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The Blacklist: Post-Employment Retaliation Under theFalse Claims Act

Katelyn Deibler

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KATELYN DEIBLER*

ABSTRACT

Within employment and whistleblower statutes lie hundreds of anti-retaliation provisions that were enacted to encourage individuals to report discrimination, harassment, and fraud in the workplace. In creating these protections, legislatures recognized one basic principle: strong anti-retaliation protections are necessary to encourage employees to report wrongdoing. In pursuit of this goal, legislatures and courts overwhelmingly agree many anti-retaliation protections apply even after an employee leaves their employment. The False Claims Act is no different.

The False Claims Act is a vital government tool to combat fraud by empowering private citizens to bring civil actions on behalf of the United States against individuals and organizations defrauding government programs. This Article discusses the divide among district and circuit courts on whether the False Claims Act's anti-retaliation provision protects post-employment retaliation. The Article recognizes that to promote consistency between anti-retaliation jurisprudence, post-employment retaliation is necessarily encompassed in the False Claims Act's protections. Further, interpreting the False Claims Act to protect post-employment retaliation best achieves the Act's goal of fraud prevention by protecting whistleblowers from being branded with an indelible scarlet letter and blacklisted because of their whistleblowing.

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"Would I do it again? With what I uncovered, indeed I would do it again. Right is right, and wrong is wrong."

David L. Felten, M.D., Ph.D.[1]

INTRODUCTION

"If we [were] to Google[] you, what would we find?"[2] Once Debbi Potts heard this question during a job interview, she knew she would not receive an offer.[3] Google searching Debbi Potts reveals dozens of articles explaining how she exposed her prior employer, CollegeAmerica-Denver ("CollegeAmerica"), for lying to maintain its accreditation, fraudulently collecting millions of dollars in federal funding, and engaging in deceptive consumer practices.[4] Debbi's whistleblowing ultimately led to the revocation of CollegeAmerica's accreditation—but at a tremendous cost to her own professional life.[5] Even today, Debbi's professional reputation is marred with an indelible scarlet letter.[6] To employers, Debbi represents a perpetual risk—once a snitch, always a snitch.[7] Although she tried to do the "right thing," Debbi wound up punished alongside CollegeAmerica—her whistleblowing haunting her for nearly ten years.[8] However, Debbi's job search ended up

1. JC Reindl, *Beaumont Whistleblower Speaks Out; Doctors' Names Revealed*, DETROIT FREE PRESS (Aug. 3, 2018, 7:10 PM), https://www.freep.com/story/money/2018/08/03/beaumont-whistleblower-speaks-out-doctors-names-revealed/897733002/.

2. Telephone Interview with Debbi Potts, Plaintiff of Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610 (10th Cir. 2018) (Aug. 20, 2021) (notes on file with Ohio Northern University Law Review).

3. *Id.* Debbi's story is not unique. Many whistleblowers fear whistleblowing hurts their future employment prospects. Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666-67, 669, 671 (2018). Nearly two-thirds of former whistleblowers reported whistleblowing negatively impacted their future employment prospects. *Id.* at 669. Additionally, if subsequent employers learn of an employee's whistleblowing, the whistleblower may experience harassment or retaliation. *See, e.g.*, Cestra v. Mylan, Inc., No. 14-825, 2015 WL 2455420, at *12 (W.D. Pa. May 22, 2015) (holding that an employee who experiences retaliation by a subsequent employer for the employee's prior whistleblowing is protected by the False Claims Act's anti-retaliation provision).

4. David Halperin, *College Rebuked Today by Education Dept. is Suing Ex-Employee Who Complained to Accreditor*, HUFFINGTON POST (Aug. 11, 2016, 2:23 PM), https://www.huffpost.com/entry/college-rebuked-today-by_b_11456722.

5. Telephone Interview with Debbi Potts, *supra* note 2; *see also* Marissa Alayna Navarro, *How a College Accrediting Agency Failed to Protect Students From a Decade of Fraud*, CTR. FOR AM. PROGRESS (June 3, 2021), https://www.americanprogress.org/article/college-accrediting-agency-failed-protect-students-decade-fraud/ (detailing that the Department of Justice, Colorado's Attorney General, Consumer Financial Protection Bureau, and Colorado Division of Private Occupational Schools were all investigating CollegeAmerica before it lost its accreditation).

6. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER 51 (Penguin Books 2016) (1850) ("It [(the scarlet letter)] had the effect of a spell, taking her out of the ordinary relations with humanity, and inclosing her in a sphere by herself.").

7. Telephone Interview with Debbi Potts, *supra* note 2; *see also* Eisenstadt & Pacella, *supra* note 3, at 667 (recounting stories from whistleblowers, one of whom said "that . . . [the] label of 'whistleblower' is synonymous in society with that of 'troublemaker.'").

8. Telephone Interview with Debbi Potts, *supra* note 2.

being the least of her worries because CollegeAmerica relentlessly retaliated against her.[9] Following her resignation, Debbi and CollegeAmerica entered a contract in which she received $7,000 if she agreed to a non-disparagement clause and promised not to report CollegeAmerica to any governmental or regulatory agency.[10] After Debbi reported CollegeAmerica to their accreditor, CollegeAmerica dragged Debbi through nearly nine years of litigation over her breach of the contract, eventually resulting in a $1 damage verdict for CollegeAmerica.[11] As Debbi learned, retaliation can continue long past when the whistleblower leaves their employment.[12]

The False Claims Act[13] ("FCA") is a vital tool to combat fraud and abuse of public funding.[14] Enacted in 1863, the FCA allows private citizens, termed "relators," to bring *qui tam* actions on behalf of the United States.[15] Congress enacted the FCA to combat government fraud in a variety of contexts, including falsifying Medicaid reports,[16] submitting false claims for federal funding,[17] and falsifying certifications to receive federal benefits.[18] The FCA reflects Congress's recognition that employees are better positioned than external regulators to notice indicia of fraud.[19] After all, employees are often privy to information that would be nearly impossible to access from outside

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9. *Id.*

10. Complaint at 20-21, Potts v. Ctr. for Excellence in Higher Educ., Inc., 244 F. Supp. 3d 1138, 1139 (D. Colo. 2017).

11. Telephone Interview with Debbi Potts, *supra* note 2; Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 612 (10th Cir. 2018).

12. Telephone Interview with Debbi Potts, *supra* note 2; *see* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 430 (6th Cir. 2021) (deciding a case where a whistleblower was terminated and blacklisted in retaliation for his whistleblowing).

13. False Claims Act, Pub. L. No. 99-562, 100 Stat. 3153 (codified and amended at 31 U.S.C. §§ 3729-3733).

14. *See, e.g.*, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, U.S. DEP'T OF JUST. (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year [hereinafter *Justice Department Recovery 2021*] (stating that FCA recoveries since 1986 total over $70 billion); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000).

15. 31 U.S.C. § 3730(b)-(c); *see also Vt. Agency of Nat Res.*, 529 U.S. at 768 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *160) (explaining that the phrase "*qui tam*" stems from the Latin expression "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates to "who pursues this action on our Lord the King's behalf as well as his own").

16. *See, e.g.*, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 181-85 (2016) (hearing a *qui tam* action regarding a hospital billing services to Medicaid without staff having appropriate licensure).

17. *See, e.g.*, Hopper v. Solvay Pharm., Inc., 588 F.3d 1318, 1322 (11th Cir. 2009) (deciding a *qui tam* action involving off-label marketing practices by a prescription drug company that were billed to Medicaid).

18. *See, e.g.,* United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1168, 1176-78 (9th Cir. 2006) (determining a school violated the FCA by not abiding by Title IV and the Higher Education Act which forbid the school from paying incentive payments to boost student enrollment).

19. *See* S. REP. NO. 99-345, at 11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

a company or organization.[20] Further, to incentivize more relators to report fraud, Congress amended the FCA in 1986 to add anti-retaliation protections for relators.[21]

Since the anti-retaliation provision's creation, courts have struggled to determine the breadth of the FCA's anti-retaliation protections.[22] In 2018, the United States Court of Appeals for the Tenth Circuit heard Debbi's retaliation claim in *Potts v. Center for Excellence in Higher Education, Inc.*[23] and determined the word "employee" in the FCA's anti-retaliation provision unambiguously limited the statute's protections to retaliatory acts that occur only during employment.[24] However in 2021, the United States Court of Appeals for the Sixth Circuit in *United States ex rel. Felten v. William Beaumont Hospital*[25] interpreted the FCA's anti-retaliation provision to include former employees who experience post-employment retaliation.[26]

Part I of this Article provides a brief background on the FCA and its anti-retaliation provision.[27] Part I continues by exploring the current circuit split between *Potts* and *Felten* and concludes by examining how other federal anti-retaliation provisions answer this interpretive question.[28] Next, Part II argues that interpreting the FCA to protect post-employment retaliation is more consistent with the FCA's statutory language and interpretations of similar language in other whistleblower protection laws.[29] Part II further explains how this interpretation aligns with anti-retaliation case law that supports interpreting anti-retaliation provisions broadly and also coherently executes Congress's stated goals in the FCA's legislative history.[30] Part III addresses potential criticisms of this interpretation and explains why they are ultimately unfounded.[31] This Article concludes that including post-employment retaliation protections best achieves the FCA's goal of fraud prevention by protecting relators from a lifetime of retaliation and promotes consistency within anti-retaliation jurisprudence.[32]

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20. *See id.* at 4 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

21. 31 U.S.C. § 3730(h)(2); S. REP. NO. 99-345, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

22. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 430 (6th Cir. 2021); Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 181 (2016); *Hopper*, 588 F.3d at 1331; *Univ. of Phoenix*, 461 F.3d at 1170.

23. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 613 (10th Cir. 2018).

24. *Id.* at 618.

25. *See Felten*, 993 F.3d at 430.

26. *See id.* at 435.

27. *See* discussion *infra* Part I.

28. *See* discussion *infra* Parts I.B-C.

29. *See* discussion *infra* Part II.

30. *See* discussion *infra* Part II.C.

31. *See* discussion *infra* Part III.

32. *See infra* Conclusion.

