cal. Ct. App. 1959).

110. *Id*. at 27 ("The commission of perjury is unlawful . . . . It is also a crime to solicit the commission of perjury. . . . The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice. It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. The threat of criminal prosecution would, in many cases, be a sufficient deterrent upon both the employer and employee, the former from soliciting and the latter from committing perjury. However, in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the Penal Code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered.").

111. The recent emphasis on the adequacy of the remedy, as in *Meehan*, prompts the question of whether the SJC will rewrite the law concerning at-will employment. It seems doubtful. The courts are not equipped to review even more termination decisions.

112. The Massachusetts courts have held that public policy claims may be pursued only by at-will employees. *See, e.g.,* Willitts v. Roman Catholic Archbishop 411 Mass. 202, 209 (1991). Given the purposes behind recognizing public policy claims, this limitation is puzzling.

113. *See* Briones v. Ashland, Inc., 164 F. Supp. 2d 228, 230 (D. Mass. 2001).

114. *See* Fauci v. Genentech, Inc., No. 06-10061-RGS. 2007WL3020191 at *11-12 (D. Mass. Oct. 12, 2007).

115. *See* Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 514 (1985).

116. 31 U.S.C. § 3730 (2010).

> of Federal enforcement agencies." . . . The Senate Committee Report indicates that the seal provision was meant to allay the Government's concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation.[117]

The requirement to file under seal would not apply to a stand-alone common law public policy claim premised on behavior prohibited by the FCA or MCA. Thus, if such claims were recognized, an individual terminated for complaining that his or her employer had submitted false claims or engaged in similar behavior could file on the public docket a common law claim in lieu of a statutory claim, immediately publicize his or her allegations, and potentially alert the defendant to pending or potential criminal proceedings. This approach seems unlikely, because it would entail foregoing a potential share in the recovery based on the false claims (versus the termination) and multiple damages. Unlikely, but not inconceivable. Especially where the amount of the alleged false claims is small (and the potential relator's share correspondingly small), a plaintiff who did not relish the prospect of turning control of his or her case over to the federal government might follow the stand-alone approach in lieu of the typical. However likely or unlikely, the approach could undermine the purpose of the requirement to file under seal.

More likely is the approach the plaintiff pursued in cases like *Hutson*.[118] There, the plaintiff alleged behavior that violated the FCA, but did not invoke the statute by asserting a claim under it or otherwise. He invoked other statutes as expressing the public policy that provided the premise for his public policy claim. The court held that the public policy claim would lie, as it expressed an actionable public policy against fraudulent claims for payment.[119] The plaintiff thus evaded the limitation on public policy claims that exists where there is a statutory remedy, and potentially undermined the purposes of the FCA's requirement of filing under seal.[120]

In short, there are multiple reasons not to permit public policy claims premised on activity prohibited by the FCA or MFCA, and no good reason to permit them. In line with this, courts should be alert to efforts to evade the enforcement schemes of the FCA and MFCA by suing based on the public policy exception through allegations that recast behavior that violates the FCA or MFCA as something else.

Conclusion

The SJC advanced the ball when it recognized the public policy exception to the rule that at-will employees can be terminated for virtually any reasons. Claims based on the exception can promote important public policies and can provide a remedy where one is needed but otherwise would not exist. But these purposes are not furthered where the claim is premised on behavior that violates the FCA or MFCA. The statutes are self-promoting via comprehensive enforcement schemes and provide for more than adequate remedies for whistleblowing employees. Claims based on behavior prohibited by the FCA or the MFCA should not be recognized.

As to cases in which a plaintiff contends that he or she was promoting both the policies behind the FCA or MFCA and other policies or statutes that do not provide a remedy, as in, for example, *Elliott-Lewis*, it appears that no like bar to the pursuit of the public policy claim would exist, as least insofar as the non-FCA/MFCA policies and statutes were at issue. The reasons for recognizing the public policy exception would apply, and the reasons against would not. That said, courts should police efforts to recast behavior that violates the FCA or the MFCA as violative of other policies and statutes, lest the comprehensive enforcement scheme of the FCA and MFCA be disrupted. A stand-alone public policy claim premised on recast FCA- or MFCA-violative behavior could alert the wrongdoer and damage the prospects for effective enforcement.

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117. State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby, 580 U.S. 26, 34 (2016).
118. Hutson v. Analytic Scis. Corp., 860 F. Supp. 6 (D. Mass. 1994).
119. *Id.* at 11.
120. *See id.*