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WHISTLEBLOWER PROTECTION UNDER THE FALSE CLAIMS ACT: PROVIDING FORMER EMPLOYEE INCLUSION

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I. INTRODUCTION

The False Claims Act ("FCA") is the government's most effective tool to fight fraud and recuperate otherwise lost taxpayer dollars.[1] The FCA is a *qui tam* statute,[2] enabling private citizens to introduce evidence of fraud against the government and pursue FCA violations on behalf of the United States.[3] Naturally, successful prosecution largely depends on honest individuals informing the government of fraudulent dealings. Inherent in its design, the FCA benefits both the government and the whistleblower by strengthening the government's ability to fight false claims and providing whistleblowers with a percentage of awarded damages.[4] Additionally, because of the substantial need for whistleblowers and the difficult choices they make in bringing an action, the FCA employs statutory protections through an anti-retaliation provision intended to protect and embolden individuals coming forward with knowledge of fraud.[5] However, courts are divided on how to properly discern the anti-retaliation provision's scope, specifically when identifying who is protected under its shield.

This Note discusses whether the FCA's anti-retaliation provision should recognize former employees' claims when alleging misconduct that arises after an employment relationship ends. In other words, should employer-defendants be able to retaliate against a whistleblower if the whistleblower no longer works for the employer? While the Tenth and Sixth Circuits have addressed this issue, each reached opposite

1. *See* Press Release, Chuck Grassley, United States Senator, Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud **[**https://perma.cc/8BBP-3XH2**]**.

2. *See* Stalley v. Methodist Healthcare, 517 F.3d 911, 916-17 (6th Cir. 2008) ("A qui tam statute allows a private person to bring an action in the name of the United States, that will benefit both the person and the government.") (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 (2000)).

3. *See* U.S. DEPARTMENT OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last visited Nov. 20, 2021).

4. *See* State Farm Fire & Cas. Co. v. United States *ex rel.* Rigsby, 137 S. Ct. 436, 440 (2016) (citing 31 U.S.C. § 3730(d); Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 298 (2010)).

5. *See* Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T. M. COOLEY L. REV. 217, 225 (2012).

conclusions.

This Note argues that the FCA's anti-retaliation provision, codified in 31 U.S.C. § 3730(h),[6] should be interpreted to afford former employees protection from retaliation. Specifically, this Note maintains that the Sixth Circuit's analysis most accurately satisfies legislative intent and governing policies inherent to the FCA. First, Section II discusses the FCA's unique procedural mechanisms, its anti-retaliation provision's historical iterations, and how the Supreme Court resolved comparable ambiguity to protect former employees against discrimination under Title VII of the Civil Rights Act of 1964. Next, Section III examines lower court decisions influencing whistleblower treatment under the FCA and discusses the current split between the Tenth and Sixth Circuits, illustrating how each took conflicting approaches to interpreting who is included under the anti-retaliation provision's protection. Lastly, Section IV contends that in the absence of legislative action or Supreme Court guidance, courts deciding whether former employees are protected against post-employment retaliation under the FCA should follow the Sixth Circuit's holding that § 3730(h) includes former employees.

II. BACKGROUND

The FCA contains unique statutory mechanisms that expand the government's ability to deter fraud.[7] Since its inception, the FCA has been amended several times, resulting in inconsistent application and statutory ambiguity.[8] This Section first provides relevant background on the FCA's general purpose as well as the procedures it established to enlist whistleblowers' aid. This Section proceeds by identifying the current language provided in 31 U.S.C. § 3730(h) and its historical iterations. Additionally, this Section recounts the Supreme Court's decision in *Robinson v. Shell Oil Co.*[9] Further, this Section provides several lower court decisions influencing the treatment of retaliation claims brought by former employees prior to the Sixth Circuit creating a split of authority.[10] Lastly, this Section illustrates the current state of the FCA's retaliation protections by discussing the recent circuit split regarding § 3730(h)'s inclusion of former employees.

6. For clarity, 31 U.S.C. § 3730(h) will be referred to as "section 3730(h)," "the anti-retaliation provision," "§3730(h)," or "the provision" throughout this Note.

7. *See* JAMES B. HELMER JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 129 (7th ed. 2017).

8. *Id.*

9. 519 U.S. 337 (1997).

10. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022) (acknowledging its decision creates a circuit split).

A. The False Claims Act

Originally enacted by Abraham Lincoln in 1863 to deter military contractors' widespread fraud against the government, the FCA in its current form enables private parties (relators) to bring actions on behalf of the United States through *qui tam* claims.[11] The FCA makes it illegal for anyone to knowingly present fraudulent claims for payment to the United States.[12] Accordingly, FCA litigation may be brought by the government and on behalf of the United States by private parties (relators) through civil *qui tam* actions.[13]

Relators, also known as whistleblowers, file a complaint under seal, serving the United States with a copy of the complaint, all material evidence, and all information in the relator's possession.[14] Once the government reviews these materials, it has discretion to either proceed or decline taking over the action.[15] Even if the government declines to proceed, the relator who commenced the action retains the right to proceed unless otherwise dismissed or fettered by the government.[16]

Because "[*q*]*ui tam* provisions are designed to set up incentives to supplement government enforcement," the FCA provides whistleblowers a percentage of the proceeds attained through settlement or successful prosecution of the claim.[17] This percentage is contingent on whether the government chooses to proceed with the whistleblower's claim and whether the whistleblower substantially contributes.[18] A whistleblower's potential for an award illustrates the broader function and purpose of the FCA: incentivizing individuals to provide information necessary for the government to successfully bring fraudulent actors to justice.[19]

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11. *See* 31 U.S.C. § 3730(b)(1) (2021); *see also* Joel D. Hesch, *General Releases in Employment Contracts Cannot Bar Employees from Filing or Participating in Qui Tam Cases Under the False Claims Act*, 44 AM. J. TRIAL ADVOC. 35, 39 (2020) ("To combat rampant military contractor fraud, Congress enacted the FCA as *a qui tam* statute that enabled private citizens to bring lawsuits against fraudulent contractors on behalf of the government.").

12. *See* 31 U.S.C. § 3729(a); *see also* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 405 (2011) (providing a preliminarily description of the general function of the False Claims Act).

13. *See* 31 U.S.C. § 3730(b); *see also* Kellogg Brown & Root Servs. v. United States *ex rel.* Carter, 575 U.S. 650, 653 (2015) (describing general procedural provisions of 31 U.S.C. § 3730(b)).

14. *See* 31 U.S.C. § 3730(b)(2).

15. 31 U.S.C. § 3730(b)(4).

16. § 3730(c).