I. BACKGROUND

This Part presents a brief history of whistleblowing, specifically focusing on the history and development of the FCA.[33] Further, this Part discusses the development, statutory language, and case law of other similar federal statutes that include anti-retaliation protections and serve similar goals as the FCA.[34]

A. Whistleblowing in the United States

In 1777, ten sailors of the Continental Navy became the earliest whistleblowers in the new nation.[35] After witnessing the Commander in Chief of the Continental Navy, Esek Hopkins, torture British prisoners of war and consistently defy Congressional orders, the sailors petitioned the Continental Congress for his removal.[36] They wrote, "I know him [(Esek Hopkins)] to be a man of no principles, and quite unfit for the important trust reposed in him. . . . [H]e [s]ets a very wicked and detestable example both to his Officers and Men."[37] After the Continental Congress dismissed Hopkins from his role, Hopkins filed—and won—a criminal libel suit against the ten whistleblowers.[38] Two whistleblowers appealed to the Continental Congress, which reversed their convictions.[39] The Continental Congress also covered the legal fees for the whistleblowers[40] and passed the first known whistleblower protection law.[41] Since 1777, Congress has repeatedly adopted new legislation to protect whistleblowers in a variety of contexts, including environmental threats,[42] public health concerns,[43] financial or accounting

33. *See* discussion *infra* Parts I.A-B.

34. *See* discussion *infra* Parts I.C-D.

35. *See generally* Christopher Klein, *US Whistleblowers First Got Government Protection in 1777*, HISTORY (Sept. 26, 2019), https://www.history.com/news/whistleblowers-law-founding-fathers.

36. *See generally* Allison Stanger, *America Needs Whistle-Blowers Because of People Like This*, ATLANTIC (Sept. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/09/what-first-whistle-blowers-taught-america/598738/.

37. AMERICAN IRISH HISTORICAL SOCIETY, 21 THE JOURNAL OF THE AMERICAN IRISH HISTORICAL SOCIETY 226 (John G. Coyle et al. eds., 1922).

38. *See generally* Stanger, *supra* note 36.

39. *See generally id.*

40. Klein, *supra* note 35.

41. *Id.*; S. RES. 202, 113th Cong. (2012) (enacted) (noting when Congress passed the Whistleblower Protection Act of 1778 on July 30, 1778, it determined "it is the duty of all persons in the service of the United States . . . to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors").

42. *E.g.*, Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 520, 91 Stat. 503-04 (codified as amended at 30 U.S.C. § 1223) (encouraging whistleblowers to report improper maintenance of coal mines).

43. *E.g.*, Safe Drinking Water Act of 1974, Pub. L. No. 103-437, 108 Stat. 4591 (codified as amended at 42 U.S.C. § 300j-9) (creating whistleblowing protections for employees to report violations of the act's drinking water standards).

misreporting,[44] and fraud prevention.[45] At the state level, many legislatures enacted similar—and in some cases identical—state-based whistleblower protections.[46]

B. The False Claims Act

Congress first enacted the FCA to address defense contractor fraud during the Civil War.[47] After Congress received reports of the army purchasing the same mules repeatedly, using flimsy boots made of cardboard boxes, and seeing rotten ships being advertised as brand new, Congress passed the FCA, and President Abraham Lincoln signed it into law on March 2, 1863.[48] The FCA, in part, makes it illegal to "knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment . . . [to] the United States Government."[49] To file a *qui tam* action, Relators file a civil complaint under seal while serving a copy of the complaint and all material evidence to the Attorney General and the relevant United States Attorney's Office.[50] After a complaint is filed, the Department of Justice ("DOJ") has sixty days to decide to intervene and prosecute the case.[51] If the government declines to intervene, a relator may generally prosecute the case independently.[52] To encourage relators to file under the FCA, the Act

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44. *E.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805, 116 Stat. 802 (codified as amended at 18 U.S.C. § 1514(A)) (establishing comprehensive auditing and financial regulations for publicly traded companies and incentivizing whistleblowers to report violations).

45. *E.g.*, 31 U.S.C. § 3730(h) (protecting relators who report potential false or fraudulent claims submitted to the United States government).

46. *E.g.*, District of Columbia False Claims Act, D.C. CODE § 2-381.02 (2013) (creating a local *qui tam* cause of action in the District of Columbia, modeled after the FCA); Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 52 (2013).

47. S. REP. NO. 99-345, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273; *see also* United States v. McNinch, 356 U.S. 595, 599 (1958) ("The False Claims Act was originally adopted following a series of sensational congressional investigations . . . [which] painted a sordid picture of how the United States had been billed for nonexistent or worthless goods . . . . Congress wanted to stop this plundering of the public treasury.").

48. James B. Helmer Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1264-66 (2013) (explaining that many senators expressed disgust towards the fraudsters—a sentiment that fueled the FCA's enactment); *see also* CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Davis) ("I do not think that there is any class of culprits who deserve more certain and speedy punishment than many of the classes of persons . . . who have failed to perform their duties in execution of contracts made with the Government.").

49. 31 U.S.C. § 3729(a)(1). Most FCA cases relate to fraudulent billing of Medicare and Medicaid programs. *See, e.g.*, Robert T. Rhoad & David Robbins, *Fraud, Debarment, and Suspension—Part I: Fraud*, 1 GOV'T CONT. YEAR REV. BRIEFS 25 (2019) (noting that health care fraud accounted for eighty-six percent of *qui tam* recoveries in 2018).

50. 31 U.S.C. § 3730(b)(2).

51. *Id.* The government usually extends the seal expiration deadline. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 498 F. Supp. 2d 389, 392 (D. Mass. 2007) (showing a *qui tam* case remained under seal for nine years before the government intervened in the prosecution).

52. 31 U.S.C. § 3730(b)(4)(B).

provides financial incentives to relators whenever a *qui tam* prosecution or settlement is successful.[53]

1. Strengthening the False Claims Act

In 1981, the Government Accountability Office issued a report that found fraud against the government was widespread due to weak internal controls that "were either inadequate, not followed, or nonexistent."[54] Also, because of additional reports of defense contractor fraud during the Cold War[55] and the 1943 amendments, which significantly weakened the FCA's effectiveness,[56] Congress proposed substantial reforms to the FCA.[57] The 1986 FCA amendments increased the penalties for each violation[58] and created anti-retaliation protection for relators.[59] The anti-retaliation provision was a direct response to the issues demonstrated in a survey of federal employees which showed sixty-nine percent (69%) of the surveyed federal employees believed they knew of fraudulent reporting or billing to the government, but would not report it.[60] When the survey respondents listed why they would not report suspected fraud, thirty-seven percent (37%) cited

53. *Compare id.* § 3730(d)(1) (explaining that, if the government does intervene, relators may receive between fifteen and twenty-five percent of the award), *with id.* § 3730(d)(2) (granting relators that pursue *qui tam* actions without government intervention between twenty-five and thirty percent of the award). Many boast that the FCA's financial incentives strengthen the Act's protections. *See* Bishara et al., *supra* note 46, at 93.

54. 1 UNITED STATES GENERAL ACCOUNTING OFFICE, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? i-ii (1981).

55. Nicholas J. Goldin, Note, *Wrongly "Identified": Why an Actual Knowledge Standard Should Govern Health Care Providers' False Claims Act Obligations to Report and Return Medicare and Medicaid Overpayments*, 94 WASH. U. L. REV. 1295, 1308 (discussing how Cold War military spending led to the increasing fraud against the government); *see also* 131 CONG. REC. 17818 (1985) (expressing concern with contractors selling $400 hammers to the military); Fred Hiatt, *Now, the $600 Toilet Seat*, WASH. POST (Feb. 5, 1985), https://www.washingtonpost.com/archive/politics/1985/02/05/now-the-600-toilet-seat/917c98b4-c2fc-40a5-808b-87ff4e5884c8/ (explaining that government contractors charged the Navy $600 per toilet seat).

56. Helmer, *supra* note 48, at 1270 (noting that the 1943 FCA amendments burdened relators by reducing the financial incentives and barred relators from reporting claims if the government had any prior knowledge of the fraud); *see also* S. REP. NO. 110-507, at 3 (2008) (stating that because of the 1943 Amendments, only six to ten *qui tam* suits were filed annually between 1943 and 1986).

57. *See* H.R. REP. NO. 99-660, at 17 (1986) (noting the FCA's 1985 protections were outdated because the Act was largely unchanged for 123 years).

58. *See* Helmer, *supra* note 48, at 1271, 1273 (explaining that before 1986, FCA rewards for relators were no more than ten percent of the recovery; however, following the 1986 amendments, relators received between fifteen and thirty percent).

59. *Id.* at 1274.

60. *See* S. REP. NO. 99-345, at 4 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

fear of retaliation.[61] By creating anti-retaliation protections, Congress hoped to encourage more relators to file *qui tam* actions.[62]

After a series of court decisions narrowed the FCA's scope,[63] Congress amended the Act again in 2009.[64] In part, the 2009 amendment increased the statute of limitations for relators and clarified that the anti-retaliation protections applied to contractors, subcontractors, and agents.[65] Today, the FCA is a highly effective fraud-fighting tool for the federal government and has successfully recovered over $70 billion since 1986.[66] Senator Charles Grassley, who introduced the 1986 amendments and co-sponsored the 2009 amendments, reaffirmed the importance of protecting whistleblowers:

> Today, 242 years . . . [after the FCA was passed], we find ourselves in the midst of another crisis: the Covid-19 pandemic. And today, Congress and the American people depend on whistleblowers to tell us about wrongdoing, just as much as our founding fathers did. In fact we depend on them more. Because as the government gets bigger, the potential for fraud and abuse [at the same time] gets bigger. So does the potential for cruel retaliation against the nation's brave truth-tellers.[67]

In 2020, relators filed over 600 *qui tam* actions under the FCA and recoveries under the Act continue to rise.[68] Additionally, the Office of Inspector General estimates approximately $80 billion of the stimulus

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61. *See id.* at 4-5 (recounting that one government worker testified that "there is a great disincentive [to report fraud] due to employer harassment and retaliation [because] . . . most individuals just simply cannot and will not put their head on the chopping block").

62. *Id.* at 8.

