

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID A. ANDERSON  
Plaintiff,  
  
v.  
  
McTish, KUNKLE & ASSOCIATES.  
Defendant.

Civ. Action No. 4:CV-04-754

**FIRST AMENDED COMPLAINT  
AND  
DEMAND FOR JURY TRIAL  
FILED ELECTRONICLY**

1. This is a civil action brought by relator David A. Anderson (“Anderson” and/or “Plaintiff”) against defendant McTish, Kunkle & Associates (“McTish”) under the anti-retaliation provisions of the Civil False Claims Act (the “False Claims Act” or “FCA”), 31 U.S.C. § 3730(h), to recover damages, costs, attorneys’ fees, and other relief owed to him.

2. In connection with the receipt of funding from the United States Department of Transportation Federal Highway Administration (“FHWA”) for

engineering and construction services on State Route 15 in Tioga County Pennsylvania (the “SR 15 Project”), Defendant and others (a) knowingly presented, and caused to be presented to an officer and employee of the United States Government false and fraudulent claims for payment and approval; (b) knowingly made, used, and caused to be made and used, false records and statements to get false and fraudulent claims paid and approved by the Government; and (c) conspired to defraud the Government by getting false and fraudulent claims allowed or paid, in violation of 31 U.S.C. §§ 3729(a)(1), (2) and (3).

3. In brief, the FCA scheme to defraud involved billing for services that were not performed in the manner required by a written contract among Defendant, New Enterprise Stone & Lime Co., Inc. (“New Enterprise”), the FHWA and the Pennsylvania Department of Transportation (“PENNDOT”). For example, under the terms of the contract, vegetation debris from the project was supposed to be carted off-site and disposed of properly. In actuality, Defendant and New Enterprise caused such debris to be burned at the site in order to save more than \$1 million for New Enterprise. There were other ways in which the contract was performed in a substandard manner as well.

4. Soon after Anderson raised questions to his supervisors and others about the propriety of fraudulent billing under the SR 15 Project contract, including, but not limited to, the practices alleged in paragraph 3, above, he was “laid off” by McTish and not called back when there was additional work for which he was qualified, as he was led to believe when he was initially hired and when he was laid off. Upon information and belief, Anderson’s employment was terminated and not renewed because

he spoke out against improper billing practices and other forms of misconduct by New Enterprise, McTish, PENNDOT and others in connection with the SR 15 Project.

### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over the claims alleged in this First Amended Complaint under 28 U.S.C. §§ 1331 (Federal question) and 31 U.S.C. § 3732(a) (False Claims Act).

6. This Court has personal jurisdiction over the Defendant named in the First Amended Complaint pursuant to 31 U.S.C. § 3732(a) because the Defendant can be found, resides, and transacts business in the Middle District of Pennsylvania and because an act proscribed by 31 U.S.C. § 3729 occurred within this District. Title 31, United States Code, Section 3732(a) further provides for nationwide service of process.

7. Venue is proper in the Middle District of Pennsylvania, under 28 U.S.C. §§ 1391(b) and (c), and 31 U.S.C. § 3732(a), because (a) the Defendants reside in this District, (b) a substantial part of the events or omissions giving rise to the violations of 31 U.S.C. § 3729 alleged in the First Amended Complaint occurred in this District, and (c) because at least one Defendant can be found in and transacts business within this District.

## **PARTIES AND ENTITIES**

8. The United States financed and managed the SR 15 Project through the FHWA. The headquarter offices for the FHWA are located at 400 7<sup>th</sup> Street, S.W., Washington, DC 20590. FHWA local field offices are directly responsible for administering state and local highway construction projects that receive FHWA funding. In this case, the SR 15 Project was administered by the Pennsylvania Division Office of the Federal Highway Administration. The Pennsylvania Division Office is located at 228 Walnut Street, Room 508, Harrisburg, PA, 17101-1720. Officials from that Office occasionally conducted on-site inspections of the SR 15 Project.

9. Plaintiff Anderson resides in Elmira, New York. He is a civil engineer by education, training and employment. On or about April 1, 2002, McTish hired Anderson as an engineer. On or about April 30, 2002, it assigned him to be the On Site Project Manager for the SR 15 Project. On or about November 1, 2002, McTish terminated Anderson's employment.

10. Defendant McTish is a professional engineering firm with offices located in Rostraver and Allentown Pennsylvania. Its main office is located at 2401 Sunshine Road, Allentown, PA, 16901. McTish's role on the SR 15 Project was to help PENNDOT oversee its construction and administer the contract, including by assisting in conducting inspections.