17. United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (citing United States v. Griswold, 24 F. 361, 366 (D. Or. 1885))

18. *See* 31 U.S.C. § 3730(d); *see also* Cochise Consultancy, Inc. v. United States *ex rel.* Hunt, 139 S. Ct. 1507, 1510 (2019) ("The relator receives a share of any proceeds from the action—generally 15 to 25 percent if the Government intervenes, and 25 to 30 percent if it does not—plus attorney's fees and costs.") (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769-70 (2000)).

19. *See* Hesch, *supra* note 5, at 221 (citing 132 CONG. REC. 29321 (1986)).

However, amendments to the FCA demonstrate Congress' struggle to balance the tension of providing adequate incentives to whistleblowers and discouraging fraud while dissuading opportunistic *qui tam* plaintiffs who lack sufficient evidence.[20] For example, in response to the Supreme Court's decision in *Marcus v. Hess*,[21] Congress amended the FCA in 1943, drastically reducing *qui tam* claims and thus increasing widespread fraud.[22] Congress responded to this increased fraud in 1986 by amending the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[23]

There, Senator Charles Grassley and Representative Howard Berman successfully led congressional efforts to amend the FCA to include an anti-retaliation provision, further encouraging whistleblowers to come forward with evidence of fraud.[24] To accommodate reluctant individuals fearing employer backlash, the anti-retaliation provision protects whistleblowers, with its most current iteration codified in 31 U.S.C. § 3730(h).[25] While the provision affords protection to those facing a resentful employer's misconduct, the full scope of protection under § 3730(h) is inconclusive.

B. Anti-Retaliation Under the FCA

A potential whistleblower deciding whether to bring a *qui tam* claim faces a difficult emotional and financial choice: stay silent and incur liability or expose fraud and suffer repercussions from a resentful employer.[26] These considerations are the exact circumstances the FCA drafters intended to remedy through the FCA's anti-retaliation provision and the allotment of awarded damages.[27] Accordingly, the statute now

20. *See Springfield Terminal*, 14 F.3d 645.

21. 317 U.S. 537 (1943).

22. *See* Hesch, *supra* note 5, at 230-31 (2012) (noting that *Hess* fostered congressional action to eliminate parasitic claims under the FCA but had the effect of significantly fettering its scope); *see also* HELMER, *supra* note 7, at 129-30 ("[T]he 1943 Amendments to the Act and several subsequent court decisions largely rendered the Act an ineffective tool in combating fraud against the United States.") (citation omitted).

23. *Springfield Terminal*, 14 F.3d at 650 (quoting S. REP. NO. 345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5266 (internal quotation omitted).

24. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020.

25. United States *ex rel.* Schweizer v. Océ N.V., 677 F.3d 1228, 1237 (D.C. Cir. 2012).

26. *See* United States v. NEC Corp., 11 F.3d 136, 138 (11th Cir. 1993) (quoting United States *ex rel.* Robinson v. Northrop Corp., 824 F. Supp. 830, 835 (N.D. Ill.1993).

27. *See id.*; *see also* United States *ex rel.* Reed v. Keypoint Gov't Sols., 923 F.3d 729, 738 (10th Cir. 2019) ("And because insiders might be reluctant to use these *qui tam* provisions due to fear of employer backlash, the False Claims Act protects whistleblowers from employer retaliation.") (citing Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 613-14 (10th Cir. 2018)).

provides that whistleblowers prevailing on retaliation claims are entitled to reinstatement, double the amount of backpay, litigation costs, and attorneys' fees associated with bringing their action.[28]

However, after the anti-retaliation provision's inception in 1986, subsequent amendments in 2009 broadened the scope of protected conduct often retaliated against by employers.[29] Importantly, Congress also used the 2009 amendments to correct courts' narrow interpretation of "employee" under the anti-retaliation provision.[30] To prevent side-stepping, Congress included "employee, contractor, or agent" in § 3730(h)(1)'s amendments to protect persons not technically engaged in the typical employer-employee relationship, but who nevertheless suffer from retaliation arising out of an agency or contractual relationship with an employer.[31]

Notably, § 3730(h)(1) currently protects whistleblowers, would-be whistleblowers lawfully acting to prevent fraud, and others assisting in furtherance of preventing fraud.[32] The statutory qualification that enables whistleblowers to recover from employer retaliation when pursuing a *qui tam* action or engaging in other efforts in furtherance of preventing FCA violations is as follows:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, 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 because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[33]

Under § 3730(h)(1), the uniformly constructed standard by which someone can successfully bring a retaliation claim against an employer requires the satisfaction of three elements: "(1) the plaintiff engaged in a protected activity, (2) the employer knew that the plaintiff engaged in a protected activity, and (3) the employer discharged or otherwise dis-

28. 31 U.S.C. § 3730(h)(2) (2021).

29. *See* United States *ex rel.* Chorches v. Am. Med. Response, Inc., 865 F.3d 71, 97 (2d Cir. 2017). Congressman Howard L. Berman asserted the amendment to section 3730(h) was intended to clear up ambiguity and demonstrate that it offers protection from "retaliation against not only those who actually file a qui tam action, but also against those who plan to file a qui tam action, who blow the whistle internally or externally without the filing of a qui tam action, or who refuse to participate in wrongdoing." *Id*. (quoting 155 CONG. REC. E1295-03, 2009 WL 1544226, at *E1300).

30. United States *ex rel.* Abou-Hussein v. Sci. Applications Int'l Corp., No. 09-1858, 2012 U.S. Dist. LEXIS 185456, at *9 (D.S.C. May 3, 2012).

31. *Id*. (quoting S. REP. NO. 110-507 (Sept. 25, 2008), 2008 WL 4415147 at *26-27).

32. *See* 31 U.S.C. § 3730(h)(1) (2021).

33. *Id*.

criminated against the employee as a result of the protected activity."[34]

The statutory language facially suggests a conventional scenario where an employee filing a *qui tam* claim gets harassed and/or wrongfully terminated for whistleblowing activities. However, a more nuanced question is whether the term "employee" in § 3730(h)(1) provides relief to whistleblowers for post-employment retaliation, such as interference with a whistleblower's ability to gain future employment. The following Section identifies how the Supreme Court resolved whether Title VII's anti-retaliation provision included former employees, providing the governing framework for the Sixth Circuit to decide the issue under the FCA.