63. *See* S. REP. NO. 110-507, at 8-9 (2008) ("[A] number of courts—including the Supreme Court—have interpreted provisions of the FCA contrary to Congress's intent in passing the 1986 Amendments."); *see also* Allison Engine Co., Inc. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008) (requiring relators to show a defendant "intended 'to defraud the government'").

64. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (codified as amended at 31 U.S.C. §§ 3729-3733).

65. 31 U.S.C. § 3730(h)(1); *id.* § 3731(b)(1)-(1).

66. *See Justice Department Recovery 2021*, *supra* note 14.

67. Senator Chuck Grassley, Speech on National Whistleblower Appreciation Day (July 30, 2020) (transcript available at https://www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day); Senator Chuck Grassley, Prepared Statement of Senator Chuck Grassley of Iowa (Apr. 20, 2009) (transcript available at https://www.grassley.senate.gov/news/news-releases/false-claims-act-and-fraud-enforcement).

68. *See Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020*, U.S. DEP'T OF JUST. (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [hereinafter *Justice Department Recovery 2020*]; James Zelenay Jr. et al., *COVID Relief Will Spur False Claims Act Enforcement*, L.A. & S.F. DAILY J. (Mar. 31, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/04/Zelenay-Hanna-Twomey-COVID-relief-will-spur-False-Claims-Act-enforcement-Daily-Journal-03-31-2021.pdf (reporting that because of the nearly five trillion dollars of federal COVID-19 relief packages, 2020 saw an unprecedented 900 *qui tam* claims).

legislation passed during the coronavirus pandemic was fraudulently obtained, making the FCA a necessary weapon for recouping these public funds.[69]

2. The FCA's Anti-Retaliation Provision and the Current Circuit Split

Because Congress recognized that few individuals would report fraud if they feared retaliation,[70] Congress enacted section 3730(h) of the FCA:

> Any employee, contractor, or agent shall be entitled to all relief necessary . . . if [they are] . . . discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done . . . in furtherance of an action under [the FCA]. . . . Relief . . . shall include [in part] reinstatement with the same seniority status.[71]

Since 2000, district courts have been divided over whether the word "employee" in the FCA's anti-retaliation provision protects only retaliatory acts that occur during employment or if it protects former employees who experience post-employment retaliation.[72] In 2021, this divide ripened into a circuit split between the Sixth and the Tenth Circuit Courts of Appeals.[73] The United States Supreme Court denied a petition for certiorari to hear the issue in January 2022.[74]

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69. Shauna Itri, *Using the False Claims Act to Combat COVID-19 Fraud*, REUTERS (Apr. 5, 2022), https://www.reuters.com/legal/transactional/using-false-claims-act-combat-covid-19-fraud-2022-04-05/. On August 5, 2022, Congress enacted the PPP and Bank Fraud Enforcement Harmonization Act of 2022. *Bill Signed: H.R. 7334 and H.R. 7352*, WHITE HOUSE (Aug. 5, 2022), https://www.whitehouse.gov/briefing-room/legislation/2022/08/05/bills-signed-h-r-7334-and-h-r-7352/. The law increases the FCA's statute of limitations to bring *qui tam* actions for ten years if the alleged fraud occurred through the Paycheck Protection Program. *Id.*

70. S. REP. NO. 99-345, at 4-5 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269-70 (1986).

71. 31 U.S.C. § 3730(h)(1)-(2).

72. *Compare* Bechtel v. Joseph Med. Ctr., No. MJG-10-3381, 2012 WL 1476079, at *9 (D. Md. Apr. 26, 2012) (finding interference with subsequent employment is not actionable under the FCA's anti-retaliation provision because it occurs post-employment), *with* Fitzsimmons v. Cardiology Assocs. of Fredericksburg, Ltd., No. 3:15cv72, 2015 WL 4937461, at *5 (E.D. Va. Aug. 18, 2015) (allowing a claim of post-employment retaliation under the FCA to proceed past a motion to dismiss for failure to state a claim).

73. *Compare* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 (10th Cir. 2018) (foreclosing recovery for post-employment retaliation), *with* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021) (determining that post-employment retaliation is protected under the FCA).

74. Petition for Writ of Certiorari, *Felten*, 993 F.3d at 428 (No. 21-443) (certiorari denied).

a. Potts v. Center for Excellence in Higher Education, Inc.

In *Potts v. Center for Excellence in Higher Education, Inc.*, the Court of Appeals for the Tenth Circuit held the FCA's anti-retaliation provision only covers retaliatory acts that occur during employment.[75] The plaintiff, Debbi Potts, worked as a Campus Director for the defendant, CollegeAmerica.[76] After working there for three years, Potts resigned, stating that CollegeAmerica's unethical business practices and fraud motivated her resignation.[77] Potts then entered into an agreement with CollegeAmerica where she would receive $7,000 if CollegeAmerica supported her unemployment claim.[78] In return, Potts signed a non-disparagement agreement and agreed not to report it to any regulatory or governmental agency.[79] A few months later, Potts sent an email to a former co-worker criticizing CollegeAmerica.[80] Following her email, CollegeAmerica filed a lawsuit seeking reimbursement of the $7,000.[81] In response, Potts filed a complaint to CollegeAmerica's accreditor, reporting CollegeAmerica for violating accreditation standards and detailing other unethical business practices.[82] CollegeAmerica amended its complaint to include Potts' report to support the breach of contract claim.[83] Potts then filed a separate lawsuit against CollegeAmerica, alleging that the amended complaint was retaliation because her reports to CollegeAmerica's accreditors were protected activity under the FCA.[84] The District Court for the District of Colorado granted CollegeAmerica's motion to dismiss on the grounds that the FCA's anti-retaliation provision uses the word "employee" which only means "'[a] person who *works* for an employer,' i.e., a current employee."[85] Therefore, the court held CollegeAmerica's conduct was not actionable because it occurred after Potts' resignation.[86]

On appeal, the Court of Appeals for the Tenth Circuit first looked at the plain language of the FCA and determined that the Act's use of "employee" unambiguously only protects current employees.[87] Second, the court looked

75. *Potts*, 908 F.3d at 618.
76. *Id.* at 612.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Potts,* 908 F.3d at 612.
81. *Id.*
82. *Id.*
83. *Id.*
84. Potts v. Ctr. for Excellence in Higher Educ., Inc., 244 F. Supp. 3d 1138, 1140 (D. Colo. 2017), *aff'd*, 908 F.3d 610 (10th Cir. 2018).
85. *Id.* at 1141, 1145 (emphasis added) (citing *Employee*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/61374).
86. *Id.* at 1144.
87. *Potts,* 908 F.3d at 613-14.

to the statute's list of six qualifying retaliatory acts: "discharge[], demot[ion], suspen[sion], threat[s], harass[ment], or . . . discriminat[ion] . . . in the terms and conditions of employment."[88] After applying the associated-words canon,[89] the court held that because someone must be currently employed to be "discharged, demoted, suspended, . . . or . . . discriminated against in the terms and conditions of employment,"[90] the remaining retaliatory acts of threats and harassment were also limited to protect only current employees.[91] Third, the court applied the *ejusdem generis* canon.[92] Because the statute's provision also states "in the terms and conditions of employment," the court determined this further limited the provision's protections to retaliatory actions occurring only during employment.[93]

The court rejected Potts' argument that the remedial provision's inclusion of "reinstatement" justified interpreting the statute to include former employees who experienced post-employment retaliation.[94] Additionally, although the court acknowledged that the Sarbanes-Oxley Act of 2002's[95] ("SOX") anti-retaliation provision "parallels" the FCA[96] and defines "[e]mployee" as an individual *presently or formerly working for* a covered person,"[97] the court rejected the parallels between the two statutes.[98] The court explained that it was unclear "whether this regulation means to protect former employees whose whistleblowing occurs solely after employment" because "this regulation may simply recognize . . . that a former employee could sue for retaliatory discrimination occurring during [their] employment."[99] Accordingly, because CollegeAmerica did not retaliate during Potts' employment, she had no recourse under the FCA's anti-retaliation provision.[100]

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88. *Id.* at 613 (quoting 31 U.S.C. § 3730(h)(1)-(2)).

89. *See* Massachusetts v. Morash, 490 U.S. 107, 114 (1989) (quoting Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 468 U.S. 207, 218 (1984) (O'Connor, J., dissenting)) (stating that the *ejusdem generis* canon means "words grouped in a list should be given a related meaning").

90. *See* § 3730(h)(2).

91. *Potts*, 908 F.3d at 614-15.

92. *Id.* at 615; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012) ("When the initial terms [in a list] all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage.").

93. *Potts*, 908 F.3d at 616.

94. *Id.*; *accord* Robinson v. Shell Oil Co., 519 U.S. 337, 342 (1997) ("[B]ecause one does not 'reinstat[e]' current employees, that language necessarily refers to former employees.") (second alteration in original).

95. 18 U.S.C. § 1514(A).

96. *Potts*, 908 F.3d at 616-17 (citing 18 U.S.C. § 1514(A)).

97. *Id.* (citing 29 C.F.R. § 1980.101(g)) (emphasis in original).

98. *Id.* at 617.

99. *Id.*

100. *Id.* at 618.

The District Court of Maryland ruled similarly in *Bechtel v. St. Joseph Medical Center, Inc.*[101] In that case, Dr. Peter Horneffer, a physician at St. Joseph Medical Center, repeatedly objected to the hospital's practice of accepting unnecessary patient referrals.[102] These referrals increased the number of Medicare and Medicaid reimbursements the hospital received.[103] Due to Dr. Horneffer's protests, hospital administration told Bechtel, a physician assistant working at the hospital, that management planned to fire Dr. Horneffer.[104] Bechtel immediately told Dr. Horneffer, and he filed a *qui tam* action against the hospital.[105] The hospital subsequently fired Bechtel.[106] After Bechtel's employment ended, the hospital's administration continued to harass Bechtel, who was attending medical school at the time.[107] The administration claimed that Bechtel negligently left a wire in a former patient and reported her to the Board of Physicians in Maryland, which nearly resulted in the revocation of her license.[108]

When Bechtel sued over the hospital's post-employment retaliation, the court held that the FCA's anti-retaliation provision's language of "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" foreclosed the possibility of post-employment retaliation protection.[109] The court dismissed Bechtel's lawsuit for failing to state a claim.[110] Like *Potts* and *Bechtel*, other courts have barred post-employment recovery under the FCA including lawsuits over blacklisting,[111] breach of contract,[112] threats of

101. Bechtel v. St. Joseph Med. Ctr., No. MJG-10-3381, 2012 WL 1476079, at *28 (D. Md. Apr. 26, 2012).

102. *Id.* at *1-2.