11. New Enterprise is a building materials supplier and highway contractor. It operates numerous production facilities, quarries, and contracting services throughout Pennsylvania, New Jersey, and New York. New Enterprise's corporate

offices are located at 3912 Brumbaugh Road, New Enterprise, PA 16664. It was the prime contractor on the SR 15 Project.

12. Upon information and belief, West Contracting, Inc. (“West”) is at 200 Powell Drive, Raleigh North Carolina. It subcontracted with New Enterprise to dispose of the vegetation debris generated by the SR 15 Project.

13. PENNDOT was jointly responsible with the FHWA authority for administering the SR 15 Project. It acted through its District 3 Office, which is located at 715 Jordan Avenue, Montoursville, PA, 17754-0218, and through its field office located in Covington, PA.

### **FACTS**

14. Through the FHWA, the United States allocates financial and administrative resources to facilitate the strategic development and maintenance of State and local transportation systems as effective and efficient elements of the national intermodal transportation system. Specifically, under its Federal-Aid Highway Program, the FHWA provides Federal financial resources and technical assistance to State and local governments for constructing, preserving, and improving the National Highway System, a 160,000-mile network that carries 40 percent of the Nation’s highway traffic. The Federal-Aid Highway Program also provides resources for one million additional miles of urban and rural roads that are not on the System, but that are eligible for Federal-aid. The Federal-Aid Highway Program is administered through the 52 Federal-Aid Division Offices.

15. The SR 15 Project was financed in large part by the Federal-Aid Highway Program. This was pursuant to FHWA funding contract number Q98X037-

149. The PENNDOT contract designation number was 037201. The contract amount was approximately \$27 million.

16. On or about April 1, 2002, construction commenced on the SR 15 Project. Its projected completion date was September 26, 2003.

17. The specific route designation for the SR 15 Project was SR 6015 Sec 52A. It was located approximately one mile north of the Bloomsburg, PA interchange to just south of Mansfield, PA. The scope of the project included grading and drainage for the construction of a four lane limited access highway with ramps and reconstruction of SR 15 and township roads T437, T443 and T473, including mitigation of two wetlands, installation of guiderail, signs, pavement markings and other related work within a length of approximately six miles.

18. Upon information and belief, the SR 15 Project contract was awarded to New Enterprise in or about March 2002 after it was determined to be the low bidder in a bidding process that began in or about February 2002. The initial proposal for the SR 15 Project contract was issued to the public in or about December 2001.

19. One aspect of the proposal, made clear at a pre-bid conference in January 2002, was that all wood from trees and brush from “clearing and grubbing” was to be chipped and carted off-site for disposal and burning of such debris would not be permitted.

20. On or about January 18, 2002, Gannet Fleming, Inc., 209 Senate Avenue Camp Hill, PA 17011, the proposal designer for the SR 15 Project, issued a memorandum clarifying that wood chips had to be carted away and stored at approved temporary and permanent waste sites.

21. When New Enterprise began the SR 15 Project it had retained a subcontractor to do the clearing and grubbing portion of the project. That subcontractor quit the job soon after starting. In or about May 2002, New Enterprise then hired West Contracting to do the clearing and grubbing work.

22. Between in or about June 2002 and November 2002, West Contracting disposed of all the clearing and grubbing debris by burning it. This was done at the direction of New Enterprise and with the knowledge and consent of McTish and PENNDOT.

23. Upon information and belief, New Enterprise saved approximately \$1 million by burning the clearing and grubbing debris instead of chipping it and hauling it away for lawful disposal. This is because New Enterprise avoided transportation, handling and disposal expenses. The debris was simply burned where it was gathered. The overall portion of the construction contract for clearing and grubbing was approximately \$1.8 million. Disposal costs constituted about \$1 million of that amount.

24. In or about June 2002, New Enterprise, McTish and PENNDOT agreed among themselves to withhold from the FHWA information about the burning of clearing and grubbing materials. On-site employees, including Plaintiff, were specifically told to keep this information away from the FHWA inspectors. For example, Plaintiff was given this instruction by Jay Miller and Ken Klingerman of PENNDOT in approximately June 2002 at the field office located in Covington, PA.

25. On numerous occasions Plaintiff raised issues with representatives of McTish, New Enterprise and PENNDOT about the propriety of burning clearing and

grubbing refuse and about the legality of not passing through the cost saving to the taxpayers through an equitable adjustment in the SR 15 Project contract price.

26. Plaintiff also observed other billing improprieties in connection with the SR 15 Project and pointed them out to representatives of McTish, New Enterprise and PENNDOT. These included, but were not limited to, the following:

- New Enterprise was not assessed liquidated damages when contract milestones were missed.
- New Enterprise was paid to maintain an accurate Critical Path Method (“CPM”) schedule, but in fact the contractor did not timely update the CPM.
- New Enterprise’s work followed no schedule and invaded a "quarantine area" over objections of the engineering design firm, thereby damaging the embankment area and causing significant cost overruns.
- New Enterprise used substandard material in the rock face of the embankment.
- The failure to conduct proper tests on job site materials and the embankment.