C. Robinson *Framework*

In *Robinson v. Shell Oil Company*,[35] the Supreme Court held that because Title VII's use of "employees" in its anti-retaliation provision was ambiguous, the statute's primary purpose and broader context persuasively supported covering former employees' discrimination claims.[36] While Title VII is not the FCA,[37] *Robinson* provided the Sixth Circuit with the relevant framework for statutorily interpreting the scope of "employee" in the FCA's anti-retaliation provision.[38]

Three considerations prompted the *Robinson* Court's conclusion that the statutory language of Title VII was ambiguous: (1) Title VII had no "temporal qualifier" definitively illustrating its anti-retaliation provision protected only persons employed at the time of retaliation; (2) Title VII's definition of "employee" was consistent with persons previously *and* currently employed, therefore lacking any "temporal qualifier"; and (3) Title VII's other provisions used "employees" to encompass an application beyond, or different from, "current employees."[39]

The *Robinson* Court first reasoned that Congress' choice not to include the words *former* or *current* when referring to "employees" did not limit "employees" to either current or former employment.[40] Congress set that

34. HELMER, *supra* note 7, at 1144-45 (citation omitted).

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

36. 42 U.S.C.S. § 2000e-3 (2022) ("[It is unlawful] for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." (citations omitted)); *Robinson*, 519 U.S. at 346.

37. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347, 133 S. Ct. 2517, 2525 (2013) ("Since the statute's passage in 1964, [Title VII] has prohibited employers from discriminating against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in § 2000e-2.").

38. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 432 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022).

39. *Robinson*, 519 U.S. at 341-42; *see also Felten*, 993 F.3d at 432.

40. *Robinson*, 519 U.S. at 341-42.

limitation in a number of other statutory provisions, meaning Congress could have provided such a limitation if it desired.[41] Second, the Court rejected the argument that common usage limited Title VII's definition of "employee"[42] to mean the employee *is* employed because it could just as easily mean *was* employed.[43] Consequently, Title VII's definition only provided further ambiguity.[44] In its third and final consideration, the Court noted that Title VII's use of the term "employee" in other provisions to describe a current employment relationship demonstrated only that Congress subscribed to the plain meaning within those respective provisions, not to its plain meaning in Title VII's entirety.[45]

Finding Title VII's use of "employees" ambiguous, the Court looked to the statute's broader context and the purpose of the anti-retaliation provision for guidance.[46] In addition to finding that Title VII expressly provided former employees relief in the form of reinstatement from discriminatory discharge, the Court found that excluding former employees from the provision's reach would "vitiate much of the protection afforded by [the anti-retaliation provision]."[47]

Specifically, the Court agreed with the United States and Equal Employment Opportunity Commission's amicus briefs, which argued that former employees' exclusion from Title VII's protections would incentivize employers to fire whistleblowing employees and deter these former employees from coming forward due to fear of post-employment retaliation.[48] Consequently, the Court unanimously decided that Title VII's broad context, which encouraged employees to step forward, suggested Congress intended to include former employees.[49] Further, the Court found that Title VII's anti-retaliation provision's primary purpose supported including individuals encountering discrimination after the end of an employment relationship.[50]

The framework for identifying and resolving statutory ambiguity in *Robinson* guided the Sixth Circuit's analysis in *United States ex rel. Felten v. William Beaumont Hospital* when considering whether the FCA's anti-retaliation provision includes former employees. In tandem

41. *Id*.

42. 42 U.S.C.S. § 2000e(f) (2021) ("The term 'employee' means an individual employed by an employer . . . .").

43. *Robinson*, 519 U.S. at 342.

44. *Id.*

45. *Id*. at 343-44.

46. *Id*. at 345.

47. *Id*.

48. *Id*. at 346 (citing Brief for United States & EEOC as Amici Curiae Supporting Petitioner, Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (No. 95-1376) at 18-21).

49. *Id*.

50. *Id*.

with several decisions discussed in the following Part, the nuances of § 3730(h)'s scope illustrate that the provision's language requires analyzing legislative intent to fully understand its interpretation.

D. Influential Court Decisions

Legislative history demonstrates that the FCA's language has gone through several iterations to correct and guide courts' interpretations.[51] The FCA's anti-retaliation provision is also in need of clarification due to the recent circuit split. This Part details several decisions that not only influenced the Sixth Circuit's holding in.*Felten* but also provided a basis for future courts deciding whether § 3730(h) includes former employee protection. The following cases illustrate courts' interpretations of the anti-retaliation provision's scope and how external doctrines influence protections afforded to FCA whistleblowers.

For example, in *Neal v. Honeywell Inc.*,[52] a district court recognized a plaintiff's constructive discharge claim arising out of FCA retaliation.[53] There, the plaintiff-employee blew the whistle on her employer's fraudulent ballistics test results submitted to the United States Department of Defense.[54] The court found that adverse employment action in the context of Title VII provided guidance on assessing the plaintiff's constructive discharge claim, albeit originating from FCA retaliation.[55] After the plaintiff was not promoted as promised and endured various forms of harassment for her whistleblowing actions, the court found that these intolerable working conditions adequately supported constructive discharge arising out of an FCA retaliation claim.[56]

The Sixth Circuit further clarified who may bring cognizable retaliation claims under § 3730(h) in *Boegh v. EnergySolutions, Inc*. when it considered whether the FCA's anti-retaliation extended to applicants

51. *See* HELMER, *supra* note 7, at 89. The 2009 amendments corrected courts' application of the statute, which diminished the effectiveness of the 1986 amendments. *Id.*

52. Neal v. Honeywell Inc., 958 F. Supp. 345 (N.D. Ill. 1997). Because this case was active in several different courts, the decision by the Northern District of Illinois discussing the plaintiff's constructive discharge claim will be referred to as "*Neal*." The Seventh Circuit previously decided whether the plaintiff's actions were protected, among other things, but the court of appeals did not discuss the viability of a constructive discharge claim under section 3730(h). Neal v. Honeywell Inc., 33 F.3d 860 (7th Cir. 1994).

53. *Neal*, 958 F. Supp. at 348.

54. *Id*. at 346.

55. *Id*. at 348 (citing Thames v. Maurice Sporting Goods, Inc., 686 F. Supp. 208, 214, 214 n.16 (N.D. Ill. 1988)).

56. *Id*. Here, the plaintiff moved for reconsideration of a ruling stating she could not sustain a constructive discharge claim. Thus, the issue was whether to grant the plaintiff's motion to reconsider. *Id*. at 346.

seeking employment.[57] There, the plaintiff contended that a potential employer failed to hire him because he participated in protected whistleblower activities at a former job; thus, the plaintiff argued a prospective employer should be liable under the FCA's anti-retaliation provision despite having no association with the applicant's FCA action.[58] The court ultimately held that the provision necessarily requires an employment-like relationship to provide relief.[59]

While legislative history suggested the term "employee" extended to former employees, the Sixth Circuit reasoned that the legislative intent behind § 3730(h) did not support broadly construing "employee" to provide applicants relief when they had no prior employment relationship with the potential employer.[60] Because the court found that the plain meaning of "employee" excluded applicants who never had employment history with an employer, the plaintiff lacked statutory standing to bring an anti-retaliation claim under the FCA.[61]

Next, in deciding whether § 3730(h) included former employee's retaliation claims, Florida's Middle District Court concluded that the FCA's anti-retaliation provision extended to former employees experiencing retaliation after the employment relationship ended.[62] In *Ortino v. School Board of Collier County*, the plaintiff filed an internal complaint regarding misappropriation of government funds.[63] After resigning due to a hostile work environment, the plaintiff discovered she was placed on a district-wide list of ineligible hires because she reported the misappropriation of federal and state funds.[64] Considering whether the FCA's anti-retaliation provision precluded an employee's retaliation claim for conduct arising post-termination, the *Ortino* court held that *Robinson* and *EnergySolutions* supported including both current and former employees under the provision.[65]

The court reasoned that Title VII's anti-retaliation provision was nearly identical to the FCA's.[66] Therefore, the *Ortino* court was persuaded to adopt the *Robinson* framework to interpret the scope of "employee" as used in § 3730(h).[67] In conjunction with the Sixth Circuit's finding that

57. Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1064 (6th Cir. 2014).

