

# Is Whistleblowing About Upcoding Protected Under the False Claims Act's Anti-Retaliation Provision?

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Yes. For example, in January 2019, Tennessee District Judge Pamela Reeves [held](#) that Thomas Forsythe, a former physical therapist at a National Health skilled nursing facility, sufficiently alleged False Claims Act protected conduct by averring that he opposed his employer upcoding (overcharging) Medicare for the provision of skilled nursing services.

## Forsythe's False Claims Act Whistleblower Retaliation Claim

While working at a National Health skilled nursing facility, Forsythe was instructed about new coding for group physical therapy, which would reduce revenue due to the lower reimbursement rate. Forsythe's supervisor, however, directed him not to use the group therapy code and instead input the code for one-on-one physical therapy sessions.

Recognizing that his supervisor was instructing him to upcode, Forsythe refused to continue using the old coding procedures. His supervisor admonished him for refusing to code the old way. Forsythe called National Health's anonymous hotline to report the upcoding. Shortly after National Health initiated an investigation, Forsythe's supervisor admonished him again for refusing to follow his order to upcode and warned him "S\_\_\_ rolls downhill, and I'm putting it on you." Forsythe reported the threat to the facility administrator.

Forsythe's co-workers treated him coldly and referred to him as a 'snitch.' In addition, National Health changed Forsythe's work schedule and denied his requests for time off. Forsythe was written up for failing to perform physical therapy on a patient who had refused therapy. National Health then fired him for "creating a hostile environment." Forsythe brought a claim under the whistleblower protections provisions of the False Claims Act.

## False Claims Act Protected Activity

National Health asserted that Forsythe did not sufficiently allege False Claims Act protected conduct because he failed to identify specific facts showing that any fraudulent codes were submitted to Medicare. Citing the Supreme Court decision *Graham Cty. Soil & Water Conservation Dist. v.*

*United States ex rel. Wilson*, Judge Reeves held that proving a concrete violation of the FCA is not required to state an FCA retaliation claim. Instead, Forsythe's actions are considered protected if they were undertaken to stop fraud on the government. In rejecting National Health's assertion that Forsythe merely raised concerns about regulatory violations, Judge Reeves noted that because of Forsythe's disclosures, National Health self-reported the upcoding and reimbursed Medicare. Moreover, Forsythe alleged that his supervisor admitted that the motivation for the upcoding was to increase the amount of reimbursements from Medicare, thereby suggesting that National Health was knowingly submitting false claims.

The court likewise found that Forsythe adequately pleaded the employer's knowledge of his whistleblowing. Forsythe alleged that he raised concerns to superiors and called the company's hotline. As discussed above, National Health undertook remedial action based on these disclosures. Accordingly, National Health had notice of Forsythe's protected conduct.

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