27. Plaintiff was warned by fellow McTish employees, including offsite manager Ron Kocher, offsite supervisor Dave Heyne and onsite supervisor Wes McNett to, in sum and substance, “watch what you say” and to “cover your ass” the way that they (Kocher, Heyne and McNett) were doing. He was also instructed directly and indirectly by these McTish representatives to “let things go,” meaning, to look the other way on contracting irregularities.

28. On or about November 1, 2002, McTish told Plaintiff that he was being laid off as of November 15, 2002, and would be rehired in the spring of 2003. When Anderson was not called back to work, he contacted McTish offsite supervisor Dave Heyne for an explanation. Mr. Heyne told Anderson, in sum and substance, that PENNDOT did not want him back on the SR 15 Project because Anderson had raised

problems with the contract administration and because he “could not keep his mouth shut as he was told.”

29. Upon information and belief, New Enterprise and McTish received federal funds from the FHWA as a result of invoices they submitted to PENNDOT and the Pennsylvania Office of the FHWA in connection with the SR 15 Project.

30. Upon further information and belief, a portion of the funds New Enterprise received was for supposedly disposing of vegetation debris generated by the SR 15 Project in a manner consistent with, and in fact, required by, the terms of the SR 15 Project contract.

31. Upon further information and belief, had the FHWA known about the above-described clearing and grubbing disposal practices, it would not have paid the full contract price to New Enterprise.

32. McTish was aware of, and was complicit with, New Enterprise’s substandard performance under the SR 15 Project contract. Had the FHWA known of McTish’s inadequate and improper oversight practices it would not have paid the full contract price owed to McTish.

33. The United States therefore was damaged by the conduct alleged in this First Amended Complaint.

**FIRST CAUSE OF ACTION**  
**FALSE CLAIMS ACT RETALIATION**  
**(31 U.S.C. § 3730(h))**

34. The allegations contained in paragraphs 1 through 33, above, are realleged as if fully set forth below.

35. Defendant McTish and others were engaged in violations of the FCA during Plaintiff's employment.

36. Plaintiff brought these violations to the attention of his supervisors and others as he observed them occurring.

37. Plaintiff was instructed by McTish representatives to collude with them and others in conduct which violated the FCA and Plaintiff was reprimanded for trying to cause the parties on the SR 15 Project to comply with certain contractual obligations, for example to conduct proper testing on job site materials and the road embankment.

38. After Plaintiff investigated possible FCA violations and brought them to the attention of his supervisors and other McTish employees, McTish terminated Plaintiff's employment and refused to rehire him, even though he had been promised "year round" employment and was told he would be working at the project office over the winter assisting in administrative and other winter work.

39. Upon information and belief, Plaintiff was terminated and not rehired because of his role as a FCA whistleblower employee.

40. Upon information and belief, the cause of Anderson's adverse employment treatment and conditions was that he protested against improper billing practices and other forms of contract improprieties by McTish others in connection with the SR 15 Project.

41. Plaintiff has been damaged, economically, emotionally and in his marital and family relations as a result of the foregoing conduct.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Anderson, on behalf of himself, demands and prays that judgment be entered against the Defendant as follows:

1. On the First Cause of Action under the Anti-retaliation Provisions of the False Claims Act, Section 3730(h), judgment against Defendant in the amount of two times Plaintiff's lost wages and all allowable incidental and consequential damages, as determined at trial or by the court.
2. And, that Plaintiff Anderson be awarded all reasonable expenses that were necessarily incurred in prosecuting this action, plus all reasonable attorneys' fees and costs, as provided by Section 3730(d).
3. And further, that Plaintiff Anderson be awarded prejudgment interest.
4. And finally, such other relief for Plaintiff Anderson, in law or equity, as this Court deems just and proper.

## **DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Anderson hereby demands trial by jury.

Respectfully submitted,

s/REGINA D. POSERINA  
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Dated: Upper Darby, Pennsylvania  
May 2, 2006

**CERTIFICATE OF SERVICE**

I, Regina D. Poserina, attorney for Plaintiff David Anderson, hereby certify that I caused to be served, by electronic means, and via first class U.S. Mail, postage prepaid, a copy of the First Amended Complaint, upon the following:

Barbara Zemlock, Esquire  
Attorney for McTish, Kunkle & Associates  
Post and Schell, P.C.  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101-1601

s/ REGINA D. POSERINA, ESQUIRE

MAY 2, 2006