103. *Id.* at *4.

104. *Id.* at *1-3.

105. *Id.* at *3, *10 (recognizing the hospital settled Horneffer's *qui tam* claims with the DOJ for $22 million dollars).

106. *Bechtel,* 2012 WL 1476079, at *7.

107. *Id.* at *5, *11-12.

108. *Id.* at *6-8.

109. *Id.* at *28.

110. *Id.* at *29-30.

111. Taul *ex rel.* United States v. Nagel Enters., Inc., No. 2:14-CV-0061-VEH, 2017 WL 4956422, at *10-11 (N.D. Ala. Nov. 1, 2017); United States *ex rel.* Davis v. Lockheed Martin Corp., No. 4:09-CV-645-Y, 2010 WL 4607411, at *24 (N.D. Tex. Nov. 15, 2010); United States *ex rel.* Wright v. Cleo Wallace Ctr., 132 F. Supp. 2d 913, 928 (D. Colo. 2000); *cf.* Knight v. Standard Chartered Bank, 531 F. Supp. 3d. 755, 769 (S.D.N.Y. Mar. 31, 2021) (dismissing a case for lack of personal jurisdiction because the defendant's only connection to New York was post-employment retaliation, which was not covered by the court's interpretation of the FCA).

112. *E.g.*, Master v. LHC Grp. Inc., No. 07-1117, 2013 WL 786357, at *3, *23-24 (W.D. La. Mar. 1, 2013) (stating that a defendant's breach of contract lawsuit was not unlawful retaliation because it occurred post-employment).

future litigation,[113] defamatory statements,[114] interference with subsequent employment,[115] and withholding wages.[116]

b. United States *ex rel.* Felten v. William Beaumont Hospital

In *United States ex rel. Felten v. William Beaumont Hospital*, the Court of Appeals for the Sixth Circuit interpreted the FCA's anti-retaliation provision to include protection from post-employment retaliation.[117] Dr. David Felten filed a *qui tam* action against William Beaumont Hospital alleging it was running a fraudulent scheme for Medicare, Medicaid, and TRICARE patient referrals.[118] After filing the *qui tam* action, the hospital terminated Dr. Felten from his position.[119] Dr. Felten then alleged the hospital continued to retaliate against him by blacklisting him and interfering with nearly forty job applications to other hospitals.[120] The District Court for the Eastern District of Michigan determined the FCA's anti-retaliation provision did not include protection from post-employment retaliation and granted the hospital's partial motion to dismiss.[121]

On appeal, the Court of Appeals for the Sixth Circuit acknowledged the *Potts* decision but declined to follow its interpretation.[122] The court determined the FCA's anti-retaliation provision's use of the term "employee" was ambiguous for three reasons.[123] First, because three of the listed retaliatory acts (discharge, demotion, and suspension) must occur while currently employed, but the remaining three (threats, harassment, and discrimination) could occur at any time, the court refused to apply the *ejusdem generis* canon.[124] Since half of the statute's words could apply to both current and former employees, the court rejected the Tenth Circuit's determination that the provision was temporally limited and protected only

113. Poffinbarger v. Priority Health, No. 1:11-CV-993, 2011 WL 6180464, at *2-3 (W.D. Mich. Dec. 31, 2011).

114. United States *ex rel.* Head v. Kane Co., 798 F. Supp. 2d 186, 207-08 (D.D.C. 2011).

115. United States *ex rel.* Complin v. N.C. Baptist Hosp., No. 1:09CV420, 2019 WL 430925, at *35 (M.D.N.C. Feb. 4, 2019), *aff'd per curiam on other grounds*, 818 Fed. App'x 179 (4th Cir. 2020); Lehoux v. Pratt & Whitney, No. Civ. 05-210-P-S, 2006 WL 346399, at *5-6 (D. Me. Feb. 8, 2006).

116. Weslowski v. Zugibe, 14 F. Supp. 3d 295, 305, 311 (S.D.N.Y. 2014).

117. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 434-35 (6th Cir. 2021).

118. *Id.* at 430 (recognizing Dr. Felten's whistleblowing led to a $84,500,000 *qui tam* settlement); Brief of Appellant David L. Felten at 3, *Felten*, 993 F.3d at 428 (No. 20-1002).

119. *Felten*, 993 F.3d at 430.

120. *Id.*; *see also* Reindl, *supra* note 1 (reporting that prior to filing his *qui tam* action, Felten was a world-renowned neuroscientist, and he described that being blacklisted "was financially ruinous and put a huge stress on . . . [his] family and . . . [his] personal health").

121. United States *ex rel.* Felten v. William Beaumont Hosp., Nos. 2:10-cv-13440, 2:11-cv-12117, 2:11-cv-12515, 2:11-cv-14312, 2019 WL 2743699, at *12-13 (E.D. Mich. July 1, 2019).

122. *Felten*, 993 F.3d at 431.

123. *Id.* at 432 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 345 (1997)).

124. *Id.*

current employees from retaliation.[125] Second, the court declined to hold that the provision's inclusion of "in the terms and conditions of employment" limited the entire provision to actions that occur only during employment.[126] The court recognized that some terms and conditions of employment may extend past employment, including covenants not to compete, non-solicitation provisions, and severance pay.[127] Third, because one remedy under the FCA's anti-retaliation provision is "reinstatement," the court determined this remedy implied Congress's intent to include protection for former employees who experience post-employment retaliation.[128] The court recognized that although reinstatement is often used to remedy retaliatory discharge, it "does not change the fact that it could be a remedy for post-termination retaliation as well."[129]

Since the statute was ambiguous, the court looked to the Supreme Court's decision in *Robinson v. Shell Oil Co.*,[130] which interpreted Title VII of the Civil Rights Act of 1964's[131] ("Title VII") anti-retaliation provision to include post-employment retaliation, as persuasive guidance.[132] The Sixth Circuit determined that *Robinson* "provides guidelines for determining when a statute's meaning is not plain in the context of protections for employees and what to do in the face of [that] ambiguity."[133] *Robinson*'s interpretive guidelines include looking at the statute's broader purpose and construing the statute's protections consistently with that purpose.[134] When applying this principle, the Sixth Circuit looked to the FCA's purpose to resolve the ambiguity.[135] In doing so, the court recognized that "[i]f 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," which would undermine the FCA's purpose.[136] Accordingly, the court held that the FCA's anti-retaliation

125. *Id.*
126. *Id.*
127. *Felten*, 933 F.3d at 432-33 (citing Lantech.com v. Yarbrough, 247 F. App'x. 769, 771-72 (6th Cir. 2007); Hall v. Edgewood Partners Ins. Ctr., Inc., 878 F.3d 524, 528-29 (6th Cir. 2017); Equal Emp. Opportunity Comm'n v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088-89 (5th Cir. 1987)).
128. *Id.* at 433 ("A plaintiff, by definition, must be a former employee; after all, only someone who has lost a job can be reinstated.").
129. *Id.* at 434.
130. Robinson v. Shell Oil Co., 519 U.S. 337, 345 (1997).
131. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 257 (codified as amended at 42 U.S.C. § 2000e-3).
132. *Felten*, 933 F.3d at 434 (citing *Robinson*, 519 U.S. at 345).
133. *Id.* at 431.
134. *See Robinson*, 519 U.S. at 345 ("Finding that the term 'employees' in § 704(a) is ambiguous, we are left to resolve that ambiguity. The broader context provided by other sections of the statute provides considerable assistance in this regard.").
135. *Felten*, 993 F.3d at 435 (citing *Robinson*, 519 U.S. at 345-46).
136. *Id.*

provision includes protection for former employees who experience post-employment retaliation.[137]

Judge Richard Allen Griffin dissented from the *Felten* majority.[138] Judge Griffin's dissent began by explaining that the dictionary definition of "employee" is "[s]omeone who *works* in the service of another person (the employer) . . . under which the employer has the right to control the details of work performance."[139] Judge Griffin continued by explaining that *Robinson* does not provide "special rules" for how the word "employee" should be interpreted; instead, he argued the majority should have focused on the plain text of the statute.[140] Judge Griffin concluded by cautioning the majority from "rewrite[ing]" the FCA and notes "[t]hat task should be left to Congress."[141]

The *Felten* majority decision aligns with dicta from the Sixth Circuit's decision in *Vander Boegh v. EnergySolutions, Inc.*[142] In *Vander Boegh*, the court held the FCA's anti-retaliation provision does not protect applicants for employment because there was never an employer-employee relationship.[143] However, the court noted that the FCA's legislative history "suggests that [the term] 'employee' extends to former employees."[144] Similar to *Vander Boegh* and *Felten*, various district courts have held post-employment retaliation was protected in cases involving blacklisting or interference with subsequent employment,[145] failure to rehire a former employee,[146] withholding stocks and assets obtained during employment,[147] and frivolous lawsuits against a relator.[148]

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137. *Id.*

138. *Id.* at 436 (Griffin, J., dissenting).

139. *Id.* (emphasis added) (quoting *Employee*, BLACK'S LAW DICTIONARY (10th ed. 2014)) (citing Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1060 (6th Cir. 2014)).

140. *Felten*, 993 F.3d at 439-40.

141. *Id.* at 440-41 ("After the majority . . . [found] ambiguity, it determine[d] which result the FCA should achieve. In doing so, it engages in unauthorized, unnecessary purposivism.").

142. *Vander Boegh*, 772 F.3d at 1056.

143. *Id.* at 1061.

144. *Id.* at 1063 (citing S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299).