58. *Id*. at 1058.

59. *Id*. at 1064.

60. *Id*. at 1063 (quoting S. REP. NO. 99-345, 1986 WL 31937, at *34 (1986)).

61. *Id*. at 1064.

62. Ortino v. Sch. Bd. of Collier Cnty., No. 2:14-cv-693-FtM-29CM, 2015 U.S. Dist. LEXIS 46463, at *8 (M.D. Fla. Apr. 9, 2015).

63. *Id*. at *2.

64. *Id*.

65. *Id*. at *7-*8.

66. *Id*. at *8.

67. *Id*.

legislative history supports including former employees under § 3730(h), Florida's Middle District Court held that the FCA's anti-retaliation provision encompassed both current and former employees.[68]

Despite these decisions, the majority of lower courts analyzing the issue of whether the FCA includes former employees' claims for post-employment retaliation take a bright-line approach, concluding that § 3730(h) only protects current, not former employees.[69] The following Part details the current circuit divide, whereby the Sixth Circuit departed from most lower courts and the Tenth Circuit by holding that § 3730(h) provides relief to former employees.[70]

E. The Circuit Split

In early 2021, when presented with the question of whether the term "employee" exclusively referred to a current employment relationship, the Sixth Circuit diverged from the Tenth Circuit by holding that the FCA's anti-retaliation provision may be invoked to provide former employees relief from post-employment retaliation.[71]

This Part describes the split between the Tenth and Sixth Circuit regarding whistleblower protection under the FCA and provide a basis for the discussion in favor of the Sixth Circuit's *Robinson* framework application. First, sub-part 1 examines the Tenth Circuit's decision holding that whistleblowers' relief under § 3730(h)(1) is restricted to the bounds of a current employment relationship [72] Next, sub-part 2 describes the Sixth Circuit's decision interpreting the FCA's anti-retaliation provision to include redress for post-employment retaliation by applying the *Robinson* framework.

68. *Id*. The court was persuaded by the *Robinson* decision as well as the Sixth Circuit's opinion in *EnergySolutions* to hold former employees were protected against retaliation under section 3730(h).

69. *See* Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1062 (6th Cir. 2014) ("Although there is no binding precedent in our circuit, other courts have overwhelmingly concluded that the term 'employee' in the FCA did not extend to persons outside the employer-employee relationship before the amendment"); *see also* United States *ex rel.* Complin v. N.C. Baptist Hosp., No. 09CV420, 2019 U.S. Dist. LEXIS 16974, at *35-36 (M.D.N.C. Feb. 4, 2019) (collecting cases to illustrate that a majority of lower courts to decide the issue follow the bright line rule, similar to *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610 (10th Cir. 2018), that the FCA's anti-retaliation provision only contemplates current employees' claims).

70. *See* discussion *infra* Part E.2.

71. *See* United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022).

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

1. *Potts v. Center for Excellence in Higher Education*

In 2018, the Tenth Circuit concluded that the FCA's anti-retaliation provision unambiguously prevented whistleblowing-employees from attaining relief against retaliatory acts occurring after the employee's discharge.[73] In *Potts v. Center for Excellence in Higher Education*, the plaintiff resigned from the defendant's employment, citing her employer's unethical practices regarding accreditation standards.[74] As part of a severance agreement, the plaintiff agreed she would not contact any governmental or regulatory agency for the purposes of filing a com-plaint or grievance, and she agreed to refrain from disparaging her former employer publicly or privately in exchange for $7,000.[75]

After violating her severance agreement by sending a disparaging email to another former employee, the plaintiff's employer sued her, seeking the $7,000.[76] The plaintiff then filed a written complaint with the Accrediting Commission of Career Schools and Colleges ("ACCSC") for her former employer's deceptive accreditation maintenance.[77] In response, the plaintiff's former employer amended its complaint to include the plaintiff's further breach of contract: she violated the severance agreement by submitting a complaint to the ACCSC.[78] The plaintiff then brought an action under the FCA's anti-retaliation provision against her former employer, alleging her former employer retaliated against her by amending its claim to include the plaintiff's breach of filing a complaint with ACCSC.[79] The district court dismissed the plaintiff's claim, concluding that former employees were not protected from post-employment retaliation under the FCA's anti-retaliation provision.[80]

On appeal, the Tenth Circuit began its analysis when deciding who qualified as an "employee" under § 3730(h)(1) by first examining whether any ambiguity existed within the language of the statute .[81] The court concluded that because four of the five enumerated retaliatory acts referenced in the statute can only occur during employment, the associated words canon prevented the court from construing the remaining retaliatory act to applied to circumstances beyond a current employment

73. *Id*. at 618.
74. *Id*. at 612.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*. at 612-13.
81. *Id*. at 614.

setting.[82]

Further, the Tenth Circuit concluded that the *ejustdem generis* canon construes the use of "in any other manner discriminated against" as a catch-all phrase which implicitly means "in any other [*similar*] manner discriminated against."[83] Accordingly, the court was dissuaded from construing "employee" to mean anything other than a current employee.[84]

Next, the court determined that the remedies available in § 3730(h)(2) relate only to a current employment relationship, rejecting the argument that "shall include" allows unspecified redress beyond employment-related relief.[85] Finally, turning to the plaintiff's contention that the Supreme Court's decision in *Robinson* applied with equal force to the FCA, the Tenth Circuit distinguished § 3730(h) from Title VII.[86] The Tenth Circuit found that unlike Title VII, § 3730(h)'s language sets a temporal limitation on retaliatory acts covered under the statute, necessarily limiting relief to employees presently engaged in an employment relationship.[87] Furthermore, the court noted that the plaintiff did not identify any provision of the FCA that speaks to former employees claiming retaliation for post-employment actions taken by an employer.[88] Therefore, the court did not interpret the FCA's anti-retaliation provision

82. *Id*. at 614-15 (citing Massachusetts v. Morash, 490 U.S. 107, 115 (1989)). The associated word canon maintains that words "associated in a context suggesting that the words have something in common . . . should be assigned a permissible meaning that makes them similar." *Id*. (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012)).

