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Retaliation Against a Former Employee Can Give Rise to a False Claims Act Retaliation Claim

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On March 31, 2021, in *United States ex rel. Felten v. William Beaumont Hospital*, the Sixth Circuit Court of Appeals held that an employer's allegedly retaliatory conduct directed at an employee ***after*** the employee's termination can give rise to a False Claims Act (FCA) retaliation claim. In doing so, the Sixth Circuit embraced a minority position among courts nationwide and created a split with the Tenth Circuit, which held in 2018 that only retaliation against someone who is a current employee at the time can support an FCA claim.

The facts of *Felten* are relatively straightforward. Mr. Felten believed that his employer, a hospital, was violating the FCA and an analogous Michigan statute by paying kickbacks to physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients. Mr. Felten filed a *qui tam* action against his employer, and also asserted that his employer retaliated against him by threatening and marginalizing him for insisting on compliance with the law.

After the federal and state governments intervened and settled the *qui tam* claim, Mr. Felten amended his complaint to add new claims that he was terminated from his employment and, after termination, had been unable to obtain a comparable position because his now-former employer disparaged him to nearly 40 institutions in retaliation for his reports of unlawful conduct. The district court granted the hospital's motion to dismiss Mr. Felten's claims based on the alleged post-termination disparagement, finding that the FCA's anti-retaliation provision only applied to retaliatory conduct occurring during the employment relationship, and not to disparagement of an employee occurring after his employment has ended.

The Sixth Circuit reversed this ruling, finding that an "employee," for purposes of the FCA, includes both current and former employees of a government contractor. The court noted that the Tenth Circuit held otherwise in its 2018 *Potts v. Center for Excellence in Higher Education, Inc.*, 908 F.3d 610 (10th Cir. 2018) decision, but departed from its sister circuit's reasoning. Instead, the Sixth Circuit relied heavily on the Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), holding that under Title VII former employees may bring retaliation claims for actions occurring after the termination of their employment. The court explained that some of the retaliatory actions prohibited by the FCA – such as, threatening, harassing, and discriminating – can refer to actions against former employees, and that some "terms and conditions of employment" persist after an employee's termination. The court also explained that a contrary result would incentivize

employers to rush to fire employees who the employees believe may engage in FCA protected activity, undermining FCA's purpose.

Because of the circuit split the Sixth Circuit's decision created, this may be a decision to watch for future developments. Regardless of what may happen next, the *Felten* decision is a useful reminder that when an employee engages in potentially protected activity, whether under the FCA, other whistleblower statutes, or anti-discrimination laws, employers must act with care in personnel actions involving that employee. In some cases, employers may win the battle but lose the war, showing that the "concerns" the employee reported were non-issues, but facing retaliation liability because of how managers or others treated the employee after he or she made the reports. *Felten* emphasizes that this care must continue even after the employee departs the organization.

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