145. United States *ex rel.* Feaster v. Dopps Chiropractic Clinic, LLC, No. 13-1453-EFM-KGG, 2016 WL 3855560, at *14, *24 (D. Kan. July 15, 2016); Ortino v. Sch. Bd. of Collier Cnty., No. 2:14-cv-693-FTM-29-CM, 2015 WL 1579460, at *6, *8 (M.D. Fla. Apr. 9, 2015) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341-46 (1997)).

146. Haka v. Lincoln County, 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008) (citing *Robinson*, 519 U.S. at 337).

147. Fitzsimmons v. Cardiology Assocs. of Fredericksburg, Ltd., No. 3:15cv72, 2015 WL 4937461, at *16, *21 (E.D. Va. Aug. 18, 2015).

148. *See* Smith v. Athena Constr. Grp., Inc., No. 18-cv-2080, 2022 WL 888188, at *18-19 (D.D.C. Mar. 25, 2022) (determining the court's reasoning in *Felten* is more persuasive and denying the defendant's motion to dismiss); Tang v. Vaxin, Inc., No. 2:13-CV-401-SLB, 2015 WL 1487063, at *5 (N.D. Ala. Mar. 15, 2015) ("One could characterize a frivolous post-termination counterclaim as harassment under 31 U.S.C. § 3730(h)(1)."); *cf.* Glynn v. Impact Sci. & Tech., Inc., 807 F. Supp. 2d 391,

C. Financial Whistleblower Statutes

This Part canvases the history and case law interpretations for two statutes that have similarly phrased anti-retaliation provisions to the FCA. Further, it summarizes how courts have uniformly interpreted both statutes' anti-retaliation provisions to include protection from post-employment retaliation.

1. Sarbanes-Oxley Act of 2002

In response to the Enron scandal, Congress enacted SOX to reinvigorate public confidence in the financial market and encourage investments after a series of corporate scandals.[149] In relevant part, the Act encourages employees of publicly traded companies to report suspected fraudulent financial reporting to the Securities and Exchange Commission.[150] Like the FCA, Congress recognized that complex financial crimes are difficult to discover and prosecute without company insiders to report violations and assist in the prosecutions.[151]

After reading emails uncovered after the Enron collapse, one email showed that an Enron employee tried to report accounting errors to her supervisors only for Enron's executives to consult an attorney to ask if they could legally fire her.[152] The lawyer advised the Enron executives that, under then-Texas law, such a firing would be permissible.[153] Congress sought to add federal anti-retaliation protections in SOX in light of state laws' apparent shortcomings.[154] The SOX anti-retaliation provision mirrors the FCA's language:

> No company with a class of securities [within SOX's protections] . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment [for reporting under SOX]. . . . An employee

412 (D. Md. 2011) (considering a claim of post-employment retaliation but determining that there was insufficient evidence the lawsuit was retaliatory).

149. *See* S. REP. NO. 107-146, at 2 (2002) (explaining SOX was necessary because "[i]n the wake of the continuing Enron Corporation (''Enron'') debacle, the trust of the United States' investors and pensioners in the nation's stock market . . . [was] seriously eroded").

150. Bishara et al., *supra* note 46, at 47 n.51.

151. S. REP. NO. 107-146, at 10 (2002).

152. *Id.* at 5 ("The consequences of this corporate code of silence for investors in publicly traded companies . . . and for the stock market . . . are serious and adverse, and they must be remedied [through whistleblower protections].").

153. *Id.*

154. *Id.* at 10 ("Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws . . . a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state.").

> prevailing in any action . . . shall be entitled to all relief necessary . . . includ[ing] reinstatement.[155]

Courts routinely interpret SOX's anti-retaliation provision to include protections for former employees who experience post-employment retaliation.[156] In *Kshetrapal v. Dish Network, LLC*,[157] an employer revoked the plaintiff's job offer after her prior employer gave a negative reference.[158] The negative reference was considered retaliation for the plaintiff's prior whistleblowing under SOX.[159] When determining if SOX protected former employees from post-employment retaliation, the *Kshetrapal* court looked at the statute's plain language.[160] The court determined that the word "employee" was ambiguous within the statute because the remedial provision allowed for reinstatement.[161] To resolve the ambiguity, the court looked to the Department of Labor's definition of "employee,"[162] consulted other prior SOX retaliation decisions,[163] and determined that failing to protect post-employment retaliation would "discourage employees from exposing fraudulent activities . . . [because of] fear of retaliation in the form of blacklisting or interference with subsequent employment."[164] These factors influenced the court's ultimate holding that SOX's anti-retaliation provision includes protection from post-employment retaliation.[165]

Although SOX's anti-retaliation provision protects post-employment retaliation, some courts determined that the retaliatory acts must still relate to

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155. 18 U.S.C. § 1514A(a), (c)(1)-(2)(A).

156. *See, e.g.*, Bogenschneider v. Kimberly Clark Glob. Sales, LLC, No. 14-cv-743-bbc, 2015 WL 796672, at *10-11 (W.D. Wis. Feb. 25, 2015) (denying the defendant's motion to dismiss because post-employment retaliation is covered under SOX's anti-retaliation provision but clarifying there is confusion among courts over how broadly post-termination retaliation protection reaches); *see also* Jordan v. Spring Nextel Corp., 3 F. Supp. 3d 917, 932 (D. Kan. 2014) (denying a plaintiff's retaliation claim under SOX because the plaintiff failed to show "that any of [d]efendants' statements actually interfered with actual or potential employment"); Feldman v. L. Enf't Assocs. Corp., 779 F. Supp. 2d 472, 493 (E.D.N.C. 2011) (quoting ALJ's Initial Decision and Order, *In re* Harvey v. The Home Depot, Inc., N2004 SOX 36, 2004 WL 5840284, at *3 (Dep't of Labor May 28, 2004)) (explaining that post-employment retaliation is covered only when the retaliation negatively impacts a present or future employment opportunity).

157. Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108 (S.D.N.Y. 2015).

158. *Id.* at 111-12.

159. *Id.* at 112, 118.

160. *Id.* at 112.

161. *Id.* at 113.

162. *Kshetrapal*, 90 F. Supp. 3d at 113 (explaining that 29 C.F.R. § 1980.101 defines "employee" as "an individual presently *or formerly* working for a covered person") (emphasis in original).

163. *Id.* at 113-14 (citing Bechtel v. Admin. Rev. Bd., U.S. Dep't of Lab., 710 F.3d 443, 446 (2d Cir. Mar. 5, 2013)); *see also* Lawson v. FMR LLC, 571 U.S. 429, 432 (2014). *See generally* Bechtel v. St. Joseph Med. Ctr., Inc., No. MJG-10-3381, 2012 WL 1476079 (D. Md. Apr. 26, 2012).

164. *Kshetrapal*, 90 F. Supp. 3d at 114.

165. *Id.* at 112.

"the terms and conditions of employment."[166] In *In re Harvey*,[167] an administrative judge determined that under SOX, post-employment retaliation includes only actions that "adversely impact[s] . . . the terms and condition[s] of . . . [the plaintiff's] employment with . . . [current] or *other subsequent employment*."[168] This holding narrows what types of retaliatory acts are protected by requiring that they relate to employment, but it still protects claims of retaliatory blacklisting, negative references, or other employment-related retaliation.[169]

2. Dodd-Frank Wall Street Reform and Consumer Protection Act

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act[170] ("Dodd-Frank") in response to the 2008 financial market collapse and subsequent recession.[171] Because SOX's financial regulations did not cover banks, consumer credit, or business lending markets, Congress enacted Dodd-Frank to strengthen financial regulations and oversight.[172] Dodd-Frank's anti-retaliation protections differ from SOX by increasing the statute of limitations for a whistleblower to file a retaliation claim,[173] allowing whistleblowers to file retaliation cases directly in federal court,[174] and broadening Dodd-Frank's scope to cover a wider array of violations.[175] Compared to SOX, Dodd-Frank's anti-retaliation provision also incentivizes whistleblowers to report under the act by increasing the

166. ALJ's Initial Decision and Order, *In re* Harvey v. Home Depot, Inc., No. 2004 SOX 36, 2004 WL 5840284, at *3-4 (Dep't of Labor May 28, 2004).

167. *Id.*

168. *Id.* at *4 (emphasis added).

169. *Id.* at *3 (determining that blacklisting is covered under SOX's anti-retaliation provision); *see also* Lantech.com v. Yarbrough, 247 Fed. App'x 769, 782 (6th Cir. 2007) (explaining that a former employee must abide by a non-compete agreement after termination).

170. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78u-6(a)(6)).

171. *See* President Barack Obama, President of the United States, Remarks by the President at the Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) (transcript available at https://obamawhitehouse.archives.gov) ("Over the past two years, we have faced the worst recession since the Great Depression. . . . Now, while a number of factors led to such a severe recession, the primary cause was a breakdown in our financial system.").

172. Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 97 (2012); *see also* Bishara et al., *supra* note 46, at 47-49 (noting that Congress enacted Dodd-Frank to reduce the opportunity for future financial fraud that could lead to another 2008-esque recession).

173. *Compare* 15 U.S.C. § 78(h)(B)(iii)(I)(aa)-(bb) (stating Dodd-Frank has a six year statute of limitations after the alleged violation occurs or a three years statute of limitations after when the whistleblower knew or should have known of the violation), *with* 18 U.S.C. § 1515(A)(b)(2)(D) (requiring a SOX action to be filed within 180 days of the violation).

174. *Compare* 15 U.S.C. § 78u(h)(B)(i) (allowing a Dodd-Frank whistleblower to bring a retaliation claim directly to federal court), *with* 18 U.S.C. § 1515A(b) (requiring administrative exhaustion before a plaintiff may bring a SOX retaliation claim in federal court).

