

A New Circuit Split: FCA Protects Former Employees from Post-Employment Retaliation in the Sixth

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by Briana Al Taqatqa

Over a vigorous dissent last week, a panel of the U.S. Court of Appeals for the Sixth Circuit vacated a ruling from the U.S. District Court for the Eastern District of Michigan and held the False Claims Act's anti-retaliation provision protects former employees alleging post-termination retaliation. *United States ex rel. Felten v. William Beaumont Hosp.*, No. 20-1002, 2021 U.S. App. LEXIS 9387 (6th Cir. Mar. 31, 2021). The decision creates a circuit split with the Tenth Circuit. *See Potts v. Center for Excellence in Higher Education, Inc.*, 908 F.3d 610 (10th Cir. 2018) ("We conclude that the False Claims Act's anti-retaliation provision unambiguously excludes relief for retaliatory acts occurring after the employee has left employment.").

Relator David Felten alleged that William Beaumont Hospital violated the anti-retaliation provision of the FCA for retaliation during and after his employment with the hospital. Felten alleged the hospital retaliated against him by terminating his employment after he filed a qui tam complaint alleging the hospital paid illegal kickbacks to physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients. Felten amended his complaint and further alleged the hospital retaliated against him post-termination by undermining his employment applications to other institutions.

In granting the hospital's partial motion to dismiss the allegations in the relator's amended complaint, the district court held that the FCA's anti-retaliation provision does not extend to retaliatory conduct that occurs after termination. In so deciding, the district court relied on the statute's "terms and conditions of employment" qualifier and concluded the provision applies only to alleged retaliatory conduct that occurs during employment. The district court also certified the question of whether the FCA applies to allegations of post-employment retaliatory conduct for interlocutory appeal.

The Sixth Circuit granted the relator's petition for permission to appeal, and on interlocutory appeal considered the temporal meaning of the word "employee" in the context of the FCA's anti-retaliation provision. *See* 31 U.S.C. § 3730(h)(1). The court relied heavily on *Robinson v. Shell Oil*, 519 U.S. 337, 345 (1997), in which the Supreme

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Court analyzed the term “employees” in the context of § 704(a) of Title VII of the Civil Rights Act of 1964. The court applied the *Robinson* framework and concluded the term “employee” in the FCA is ambiguous. Specifically, the court reasoned that the FCA’s anti-retaliation provision has no temporal qualifier accompanying the term “employee,” that the dictionary definition of “employee” can include current and former employees, and that other aspects of the statutory framework—including the remedies and special damages provisions—support a reading that the FCA covers former employees.

Because the definition of “employee” is ambiguous, the court continued with an analysis of the broader context and primary purpose of the statute. Analogizing to *Robinson*, the Sixth Circuit reasoned that the purpose of the statute is to encourage the reporting of fraud and facilitate the government’s ability to stymie crime by protecting those who report it. The court determined: “If employers can simply threaten, harass, and discriminate against employees without repercussion as long as they fire them first, potential whistleblowers could be dissuaded from reporting fraud against the government.” *Felten*, 2021 U.S. App. LEXIS 9387 at *14. For this reason, the court held that the anti-retaliation provision of the FCA protects former employees from post-termination retaliation.

Judge Griffin dissented and voiced frustration at the majority’s creation of a circuit split and divergence from other district courts’ interpretations of the FCA’s anti-retaliation provision. In his dissent, Judge Griffin thoroughly analyzed the statute and considered the *Robinson* factors, but determined none were present. Finally, Judge Griffin concluded that nothing in the other sections of the FCA indicates the anti-retaliation provision extends to conduct against former employees. Rather, Judge Griffin concluded the statutory remedies are only available to former employees who experienced retaliation *during* their employment. Based on his analysis of precedent, specifically *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014), and the statute’s plain meaning, Judge Griffin determined the term “employee” in the FCA is unambiguous and applies only to current employees.

The majority decision represents a significant extension of employee—that is, current and former employee—protections under the FCA. As with any circuit split, this is an issue worth monitoring for further developments.

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