83. 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 . . . .") (emphasis added); *see also Potts*, 908 F.3d at 615. *Ejusdem generis* represents the principle that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 129 (1991) (citing Arcadia v. Ohio Power Co., 498 U.S. 73, 84-85 (1990)). Additionally, the Supreme Court usually uses "*ejusdem generis* to ensure that a general word will not render specific words meaningless." CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 295 (2011) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001); 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2007)).

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

85. *See id.* at 616 (holding Title VII's anti-retaliation provision permits former employees redress from post-employment retaliation). The court also considered the plaintiff's argument that the Department of Labor shared her position when construing the Sarbanes-Oxley Act, an Act with a similar anti-retaliation provision to the FCA's, to include coverage for former employees facing post-employment discrimination. *Id.* at 616-17. However, the court glanced over this argument, concluding the Department of Labor regulations may have just meant that former employees can sue for the retaliatory discrimination that occurred during previous employment. *Id*. at 617.

86. *Potts*, 908 F.3d at 617-18. The court identified the three-step statutory interpretation analysis in *Robinson* by directly quoting its language. *Id*, Subsequently, The Tenth Circuit focused primarily on the fact that Title VII includes no temporal limitation in its anti-retaliation provisions, as distinct from the FCA's, and was therefore inapplicable to the case at bar. *Id*.

87. *Id*.

88. *Id*. at 618

through the *Robinson* framework.[89]

For these reasons, the Tenth Circuit took the position that the FCA's anti-retaliation provision, on its face, unambiguously excluded any cognizable claim for relief when a whistleblower faced post-employment discrimination for exposing her former employer's fraud against the government.[90]

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

Conversely, the Sixth Circuit split from the Tenth Circuit in 2021 and held that "employee" under § 3730(h) included former employees, extending whistleblowers' protection.[91] In *Felten*, the plaintiff filed a *qui tam* action against a defendant-employer, alleging that his defendant-employer violated the FCA by engaging in physician kickback schemes in exchange for Medicare and Medicaid referrals.[92] After the United States intervened and settled the action with the plaintiff's former employer, the plaintiff amended his complaint to include, among other things, post-employment retaliation in the form of blacklisting and intentional interference with the plaintiff's ability to secure comparable employment.[93] After the district court dismissed the plaintiff's claims for post-employment retaliation, the sole issue on appeal was whether the word "employee" under § 3730(h)(1) offered redress to whistleblowers alleging retaliation *after* the employment relationship ended.[94]

In a case of first impression, the Sixth Circuit looked to *Robinson*'s statutory interpretation, first searching § 3730(h)'s text for facial ambiguity.[95] Noting that the presence of ambiguity dictates an inquiry into the statute's broader context and primary purpose behind its anti-retaliation provision according to *Robinson*, the court observed that the FCA provides no qualification as to whether its anti-retaliation provision exclusively applies only to current and not former employees.[96]

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89. *Id*.

90. *Id*.

91. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 430 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022).

92. *Id*.

93. *Id.*

94. *Id*. at 430-31 ("When [31 U.S.C. § 3730(h)(1)] refers to an 'employee' and proscribes certain employer conduct, does it refer only to a current employment relationship, or does it also encompass one that has ended?").

95. *Id*. at 431 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997)).

96. *Id*. While the Court notes that it usually interprets statues without any inquiry into its purpose and without assistance from extratextual tools to determine legislative intent, *Robinson* provided guidelines for the Court's determinization of statutory meaning in the face of ambiguity. *Id*. (citing Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019); Food Mktg Inst. v. Argus Leader Media, 139 S. Ct.

Under the first prong of the *Robinson* framework, the court recognized that Congress provided no temporal qualifier clarifying whether the FCA's anti-retaliation provision included only current or former employees.[97] Therefore, the court found that § 3730(h)(1) could be read to afford redress to both current and former employees.[98] Rejecting the argument that the *noscitur a sociis* canon limits all actionable conduct to a current (and thus excluding a former) employment relationship,[99] the court conceded that while being "discharged, demoted, or suspended" can only harm someone currently employed, a person can be "harassed," "threatened," or "discriminated against" irrespective of an employment relationship's timing.[100] Additionally, the court found the explicit reference of "[a]ny employee"[101] in the provision's opening sentence provided further ambiguity because § 3730(h)(1) could possibly apply to anyone who had ever been employed.[102]

Rejecting that the dictionary definition of "employee" only means a currently employed individual under the second prong, the court concluded "employee" could be read as any individual who *is* and *was* employed.[103] Similarly, the Sixth Circuit's precedent establishing that potential employees were not covered under the FCA's anti-retaliation provision had no bearing on former employees' prospect of inclusion.[104] The court found that both current and former employees may bring retaliation claims derived from an employment relationship, unlike job applicants who never performed work within the scope of employment.[105]

Finally, under the third *Robinson* consideration, the court found the

2356, 2364 (2019); McKnight v. Gen. Motors Corp., 550 F.3d 519, 524 (6th Cir. 2008)).

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

98. *Id*.

99. The Supreme Court illustrated the canon's meaning by stating that it relied on "*noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" Yates v. United States, 574 U.S. 528, 543 (2015) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)); *see also* S. D. Warren Co. v. Me. Bd. of Env'tal Prot., 547 U.S. 370, 378 (2006) ("[*Noscitur a sociis*] is invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" (quoting Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990)).

100. 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 . . . ."); *Felten*, 993 F.3d at 432.

101. *See* § 3730(h)(1).

102. *Felten*, 993 F.3d at 432. Importantly, the court considered whether "in the terms and conditions of employment" applied with equal force to all actionable conduct listed in section 3730(h)(1). *Id*. at 432. Because "terms and conditions of employment" is a catch-all phrase that encompasses many post-employment agreements, the court found the phrase, even if applied equally to all conduct listed, cut in favor of finding ambiguity. *Id*. at 433.

103. *Id*. (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

104. *Id.* (distinguishing Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1062 (6th Cir. 2014)).