175. Barr, *supra* note 172, at 92.

available financial incentives.[176] The anti-retaliation provision of Dodd-Frank states, in relevant part, "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower. . . . Relief for an individual . . . shall include reinstatement."[177]

Like SOX, courts interpret Dodd-Frank to cover post-employment retaliation.[178] For example, in *MiMedx Group, Inc. v. Fox*,[179] the plaintiff was harassed, demoted, and eventually terminated from his employment with MiMedx.[180] After his termination, the plaintiff accepted a position at CPN; however, MiMedx harassed CPN, alleging that MiMedx would file suit against CPN for hiring its former employee.[181] Eventually, CPN fired the plaintiff saying it "could not handle any more 'legal drama' with MiMedx."[182] In the plaintiff's subsequent lawsuit against MiMedx for post-employment retaliation, the court held that Dodd-Frank's anti-retaliation provision includes protection from all retaliation, even if it is post-employment.[183] The court held that Dodd-Frank's anti-retaliation provision lacked a temporal qualifier that would limit its scope to only current employees, and this interpretation would encourage whistleblowers to report violations under Dodd-Frank.[184]

D. Title VII of the Civil Rights Act of 1964

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

176. *See* Zizi Petkova, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18 U. PA. J. BUS. L. 573, 589-90 (2016) (arguing that higher monetary rewards strengthens Dodd-Frank's protections by incentivizing whistleblowers to report violations).

177. § 78u-6(h)(1)(A)-(C)(i).

178. *See, e.g.*, MiMedx Grp., Inc. v. Fox, No. 16 CV 11715, 2018 WL 558500, at *3, *8 (N.D. Ill. Jan. 24, 2018) (holding that a subsequent employer's decision to fire the plaintiff because it "could not handle any more 'legal drama'" from the plaintiff's whistleblowing at their prior employer was actionable retaliation); *see also* U.S. Sec. & Exch. Comm'n v. Collector's Coffee Inc., No. 19 Civ. 4355, 2021 WL 3082209, at *2 (S.D.N.Y. July 21, 2021) (noting that "while certain portions of Section 21F [Dodd-Frank's anti-retaliation provision] provide anti-retaliation protections specific to only presently employed whistleblowers who are employees, nothing in the statute's text nor the supporting documents indicates that Congress intended to protect *only* those whistleblowers who are employees") (emphasis in original).

179. *MiMedx*, 2018 WL 558500, at *1.

180. *Id.* at *2.

181. *Id.* at *3.

182. *Id.*

183. *Id.* at *7-8.

184. *MiMedx*, 2018 WL 558500, at *8 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997)).

race, color, religion, sex, or national origin."[185] This provision ("the substantive provision") prohibits unlawful employment discrimination that impacts "terms, conditions, or privileges of employment."[186] Title VII also contains an anti-retaliation provision that states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[187] If an employer violates Title VII's anti-retaliation provision, one available remedy is reinstatement.[188] Because there is little legislative history available on Title VII's anti-retaliation provision,[189] courts use the Act's purpose to determine how broadly to construe its protections.[190] The United States Supreme Court recognized that Congress created Title VII to encourage individuals to report employment discrimination and that the "primary purpose of anti[-]retaliation provisions" is to "maintain[] unfettered access to statutory remedial mechanisms."[191]

Like both SOX and Dodd-Frank, Title VII's anti-retaliation protections have been interpreted to protect post-employment retaliation.[192] In *Robinson v. Shell Oil Co.*, the plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging unlawful termination because of his race.[193] Before the EEOC decided his discrimination claim, the

185. 42 U.S.C § 2000e-2(a)(1).

186. *Id.*

187. *Id.* § 2000e-3(a).

188. *Id.* § 2000e-5(g)(1).

189. Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 393 (1988).

190. *See, e.g.*, Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174-75 (2011) (interpreting Title VII's anti-retaliation protections to include a third party who experiences retaliation because of his fiancé's protected activity).

191. Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997) ("[I]t would be destructive of this purpose of the anti[-]retaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII . . . . We agree with these contentions and find that they support the inclusive interpretation of 'employees.").

192. *See, e.g.*, Rutherford v. Am. Bank of Com., 565 F.2d 1162, 1164-66 (10th Cir. 1977) (determining that an employer's negative job reference about a former employee after the employee filed an EEOC complaint was covered under Title VII's retaliation provision). The Tenth Circuit explained that former employees require the same protection as current employees:

> The possibility of retaliation, however, is far from being "remote and speculative" with respect to former employees. . . . First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. . . . Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with the Secretary.

Id. at 1166.

193. *Robinson*, 519 U.S. at 337, 339.

defendant gave a poor employment reference on behalf of the plaintiff.[194] The Court unanimously held that Title VII's anti-retaliation provision protects former employees who experience post-employment retaliation.[195] The Court first began its analysis by determining whether Title VII's anti-retaliation provision was ambiguous.[196] The Court held that the anti-retaliation provision lacked a temporal qualifier that limited the provision's protections to only current employees.[197] Because the remedial provision authorized "reinstatement," the Court presumed that Congress intended to include former employees within the provision's protections.[198] Further, the Court reaffirmed this interpretation by finding that it supported the broader purpose of Title VII: to encourage parties to report discrimination in the workplace.[199] The Court concluded that if former employees were excluded from Title VII's anti-retaliation provision's reach, it would "allow[] the threat of post[-]employment retaliation to deter victims of discrimination [from reporting it]."[200]

Despite the Court determining that Title VII's anti-retaliation provision included post-employment protections, lower courts have disagreed over how broadly this coverage reached.[201] In 2006, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White* to resolve the varying interpretations.[202] The Court determined that retaliatory acts did not need to be employment-related to be covered by Title VII's retaliation protections.[203] Although Title VII's substantive provision was limited to "terms, conditions, and privileges of employment," the anti-retaliation provision did not contain this same limiting language.[204] Accordingly, the Court expressed that broadening Title VII's anti-retaliation protection to cover non-employment-related retaliation was prudent:

> But one cannot secure the . . . [anti-retaliation provision's] objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti[-]retaliation provision's objective would *not* be

194. *Id.*
195. *Id.* at 346.
196. *Id.* at 340.
197. *Id.* at 341.
198. *Robinson*, 519 U.S. at 342.
199. *Id.* at 346 ("We agree with these contentions and find that they support the inclusive interpretation of 'employees' in § 704(a) that is already suggested by the broader context of Title VII.").
200. *Id.*
201. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60-61 (2006) (detailing how circuit courts of appeals were deeply divided over how broadly Title VII's post-employment retaliation coverage extended).
202. *Id.*
203. *Id.* at 67.
204. *Id.* at 62.

> achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* [of] the workplace. . . . A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.[205]

Burlington Northern held that Title VII retaliation claims must be materially adverse enough to dissuade a reasonable employee or applicant from reporting discrimination, but there is no requirement that the materially adverse action be employment related.[206]

II. ANALYSIS

This Part argues that the *Felten* decision is more consistent with the FCA's statutory language and other court's interpretations of similar language in SOX, Dodd-Frank, and Title VII.[207] Further, this Part contends that interpreting the FCA's protections to include post-employment retaliation is aligned with the legislative history of the FCA and broader anti-retaliation jurisprudence.[208] Finally, this Part discusses potential limits on the FCA's post-employment reach.[209]

A. The FCA's Anti-Retaliation Provision's Plain Text Is Ambiguous

The first step to any statutory interpretation begins with determining if the statute's plain text is ambiguous.[210] A plain text reading of the FCA's anti-retaliation provision shows that the statute's use of "employee" is ambiguous.[211] First, the remedial provision of the FCA offers aggrieved relators a list of remedies, including reinstatement.[212] This remedy implies Congressional intent to include former employees within the FCA's ambient.[213] This reasoning was also accepted in the *Robinson*, *Felten*, and

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205. *Id.* at 63-64.

206. *White,* 548 U.S. at 68 (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); Rochon v. Gonzalez, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

207. *See infra* Part III.

208. *See infra* Part III.

209. *See infra* Part III.

210. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989). Once text is deemed ambiguous, judges may defer to sources outside of the statutory text to resolve the ambiguity. *Id.* at 241. Courts often use canons of construction to resolve ambiguity. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94, 99 (2001) (noting that "canons are not mandatory rules [because] [t]hey are guides . . . designed to help judges determine the Legislature's intent").

211. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021) (quoting 31 U.S.C. § 3730(h)(1)).

212. § 3730(h)(1)-(2).

213. *See Reinstate*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "reinstate" as "[t]o place again in a former state or position").

Kshetrapal decisions to explain why the text in their respective statutes is ambiguous.[214] Although the presence of reinstatement as a statutory remedy implies that former employees may receive anti-retaliation protections, the question remains whether the FCA only covers former employees who are retaliated against during employment—the *Potts* holding.[215] However, using a plain-text reading, courts are expected to presume that "the words employed are to be taken as the final expression of the meaning intended."[216] Therefore, because the FCA's anti-retaliation provision implies former employees are protected through its promise of reinstatement and does not definitively foreclose post-employment recovery, the provision is ambiguous.[217] *Felten* embraced this ambiguity and held that without a clear indication that post-employment retaliation was precluded, the judiciary may not create a limitation that the statutory text lacks.[218]

Second, the FCA's anti-retaliation provision protects employees that face retaliatory discharge, demotion, suspension, threats, harassment, or other discrimination in "the terms and conditions of [their] employment."[219] *Potts* held that because four of the six terms can occur only during employment (discharge, demote, suspend, or discriminate against in the terms and conditions of employment), the statute was temporally limited.[220] Conversely, *Felten* concluded that three words—threaten, harass, and discriminate against—can reasonably apply to both current or former employees.[221] Under *Felten*'s reading, "discriminated against in the terms and conditions of employment" does not solely apply to current employees because many terms and conditions of employment, such as non-compete clauses or severance packages, continue after the employee-employer relationship ends.[222] This reading evinces an even split: three terms reserved for current employees and three that may apply to either former or current

214. Robinson v. Shell Oil Co., 519 U.S. 337, 341-42 (1997); Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 113 (S.D.N.Y. 2015); *Felten*, 993 F.3d at 433, 435.

215. Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 617 (10th Cir. 2018).

216. United States v. Mo. Pac. Ry. Co., 278 U.S. 269, 278 (1929); *cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law.").

217. *See, e.g.*, *Robinson*, 519 U.S. at 342, 346 ("[B]ecause one does not 'reinstat[e]' current employees, that language necessarily refers to former employees.") (second alteration in original).

218. *See Felten*, 993 F.3d at 434-35 ("But the text does not contain that limitation. . . . True, reinstatement can be a remedy for wrongful discharge, but that does not change the fact that it could be a remedy for post-termination retaliation as well.").

