

## 4th Circuit: Absence of Reasonable Basis for Fraud Allegation Defeats Retaliation Claim

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By R. Mark Dare

An employee of a federal government contractor who takes action against his own employer for defrauding the government is shielded from retaliatory termination, but only if he has a reasonable basis for believing that a fraud was perpetrated, according to the 4th U.S. Circuit Court of Appeals.

Jason Mann worked for Heckler & Koch Defense Inc. (HKD), which supplies firearms to the U.S. military and law enforcement agencies. In response to a request for proposal (RFP) issued by the U.S. Secret Service, HKD submitted a bid to supply HKD's HK-416 rifle.

Mann's supervisor knew that HKD's rifles did not meet two of the Secret Service's specifications: They were not equipped with ambilevers, which facilitate use by left-handed shooters, or with two-stage match triggers. HKD noted when it submitted its bid that its rifles did not strictly meet the ambilever and two-stage match trigger requirements but explained that it would add these components if it won the bid. After the bidding closed, Mann's supervisor arranged to have after-market ambilevers delivered to a friend at the Secret Service. (HKD ultimately did not win the contract.)

Mann complained to HKD management about his supervisor's handling of the bid, pointing out that the HKD rifles did not meet the RFP specifications and that the personal delivery of ambilevers after the close of bidding was inappropriate. Mann also began his own investigation of whether his supervisor had violated federal contracting laws. When Mann's complaints reached the company's CEO, Mann was put on administrative leave, and an outside attorney was retained to ascertain and examine the facts. The outside counsel concluded that Mann's claims of illegality were unfounded. Mann filed suit in federal court asserting that HKD had retaliated against him. HKD subsequently terminated Mann, who then included the termination as another instance of alleged retaliation.

The trial court dismissed the case on pretrial motions, and the 4th Circuit affirmed. The fatal flaw in Mann's claims, the court said, was that they were based on the False Claims Act, which protects employees from termination for uncovering an employer's fraud on the U.S. government or for pursuing a reasonable belief that fraud has occurred. In this case, the court pointed out that there was no fraud—and it was not reasonable for Mann to believe there was fraud—because HKD did not conceal anything from the Secret Service. HKD had advised the Secret Service from the very beginning that its rifles did not fit the specifications precisely; Mann knew that HKD had given the Secret Service this information, so Mann knew that HKD had not committed fraud. Since Mann could not have had a reasonable belief that HKD was engaging in conduct that violated the False Claims Act, he was not protected from termination or other adverse action.

*Mann v. Heckler & Koch Defense Inc.*, 4th Cir., No. 09-1847 (Dec. 27, 2010).

**Professional Pointer:** The employer took a risk in terminating Mann shortly after he filed a suit against the company. This may be justified, but it is incendiary and should be done

only after consultation with employment counsel and consideration of the consequences. In this instance, the employer engaged outside counsel to conduct an investigation and perform a factual and legal analysis before terminating the employee.

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***Editor's Note: This article should not be construed as legal advice.***

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