105. *Id.*

FCA's remedial provision in § 3730(h)(2) evidenced a broader intention to afford relief to former employees.[106] In addition to remedying misconduct that is not limited to current employees, § 3730(h)(2)'s use of "shall include" in tandem with "entitle[ment] to all relief necessary to make that employee . . . whole" persuaded the Sixth Circuit that the non-exhaustive list of remedies applied with equal force to both current and former employees.[107]

Because the FCA's anti-retaliation provision could be read to create equal causes of action for both current and former employees, sufficient ambiguity existed for the court to consider the FCA's broader context and purpose of the anti-retaliation provision in determining whether the FCA afforded protection to former employees.[108] The *Felten* court then reasoned that the FCA's anti-retaliation provisions existed to incentivize and protect individuals coming forward with incriminating information that enhanced the government's ability to prosecute fraud, and without extending that protection to former employees, many potential whistleblowers would be dissuaded from stepping forward.[109] Additionally, the court concluded that not including former employees would impair the statute's effectiveness because employers could simply discriminate, harass, and threaten whistleblowers without repercussion in the post-employment context.[110]

Consequently, the Sixth Circuit held that the FCA's anti-retaliation provision provided former employees a cause of action against employers for post-termination retaliation according to the *Robinson* framework.[111] However, while the court acknowledged that its decision created a circuit split, it declined to address the question of whether blacklisting constituted a cognizable harm supporting a retaliation claim.[112]

The circuit split notably provides competing standards when interpreting "employee" to determine § 3730(h)'s scope. The split also means that the FCA's anti-retaliation provision applies inconsistently depending on which court hears the claim. In addition to promoting continuity and

106. *Id.* at 433.

107. 31 U.S.C. § 3037(h)(1)-(2); *Felten*, 993 F.3d. at 434. Additionally, the Court rejected the argument that the remedies listed in section 3730(h)(2) should only be available to individuals who were employed when the wrongful conduct took place, stating that the text of the statute does not explicitly contain that limitation. *Felten*, 993 F.3d. at 434. Further, the Court rejected the contention that Title VII's broad prohibition of employment discrimination created a meaningful delineation from the FCA's explicit cause of action for wrongful discharge, concluding that reinstatement can be a remedy for both wrongful discharge and post-termination retaliation. *Id.*

108. *Id*. at 434-35.

109. *Id*. at 435 (citing Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Circ. 1994); Neal v. Honeywell Inc., 33 F.3d 860, 861 (7th Cir. 1994)).

110. *Id*.

111. *Id*.

112. *Id*.

equal application of the law, the proceeding discussion also argues that *Felten*'s interpretation of § 3730(h) should govern the provision's application moving forward.

III. DISCUSSION

In the absence of legislative movement or further guidance from the Supreme Court, future courts analyzing whether the FCA's anti-retaliation provision affords causes of action to former employees should do so according to the *Robinson* framework, as applied by the Sixth Circuit in *Felten*. Accordingly, this Section first argues that the Sixth Circuit's holding best comports with the FCA's legislative history and fulfils governing policy goals detailed in § 3730(h)'s text. Second, this Section argues that courts' adoption of employment law doctrines necessarily favors affording former employees relief from post-employment retaliation under the FCA. Finally, this Section evaluates the practical implications if courts analyze whistleblower protections under the FCA according to *Felton* and *Potts*.

A. Felten *Accurately Fulfills the FCA's Purpose and Legislative Intent*

Felten's application of the *Robinson* framework allows courts to construct "employee" more accurately in accordance with the FCA's purpose and legislative intent. By giving courts the capacity to consider the FCA's broader context and the purpose behind the anti-retaliation provision, the *Robinson* framework, as applied by the *Felten* court, equips courts with the requisite tools to construe § 3730(h) congruently with Congress' interests.[113]

As illustrated below, courts and Congress have played a continuous cat-and-mouse game with the FCA in which Congress lays out statutory requirements, court decisions illuminate the effect of Congress' language, and Congress responds by amending the statute to correct misapplication. The current circuit split on how to interpret "employee" in § 3730(h) reflects a similar struggle that evidences the need to change the statute's interpretation.

For example, after a significant factual inquiry revealed that the 1943 amendments left the government overwhelmed by the level of fraud it faced, in 1986, Congress strengthened the FCA's *qui tam* provision in a

113. *Felten*, 993 F.3d at 435 ("When confronted with similar ambiguity, the *Robinson* Court looked to the 'broader context of Title VII and the primary purpose of § 704(a)' to hold that former employees were covered by Title VII's anti-retaliation protections." (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997))).

partnering effort with taxpayers to combat fraud.[114] To further accommodate that end, Congress added § 3730(h) in 1986 to protect those taxpayers' interests against retaliation when assisting with the prosecution of fraud.[115]

In the wake of the 1986 amendments, courts substantially narrowed the interpretation of "employee" as used in § 3730(h), pushing Congress to once again amend the provision in 2009 to correct the courts' fettered application.[116] Prompted by decisions in the Fourth and Third Circuits refusing to extend the Act's protection to persons in a contractual or agency relationship, Congress closed this loophole through the 2009 amendments.[117]

Like the courts that narrowly interpreted "employee" prior to the 2009 amendments, the Tenth Circuit's holding in *Potts* excluding former employees' claims for post-employment retaliation erroneously chips away at the effectiveness of § 3730(h) as well as the FCA's governing purpose.[118] To be sure, even prior to the 2009 amendments, courts uniformly acknowledged that congressional intent dictated that § 3730(h) applied broadly.[119] In addition to this directive, Congress chose to expand § 3730(h)'s scope to cover more plaintiffs and thus expanded protected activity through the 2009 amendments.[120]

Further, the FCA's legislative history illustrates that the definition of "employee," although not defined, should be "all-inclusive," and "[t]emporary, blacklisted or discharged workers should be considered

114. *See* HELMER, *supra* note 7, at 74, 77. The 1986 amendments were based on a significant factual analysis which revealed the DOJ was overwhelmed in its capacity to prosecute the amount of fraud it faced. *Id.*

115. United States *ex rel.* Schweizer v. Océ N.V., 677 F.3d 1228, 1237 (D.C. Cir. 2012) (quoting Neal v. Honeywell Inc., 33 F.3d 860, 861 (7th Cir. 1994)).

116. *See* United States *ex rel.* Abou-Hussein v. Sci. Applications Int'l Corp., No. 09-1858, 2012 U.S. Dist. LEXIS 185456, at *9 (D.S.C. May 3, 2012) (quoting S. REP. NO. 110-507 (Sept. 25, 2008), 2008 WL 4415147, at *26-27). Congress amended section 3730(h) by supplementing the provision to include agents and contractors as individuals eligible for relief from retaliation when acting in furtherance of an FCA claim. *Id.*

117. *Id.* (citing Vessell v. DPS Assocs. of Charleston, Inc., 148 F.3d 407, 411 (4th Cir. 1998); United States *ex rel.* Watson v. Conn. Gen. Life Ins. Co., 87 F. App'x 257, 261 (3d Cir. 2004)).

118. *See* Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 618 (10th Cir. 2018) (holding that section 3730(h) unambiguously excludes allowing former employees relief under for retaliation occurring after an employment relationship ended); *see also* United States *ex rel.* Complin v. N.C. Baptist Hosp., No. 09CV420, 2019 U.S. Dist. LEXIS 16974, at *35 (M.D.N.C. Jan. 4, 2019) (noting that while the Fourth Circuit hadn't squarely addressed the issue, it was clear that section 3730(h) did not support a remedy for post-employment retaliation) (citing *Potts*, 908 F.3d at 610).