219. 31 U.S.C. § 3730(h)(1).

220. *Potts*, 908 F.3d at 614-15.

221. *Felten*, 993 F.3d at 432-33.

222. *See id.* (quoting Lantech.com v. Yarbrough, 247 F. App'x 769, 771-72 (6th Cir. 2007); Hall v. Edgewood Partners Ins. Ctrs. Inc., 878 F.3d 524, 528-29 (6th Cir. 2017); Equal Emp. Opportunity Comm'n. v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088-89 (5th Cir. 1987)) ("There are many terms and conditions of employment that can persist after an employee's termination . . . a noncompete agreement and confidentiality agreement[,] . . . non-solicitation provision[][,] . . . [and] discontinuance of severance pay.").

employees.[223] This equal split shows the ambiguity within the FCA's anti-retaliation provision and support *Felten*'s interpretation. Similarly, this same reasoning convinced courts interpreting both SOX's and Dodd-Frank's anti-retaliation provisions that the provision was ambiguous and implied post-employment protections.[224] The FCA, SOX, and Dodd-Frank all share the verbatim phrase that the *Potts* court determined temporally limited the FCA's anti-retaliation provision: "discharge[d], demote[d], suspend[ed], threaten[ed], harass[ed], or in any other manner discriminate[d] against an employee in the terms and conditions of employment."[225] However, courts interpreting both SOX and Dodd-Frank have never held that those statutes were temporally limited and often cite *Robinson* as persuasive authority, similar to the *Felten* decision.[226] Without any temporal limitation in the FCA's anti-retaliation provision, the Tenth Circuit's dismissal of *Robinson*'s persuasive value is greatly diminished.[227] Accordingly, without the perceived temporal limitation discussed in *Potts* standing on solid ground, the court's dismissal of *Robinson* is weakened.[228]

Because both the FCA and Title VII lack a temporal limitation, *Robinson*'s two interpretive principles become instructive in resolving the current circuit split. First, *Robinson* acknowledges that within anti-retaliation provisions, including former employees in anti-retaliation protections is crucial to ensure individuals report discrimination.[229] Second, *Robinson* recognizes that examining the purpose of a statute ensures Congressional intent is conveyed in its interpretation.[230] Similar to the Court's statement in *Robinson* that "exclusion of former employees from . . . [Title VII's protections] would undermine the effectiveness of Title VII by allowing the threat of post[-]employment retaliation to deter victims of discrimination from complaining to the EEOC,"[231] failure to include post-employment

223. *Felten*, 993 F.3d at 432.

224. Bogenschneider v. Kimberly Clark Glob. Sales, LLC, No. 14-cv-743-bbc, 2015 WL 796672, at *10-11 (W.D. Wis. Feb. 25, 2015); Jordan v. Sprint Nextel Corp., 3 F. Supp. 3d 917, 932 (D. Kan. 2014); Feldman v. L. Enf't Assocs. Corp., 779 F. Supp. 2d 472, 493 (E.D.N.C. 2011) (quoting ALJ's Initial Decision and Order, *In re* Harvey v. The Home Depot, Inc., No. 2004 SOX 36, 2004 WL 5840284, at *3 (Dep't of Labor May 28, 2004)); MiMedx Grp., Inc. v. Fox, No. 16 CV 11715, 2018 WL 558500, at *8 (N.D. Ill. Jan. 24, 2018); U.S. Sec. & Exch. Comm'n v. Collector's Coffee Inc., No. 19 Civ. 4355, 2021 WL 3082209, at *2 (S.D.N.Y. July 21, 2021).

225. *Potts*, 908 F.3d at 618; 15 U.S.C. § 78u-6(h)(1)(A); 18 U.S.C. § 1514A(a).

226. Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 113 (S.D.N.Y. 2015) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)) (interpreting SOX's anti-retaliation provision); *MiMedx Grp., Inc.*, 2018 WL 558500, at *8 (citing *Robinson*, 519 U.S. at 340-41) (interpreting Dodd-Frank's anti-retaliation provision).

227. *Potts*, 908 F.3d at 618.

228. *Id.*

229. *See Robinson*, 519 U.S. at 345 ("[I]t is far more consistent to include former employees within the scope of 'employees' protected by § 704(a).").

230. *Id.* at 346.

231. *Id.*

retaliation under the FCA would undermine the Act's purpose of encouraging parties to report suspected fraud.[232] Accordingly, interpreting the FCA to include post-employment retaliation protections promotes consistency within anti-retaliation jurisprudence.[233]

However, the FCA's anti-retaliation provision's reach must be narrower than Title VII.[234] In *Burlington Northern*, the Supreme Court held that Title VII's anti-retaliation protection includes any materially adverse action that would dissuade a reasonable worker from reporting discrimination, including non-workplace-related post-employment retaliation.[235] However, there is a key distinction between Title VII and the FCA's anti-retaliation provision; the FCA includes the limiting language of "in the terms and conditions of employment," but Title VII's anti-retaliation provision does not.[236] Although some scholars have suggested whistleblower anti-retaliation provisions should be interpreted to follow *Burlington Northern*'s materially adverse standard,[237] this standard has not yet been followed outside of employment statutes.[238] Because of this distinction, it would be improper to suggest the materially adverse standard should apply to the FCA.

Instead, case law from SOX's anti-retaliation provision is helpful in defining the contours of the FCA's post-employment reach because both statutes have similar limiting language.[239] The SOX interpretation from *In re Harvey* is instructive for determining the FCA's reach because it limits post-employment protections to employment-related retaliation, including blacklisting and interference with subsequent employment.[240] Although this

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232. *See* S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 ("The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to . . . retaliation.").

233. S. REP. NO. 99-345, at 23 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288.

234. *See* Robert Johnson, *Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation After* Burlington Northern v. White, 42 U. RICH. L. REV. 1337, 1355 (2008) (explaining that *Burlington Northern*'s holding "created a fundamental inconsistency between whistleblower retaliation laws and non-whistleblower retaliation laws").

235. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

236. *Compare* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."), *with* 31 U.S.C. § 3730(h)(1) ("Any employee, contractor, or agent shall be entitled to all relief necessary . . . if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment [for reporting a FCA violation].").

237. *See* Johnson, *supra* note 234, at 1356-57 (arguing that whistleblower anti-retaliation provisions should be amended to include non-employment-related retaliation because the change would support the statues' objectives, promote consistency within anti-retaliation law, and better protect whistleblowers).

238. *Id.* at 1355.

239. *See generally* 31 U.S.C. § 3730(h); 15 U.S.C.S. § 78u-6; ALJ's Initial Decision and Order, *In re* Harvey v. Home Depot, Inc., No. 2004 SOX 36, 2004 WL 5840284, at *4 (Dep't of Labor May 28, 2004).

240. *In re Harvey*, 2004 WL 5840284, at *4.

coverage is narrower and may not protect some forms of post-employment retaliation, it would still protect many relators. For example, the retaliation Felten faced would be covered because he was actively blacklisted from obtaining subsequent employment.[241]

B. The FCA's Legislative History Supports Interpreting the Anti-Retaliation Provision to Include Post-Employment Retaliation

The FCA's extensive legislative history explicitly supports the FCA's anti-retaliation provision protecting post-employment retaliation.[242] While drafting the original anti-retaliation provision, Congress sought to create comprehensive coverage for whistleblowers because too few individuals were willing to file *qui tam* actions without adequate protections.[243] These protections were discussed during the FCA's 1986 amendments debates because "the [Senate Judiciary] Committee believe[d] only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[244] To achieve this goal, the anti-retaliation provision sought to protect whistleblowers from any flavor of employer retaliation and incentivize whistleblowers to file *qui tam* actions.[245] A report from the Senate Judiciary Committee reflects a desire for the FCA's anti-retaliation provision to be construed broadly by expressing that "employee" in the statute should be interpreted expansively.[246] The committee determined this broad interpretation was necessary "to halt . . . [employers] from using the threat of economic retaliation to silence 'whistleblowers,' as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts."[247]

This desire to create broad anti-retaliation protections for relators was also present in the 2009 FCA amendments, as the committee declared the amendments sought to respect "the spirit and intent of the 1986 Amendments."[248] After years of disagreement among circuit courts,

241. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 430 (6th Cir. 2021).

242. S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299.

243. S. REP. NO. 99-345, at 4-5 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269-70; *see also* Helmer, *supra* note 48, at 1272-74 (listing the reasons for the 1986 amendments: decreasing fraud against the government, incentivizing relators to file *qui tam* actions, and protecting relators from retaliation).

244. S. REP. NO. 99-345, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

245. S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299.

246. *Id.*

247. *Id.*

248. S. REP. NO. 110-507, at 20 (2008); *see, e.g.*, S. REP. NO. 110-10, at 16 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 442 (recognizing the 2009 amendments clarified the broad reach of other FCA provisions); *see also* H.R. REP. No. 11-97, at 14 (2009) (determining section 3730(b)—the FCA's retaliation statute of limitations provision—should be ten years, superseding more restrictive court interpretations of the provision); S. REP. NO. 110-10, at 11 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430,

Congress amended the FCA to afford protection to contractors, subcontractors, and agents.[249] In doing so, Congress sent a clear message—the FCA's anti-retaliation provision must afford broad protections to anyone willing to report fraud.[250] The Committee clarified that this expansive interpretation was necessary "to assist individuals who are not technically employees within the typical employer-employee relationship" but deserving of protection.[251]

Because the FCA's anti-retaliation provision is ambiguous, consideration of the FCA's extensive legislative history is both acceptable and persuasive in determining that the FCA covers post-employment retaliation. The FCA's 1986 amendments evolved from Congress's desire to modernize the FCA's protections and increase its effectiveness at combating fraud.[252] Similarly, the FCA's 2009 amendments clarified and re-expanded the FCA's protections because court decisions narrowed the FCA's protections.[253] As Congress said when drafting the FCA's anti-retaliation provision, "[t]emporary, *blacklisted[,] or discharged workers* should be considered 'employees' for the purposes of this act."[254] The legislative intent could not be clearer.

