

## \$1.6 Million Fraud Award Overturned

Universities are breathing a sigh of relief after a federal appeals court last week threw out a lower court's award of \$1.6 million in a case brought by a former graduate student who had claimed that the University of Alabama, Birmingham (UAB), defrauded the government by wrongly taking credit for her work in grant applications. On 22 January, the appeals court firmly rejected charges brought by the plaintiff, nutritionist Pamela Berge, easing fears of a wave of similar lawsuits against universities.

Berge's legal tactics concerned UAB because she went beyond the government's internal system for appealing scientific fraud decisions and instead went directly to the courts. When a federal jury in Baltimore gave her an unprecedented victory 2 years ago, university groups hit the alarm button. UAB appealed, and other universities and academic lobby organizations filed amicus curiae briefs arguing that the lower court's ruling threatened to undermine schools' procedures for dealing with scientific misconduct and force them to pour scarce resources into defending against lawsuits.

The suit stemmed from Berge's work as a Cornell University doctoral student on cytomegalovirus (CMV), a cause of birth defects.

With approval from UAB pediatrician Sergio Stagno and his colleagues, Berge spent 6 months in 1987 using UAB's extensive CMV database to prepare a thesis on links between CMV and low birth weight. In 1990, Berge claims, she was shocked when UAB graduate student Karen Fowler presented a talk that seemed to echo Berge's own work, and she accused Fowler of plagiarism. UAB conducted two investigations but found no misconduct.

When the Department of Health and Human Services didn't take up the case, Berge filed a lawsuit in 1993 under the False Claims Act—which allows “qui tam” lawsuits by citizens who allege fraud in government contracts—claiming that UAB and four of its researchers made false claims in grant proposals to the National Institutes of Health (NIH), which funded the CMV work. In 1995, a federal court jury in Baltimore ruled in Berge's favor, and the court ordered UAB to pay \$1.65 million and the researchers, \$10,000, 30% of which went to Berge (*Science*, 26 May 1995, p. 1125).

The 4th Circuit Court of Appeals, however, was not persuaded by Berge's claims. It found that the alleged false statements “were not material to [NIH's] funding decisions, and

... indeed, are not even false.” The court also found that “once the surface is scratched, there is nothing to Berge's claim [of plagiarism by Fowler] except her complaint that Fowler did not give Berge's work the notice she felt she deserved.” The judges found Berge had overestimated the value of her contributions: “The hubris of any graduate student to think that such grants depend on the results of her work is beyond belief. That is not the way Big Science works.” One of Berge's attorneys, Alexander T. Bok of Boston, says the court “made a serious error” in ignoring evidence in the case, and that Berge will appeal.

University groups believe the court's scathing language will discourage other qui tam suits. “I'm hoping that this will stem the tide,” says Washington, D.C., attorney Barbara Mishkin, who represented UAB. The decision is narrower than some had hoped, however: The judges did not address whether the False Claims Act should be used to resolve scientific disputes. “It would have been nice to have a broader decision,” says Washington, D.C., attorney Robert Burgoyne, who filed an amicus brief for the American Association of Medical Colleges. But Mishkin says the decision sends the message that this type of dispute among co-authors “is not a federal case.”

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