Proskauer

6th Circuit: FCA Whistleblower Protections Extend to Post-Employment Retaliation

Proskauer Whistleblower Defense Blog on **April 23, 2021**

On March 31, 2021, the Sixth Circuit addressed an issue of first impression in the circuit, holding that the False Claims Act's ("FCA") whistleblower protection provisions protect former employees from post-employment retaliation. *United States, ex rel. Felten v. William Beaumont Hospital*, No. 20-1002.

Background

Plaintiff was employed as a doctor at a Michigan hospital. He filed a qui tam action against the hospital alleging that it was paying kickbacks to various physicians and physicians' groups in exchange for patient referrals. Plaintiff also claimed that the hospital terminated his employment and then maligned him in retaliation for his reports of illegal conduct, thus undermining his employment applications to numerous other institutions.

The U.S. District Court for the Eastern District of Michigan dismissed Plaintiff's retaliation claims pertaining to conduct that occurred after his termination, holding that the FCA's anti-retaliation protections apply only to conduct occurring during the course of employment. Plaintiff requested that the dismissal order be amended to restore all of his claims, and the district court certified for interlocutory appeal the question of whether the FCA's anti-retaliation provision applies to allegations of post-employment retaliation. The Sixth Circuit granted interlocutory review.

Ruling

A split Sixth Circuit panel vacated the district court's dismissal order, holding that the FCA's anti-retaliation provision protects former employees from post-employment retaliation. Following the statutory interpretation framework laid out by the Supreme Court in *Robinson v. Shell Oil*, 519 U.S. 337 (1997)—in which the Court held that Title VII covers former employees—the court concluded that the term "employee," as used in the FCA, is ambiguous and could encompass both current and former employees.

Given the statute's ambiguity, the court examined the "broader context" and "primary purpose" of the FCA's anti-retaliation provision to determine whether it covers former employees. Explaining that the provision is meant to encourage the reporting of fraud against the government by protecting individuals who assist in the discovery and prosecution of such fraud, the court held that former employees can invoke the statute's protections. The court reasoned that potential whistleblowers would be dissuaded from reporting fraud if employers had the ability to retaliate against them without repercussion as long as they terminate the employee first. Notably, however, the court did not address whether blacklisting is a form of retaliatory conduct that is prohibited by the FCA, and it remanded the issue for the district court to decide.

Implications

This decision creates a circuit split, as the Sixth Circuit's holding contradicts the decisions of the Tenth Circuit and numerous federal district courts which have held that former employees are not covered by the FCA's anti-retaliation provision.

View Original

Related Professionals

- **Steven J. Pearlman**
  Partner
- **Julia F. Hollreiser**
  Associate