C. Coverage of Post-Employment Retaliation Is Consistent with the Trend that Courts Routinely Interpret Anti-Retaliation Provisions Broadly to Support the Statute's Broader Purpose

When interpreting anti-retaliation provisions, courts repeatedly interpret the provisions expansively.[255] Anti-retaliation provisions have been interpreted expansively, in part, because they were enacted to encourage individuals to report unlawful or improper behavior for acts that society deems important, without fear that reporting will adversely impact them.[256]

438-39 (changing the language of section 3729(a)—which states who may file a *qui tam* action— to "[a]ny person" instead of "an officer or employee of the Government, or to a member of the Armed Forces").

249. 31 U.S.C. § 3730(h)(1).

250. S. REP. NO. 110-507, at 26 (2008) ("While this provision was designed to protect employees from employer retaliation, over the past [twenty] years courts have limited this protection through various decisions narrowly interpreting the definition of 'employee.'").

251. *Id.* at 27.

252. *See supra* notes 54-62 (noting why Congress determined relators require strong anti-retaliation protections).

253. S. REP. NO. 110-10, at 4 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 433.

254. S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 (emphasis added).

255. *See, e.g.*, Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 382 (2010) ("[T]he Court's use of the Anti[-]retaliation Principle in statutory retaliation cases typically has led to enhanced employee protection as compared to other types of employment-law cases . . . [because the court considered] the interest of society in having the law enforced.").

256. *Id.* at 380 (explaining that protection from retaliation is vital to ensure community compliance with both civil and criminal laws).

Accordingly, broad anti-retaliation coverage is crucial towards ensuring that whistleblowers will report fraud.[257] This principle of broadly interpreting "employee" is seen in SOX, Dodd-Frank, and Title VII anti-retaliation case law.[258] From cases involving blacklisting,[259] negative references,[260] or retaliatory lawsuits,[261] courts repeatedly interpret the statutes' protections to maintain consistency between their interpretations and statutes' broader purposes. In *Robinson*, after the Court determined there was ambiguity in Title VII's coverage, the Court looked to the purpose of the statute: encouraging parties to report discriminatory workplace actions.[262] Similarly in *Kshetrapal*, the court looked to SOX's primary purpose: to revitalize the financial services sector by encouraging whistleblowers to expose fraudulent financial reporting.[263] And finally, in *MiMedx*, the court looked to Dodd-Frank's purpose when construing the anti-retaliation provision's reach: encouraging whistleblowers to report securities violations.[264]

Similarly, the United States Court of Appeals for the Sixth Circuit in *Felten* recognized that the FCA's broader purpose—encouraging relators to expose fraud to the government—can only be furthered with the proper anti-retaliation protections.[265] The *Potts* precedent not only undermines the plain-text reading discussed above but also weakens the FCA's effectiveness.[266] The Act is designed to encourage whistleblowers to report fraud that the government would otherwise have difficulty discovering and prosecuting.[267] However, precedent which fails to protect whistleblowers from retaliation significantly curtails the number of relators willing to risk their careers to expose fraud.[268] Congress recognized this was why the FCA was rarely

257. *See* S. REP. NO. 99-345, at 5-6 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5270-71 (noting fear of retaliation and harassment prevents employees from reporting fraud).

258. *See infra* notes 259-61 (discussing that, in all three statutes' anti-retaliation provisions, courts have interpreted the statutes to protect post-employment retaliation).

259. Bogenschneider v. Kimberly Clark Glob. Sales, LLC, No. 14-cv-743-bbc, 2015 WL 796672, at *10 (W.D. Wis. Feb. 25, 2015); Feldman v. L. Enf't Assocs. Corp., 779 F. Supp. 2d 472, 493 (E.D.N.C. Mar. 10, 2011); ALJ's Initial Decision and Order, *In re* Harvey v. The Home Depot, Inc., N2004 SOX 36, 2004 WL 5840284, at *4 (Dep't of Labor May 28, 2004).

260. MiMedx Grp., Inc. v. Fox, No. 16 CV 11715, 2018 WL 558500, at *8 (N.D. Ill. Jan. 24, 2018); Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 116 (S.D.N.Y. 2015); *see also* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

261. *Bogenschneider*, 2015 WL 796672, at *11.

262. *Robinson*, 519 U.S. at 345-46.

263. *Kshetrapal*, 90 F. Supp. 3d at 114.

264. *MiMedx*, 2018 WL 558500, at *8.

265. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021).

266. *Id.* at 435, 438 ("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.").

267. S. REP. NO. 99-345, at 4 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

268. *See* Eisenstadt & Pacella, *supra* note 3, at 666, 671 (explaining that few employees wish to blow the whistle on fraud if there are no retaliation protections).

utilized before the 1986 amendments,[269] and the growth in FCA prosecutions since anti-retaliation protections were enacted shows that the Act's success hinges on having broad anti-retaliation protections.[270] Accordingly, the *Felten* decision is more consistent with the broader anti-retaliation jurisprudence.[271]

III. CRITICISMS: PLAIN LANGUAGE AND POLICY IMPLICATIONS

The most obvious critique of this piece stems from the definition of "employee" which Black's Law Dictionary defines as "[s]omeone who works in the service of another person (the employer) under the express or implied contract of hire."[272] With this definition, many would argue the inquiry ends. However, the Supreme Court in *Robinson* understood that statutory interpretation is not always just consulting a single dictionary definition.[273] The Court recognized that "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question."[274] But the Court expressed that Congress' omission of the phrase "former employees" was not conclusive because Congress could have also drafted the provision to say only "current employees."[275]

If the goal behind statutory interpretation is to "determine the Legislature's intent as embodied in particular statutory language,"[276] this means that either Congress is woefully and repeatedly unclear, or courts are continuously missing the mark. As Associate Justice Neil Gorsuch wrote, "the limits of the drafters' imagination supply no reason to ignore the law's demands."[277] The 1986 FCA amendments' drafters meant for the anti-retaliation provision's use of "employee" to be broadly construed to include former and blacklisted employees.[278] This is also supported by the FCA's purpose which requires broad protections for post-employment retaliation or the federal government risks losing one of its strongest fraud prevention mechanisms.[279] The FCA drafters' imagination was not lacking, but rather,

269. *See* discussion *supra* Part I.B (explaining that fear of retaliation disincentivizes relators from filing *qui tam* actions).

270. *Compare* Helmer, *supra* note 48, at 1276 (noting that in 1985—the year before the FCA had protection from retaliation—the DOJ recovered $54 million), *with Justice Department Recovery 2021*, *supra* note 14 (announcing the DOJ's 2022 FCA recoveries totaled $5.6 billion).

271. *Felten*, 993 F.3d at 435.

272. *Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

273. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

274. *Id.*

275. *Id.*

276. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

277. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

278. S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299.

279. S. REP. NO. 99-345, at 4 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 (recognizing that individuals outside of a company are unlikely to detect indicia of fraud).

their intent was lost in translation.[280] Nevertheless, the government depends on whistleblowers to report fraud,[281] and it is ill-conceived to narrow a statute when there is a robust history of legislative history, common law interpretations, and similar statutes that resolve the Act's ambiguity.

Another concern with *Felten*'s holding is subjecting employers to limitless liability for post-employment retaliation.[282] In an *amici curiae*, the American Hospital Association argued that *Felten*'s precedent could harm employers by "distorting the FCA's text to permit retaliation claims by former employees, for conduct years after their employment ceased . . . [and by] expos[ing] employers to virtually-unbounded retaliation liability."[283] However, this argument falls flat in light of the FCA's three year statute of limitations for filing FCA retaliation claims.[284] Therefore, it is unfounded that an employee could subject a former employer to endless litigation, unless that employer is continuously retaliating against the former employee.[285] In that case, employers can predict their liability because it will only extend if the employer continues to retaliate.[286]

CONCLUSION

This Article argues that the FCA's anti-retaliation provision properly includes protection from post-employment retaliation.[287] Besides the inherent necessity in providing broad anti-retaliation protections for employees reporting fraud, whistleblowers provide a crucial public service to our society.[288] The FCA is one of the strongest fraud-prevention tools

280. *Compare* S. REP. NO. 99-345, at 34 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 (clarifying former employees who experience post-employment retaliation may recover under the FCA), *with* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 (10th Cir. 2018) (foreclosing relators from recovering if the retaliation occurs after employment ends).

281. S. REP. NO. 110-507, at 5-6 (2008).

282. Brief of Amici Curiae American Hospital Association, Federation of American Hospitals, Michigan Health & Hospital Association, Kentucky Hospital Association, Ohio Hospital Association, and Tennessee Hospital Association in Support of Petitioner William Beaumont Hospital, United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428 (6th Cir. 2021) (No. 21-443), 2021 WL 4864667, at *4 [hereinafter Amici Curiae Brief of American Hospital Association]; *see also Potts*, 908 F.3d at 614-15 n.2 ("Under Potts's interpretation, a former employee could wait years upon years before whistleblowing and then sue if the employer allegedly retaliated . . . [against them] any such open-ended litigation option also weighs against her interpretation.").

283. Amici Curiae Brief of American Hospital Association, *supra* note 282, at *4.

284. 31 U.S.C. § 3730(h)(3) (limiting when civil action can be brought for retaliation to three years).

285. *Compare* Amici Curiae Brief of American Hospital Association, *supra* note 282, at *4 ("[D]istorting the FCA's text to permit retaliation claims by former employees, for conduct years after their employment ceased . . . [and by] expos[ing] employers to virtually-unbounded retaliation liability."), *with* 31 U.S.C. § 3730(h)(3) ("A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.").

286. § 3730(h)(3).

287. *See supra* Part II.

288. Eisenstadt & Pacella, *supra* note 3, at 671.

available to the government today.[289] However, the Act's success hinges on providing necessary protections to relators.[290] Interpreting the FCA to only provide retaliation protections during employment could chill whistleblowers, which, in turn, leaves everyone's tax dollars more vulnerable.

289. *See Justice Department Recovery 2020*, *supra* note 68.

290. S. REP. NO. 110-507, at 5 (2008) ("Further, the [1986] amendments provided whistleblower protections in recognition of the risk that *qui tam* relators take in reporting fraud against the Government.").