119. Cestra v. Mylan, Inc., No. 14-825, 2015 U.S. Dist. LEXIS 67406, at *9 (W.D. Pa. Apr. 6, 2015) (citing Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir. 2001); McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 514 (6th Cir. 2000); United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 741 (D.C. Cir. 1998)).

120. *Cestra*, 2015 U.S. Dist. LEXIS 67406, at *9.

'employees' for purposes of [the] act."[121] Against a historical backdrop of legislative intent to construe "employee" broadly in order to enhance the FCA's effectiveness,[122] courts continue to narrowly interpret "employee" and diminish the government's prospect of bringing fraudulent actors to justice.[123]

Fortunately, *Felten*'s application of the *Robinson* framework counters this negative trend and permits courts to construe the meaning of "employee" in § 3730(h) broadly by factoring in the statute's broader context and the purpose behind the anti-retaliation provision.[124] Evidencing *Felten*'s congruence with legislative intent, a bipartisan sponsored bill led by Senator Grassley to amend § 3730(h)(1) was recently submitted before the Senate.[125] Introduced on July 22, 2021, § 4 of the bill includes a post-employment whistleblower retaliation provision by inserting "current or former" after "Any" in § 3730(h)(1).[126] Because Congress intended the FCA's whistleblower protections to apply broadly to protect whistleblowers from retaliation[127] and the primary purpose of the provision is to encourage whistleblowers coming forward with evidence of fraud,[128] courts should decide that "employee" includes former employees under § 3730(h), consistent with *Felten*'s application of the *Robinson* framework.

Holding former employees as eligible for relief under § 3730(h) comports with legislative history without overly expanding the provision

121. Ortino v. Sch. Bd. of Collier Cnty., No. 14-cv-693-FtM-29CM, 2015 U.S. Dist. LEXIS 46463, at *7 (M.D. Fla. Apr. 9, 2015) (quoting S. REP. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299). *See generally* Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1063 (6th Cir. 2014) (reasoning that the FCA's legislative history supports "employee" extending to both former and current employees).

122. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 435 (6th Cir. 2021) *cert. denied*, 142 S. Ct. 896 (2022) ("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.") (citing Haka v. Lincoln Co., 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008)).

123. *See Potts*, 908 F.3d at 618.

124. *Felten*, 993 F.3d at 432-33 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997)). *Robinson*'s guidance provides that ambiguity within a statute compels the court to look to the broader context and purpose behind the anti-retaliation provision, and given the lack of clarity in section 3730(h), *Robinson* applied with equal force when interpreting the FCA's anti-retaliation provision. *Id.*

125. False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021).

126. *Id.* If the bill were to pass, 31 U.S.C. § 3730(h)(1) would read as follows: "Any current or former employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, 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 . . . ." *See id.*

127. *See* HELMER, *supra* note 7, at 1129.

128. *See Felten*, 993 at 435 (citing Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Circ. 1994)); *see also* Neal v. Honeywell Inc., 33 F.3d 860, 861 (7th Cir. 1994)).

or crossing the threshold into purposivism.[129] For example, courts have held a cognizable retaliation claim under the FCA must necessarily arise out of an employment relationship.[130] Such a restriction adequately sets the parameters from which a litigant may bring a retaliation claim, while not rendering the term "employee" universally inclusive.

Because former employees' claims must arise out of previously formed employment relationships, the fact that an employment relationship ended should not bar subsequent retaliation relief.[131] To be sure, the provision's text explicitly allows for these post-employment remedies, including relief in the form of reinstatement.[132] Similarly, the provision remedies employer wrongdoing without specifying a current or former employment relationship.[133] Because case law and the provision's text necessarily implicate an established employment relationship and provide post-employment redress for retaliation, former employees' eligibility for relief does not expand "employee" beyond legislative intent.

Indeed, if the policy governing the anti-retaliation provision is to increase the government's prospect of bringing fraudulent actors to justice by giving whistleblowers unencumbered access to the statute's remedial mechanisms, then holding "employee" to include former employees-fully satisfies the FCA's design.[134] The Court in *Robinson* came to a similar conclusion when discussing whether Title VII's anti-retaliation provision provided relief to former employees.[135] Like *Felten*

129. *Felten*, 993 at 440 (Griffin, J., dissenting) ("Purposivism 'suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous purpose that happens to match the outcome one party wants.'") (quoting Arangure v. Whitaker, 911 F.3d 333, 345 (6th Cir. 2018)).

130. *See* Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1064 (6th Cir. 2014). Section 3730(h) requires some kind of employment relationship to have been established in order to provide relief, thus mere applicants are not included as an "employee" for purposes of the statute because an employment relationship was never formed. *Id.*; *Felten*, 993 F.3d at 433 ("In order to be a current or former employee, an employment relationship must have formed"); United States *ex rel.* Abou-Hussein v. Sci. Applications Int'l Corp., No. 09-1858, 2012 U.S. Dist. LEXIS 185456, at *9 (D.S.C. May 3, 2012) ("The Court finds particularly persuasive the thoughtful decision in *Mruz*, which noted that the statutory language of § 3730(h) reflected 'a legislative intent to operate exclusively in the area of the employment relationship.'") (quoting Mruz v. Caring Inc., 991 F. Supp. 701, 709 (D.N.J. 1998)); *see also* HELMER, *supra* note 7, at 1132 (noting that the defendant and the employer must have some sort of established employment relationship for section 3730(h) to apply) (citation omitted).

131. See *Felten*, 993 F.3d at 433. The fact that applicants are excluded from the provision does not mean former employees are excluded as well. *Id.*

132. *See* 31 U.S.C. § 3730(h)(2).

133. *Id*. ("Relief . . . shall include . . . compensation for any special damages sustained as a result of the discrimination . . . ."). The court also found persuasive that previous decisions held the FCA's remedial provision for special damages includes unlisted remedies, pointing to the conclusion that Congress intended a claimant be made whole whether or not she was a current or former employee. *Felten*, 993 F.3d at 434 n.3 (citing Wilkins v. St. Louis Hous. Auth., 198 F. Supp. 2d 1080, 1091 (E.D. Mo. 2001)).

134. *See* United States *ex rel.* Schweizer v. Océ N.V., 677 F.3d 1228, 1237 (D.C. Cir. 2012).

135. Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997) (citing NLRB v. Schrivener, 405 U.S. 117, 121-22, (1972); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292-93 (1960)).

considered the issue under the FCA, the Court in *Robinson* found that excluding former employees from Title VII's protections would diminish the anti-retaliation provision's purpose and similarly enable employers to "retaliate with impunity against an entire class of acts under Title VII[.]"[136]

These congruent concerns that excluding former employees from the statute's protection substantially limits whistleblowers' ability to obtain relief and encourages employer retaliation are why the *Felten* court included former employees within § 3730(h)(1)'s scope.[137] While these concerns adequately inform a decision to hold former employees eligible for relief, they fall short of illustrating the full scope of a whistleblower's role in FCA litigation, which bolsters the argument for courts to include former employees.

For example, in 2020, whistleblower lawsuits filed under the FCA's *qui tam* provisions represented 1.6 billion of the total 2.2 billion dollars recovered by the Department of Justice in settlements and judgements from civil cases of fraud against the government.[138] Further, since the 1986 anti-retaliation provision was added to the FCA, the number of *qui tam* lawsuits filed under the FCA's provisions has grown substantially, with 672 suits being filed in 2020. [139] Only adding to these numbers' significance, Assistant Attorney General Clark illustrated the FCA's reliance on whistleblowers: "Whistleblowers with insider information are critical to identifying and pursuing new and evolving fraud schemes that might otherwise remain undetected."[140] The legislative intent to construe § 3730(h) broadly in addition to data illustrating the government's vital reliance on whistleblowers provide courts with a substantial basis to hold the provision protects former employees.

The historical progression of congressional response to judicial action regarding whistleblowers' treatment under the FCA's anti-retaliation provision demonstrates a legislative intent to err on the side of inclusivity. Because *Felten*'s application of the *Robinson* framework enables courts to decide whether former employees are afforded redress for retaliation under § 3730(h) most compatibly with legislative intent while staying within parameters set by the FCA's design, future courts analyzing whether the FCA's anti-retaliation provision affords causes of action to former employees should do so according to *Felten* in the absence of legislative action or Supreme Court guidance.

136. *Robinson*, 519 U.S. at 346.

137. *See id.*; *see also Felten*, 993 F.3d at 435 (citing the same *Robinson* concerns and concluding former employees were eligible for relief under section 3730(h)(1)).

138. Press Release, *supra* note 24.

139. *Id.*

140. *Id.*

B. The FCA's Employment Law Adoptions Support Former Employee Inclusion

Holding former employees ineligible for relief under § 3730(h) and failing to apply the *Robinson* framework when deciding the issue ignores the fact that courts have previously looked to employment discrimination law to resolve the provision's scope.[141] Indeed, if practice permits courts to look beyond the statutory framework and into other areas of law for clarity, subscribing to the *Robinson* framework as applied by the *Felten* court to hold former employees eligible for relief under the FCA's anti retaliation provision should be customarily accepted.

Notably, § 3730(h) does not explicitly reference constructive discharge as it is a judicially created doctrine that relieves employees of intolerable working conditions who would otherwise be compelled to resign.[142] Similarly, the provision does not explicitly include former employees as eligible for redress.[143] However, given courts' willingness to look towards employment law doctrines when assessing § 3730(h)'s scope, and provided Congress intended the provision to apply broadly, courts should likewise seek guidance from the employment law context when assessing former employees' ability to attain relief from retaliation under the FCA.

Both the *Neal* court and the *Felten* court looked to Title VII for direction while navigating claims arising out of FCA retaliation.[144] Particularly persuasive was the congruent remedial provision shared by the FCA and Title VII.[145] The court in *Felten* maintained that Title VII and the FCA's anti-retaliation provisions both recognized reinstatement as a remedy for misconduct under the statutes, necessarily implicating former and current employees' ability to bring a claim post-termination.[146] By looking at the *Robinson* Court's finding that Title VII's reinstatement remedy was ambiguous because it provided former and current employees an avenue for redress without specificity, the Sixth

141. *See* HELMER, *supra* note 7, at 1143 (noting that courts have looked to federal law in the employment discrimination area when analyzing retaliation claims under section 3730(h)). HELMER, *supra* note 7, at 1143-44 provided the framework for the following analysis, first illustrating that the FCA has adopted constructive discharge in Neal v. Honeywell, Inc., 958 F. Supp. 345, 348 (N.D. Ill. 1997) and subsequently discussing Moore v. Cal. Inst. of Tech. Jet Propulsion Lab., 275 F.3d 838, 847-48 (9th Cir. 2002), that paralleled FCA retaliation claims to Title VII's adverse action claims. This section congruently uses that same framework to argue future courts should look to *Robinson*, like the *Felten* court did, when deciding whether former employees should be covered under section 3730(h).

142. *See* 31 U.S.C. § 3730(h); *see also Neal*, 958 F. Supp. at 348 n.7 (quoting Gray v. Ameritech Corp., 937 F. Supp. 762, 772 (N.D. Ill. 1996)).

143. *See* 31 U.S.C. § 3730(h).

144. United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 432 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022) ("*Robinson*'s reasoning applies with equal force to the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h)(1).").

145. *See id.* at 434-35.

146. *Id.*

Circuit correctly found that the FCA's anti-retaliation provision (providing reinstatement as a remedy) was similarly ambiguous, and held that the provision included former employees.[147]

The Sixth Circuit's adoption of the *Robinson* framework mirrors a similar application taken by previous courts that looked to employment law to determine the scope of retaliation claims under § 3730(h).[148] Denying future courts the ability to consider the *Robinson* framework when deciding whether former employees can obtain relief under the FCA's anti-retaliation provision ignores previous efforts invoking federal employment law to identify the provision's scope.

C. Practical Implications

Withholding former employees' eligibility for relief under § 3730(h) obviates protection the provision was intended to afford and likewise immunizes otherwise unlawful conduct as long as it occurs after an employment relationship ends. Becoming a whistleblower is often an extremely difficult experience in which individuals face losing their employment.[149] Consequently, when an individual becomes a whistleblower, the course of their life changes.[150] If § 3730(h)'s purpose is to protect and encourage whistleblowers to come forward with evidence of fraud, will a preferable result follow if the provision enables employers to harass, discriminate, and threaten their former employees?[151]

Enabling employers to retaliate against former employees only decreases the pool of those willing to report fraud by stripping away potential remedies for whistleblowers facing retaliation. Like in *Felten*, post-employment retaliation often looks like blacklisting where a former employer conspires to prevent the discharged employee from procuring future employment.[152] Termination is undoubtedly a setback, but the potential of never achieving comparable future employment is a similarly daunting prospect that likely prevents individuals from reporting fraud. Unsurprisingly, one of the most significant reasons people choose not to report fraud is fear of retaliation.[153] As a result, many will choose to

147. *Id*.

148. *See supra* Section II(D).

149. HELMER, *supra* note 7, at 14.

150. *Id*.

151. *See Felten*, 993 F.3d at 435 (citing Neal v. Honeywell, Inc., 33 F.3d 860, 861 (7th Cir. 1994); Haka v. Lincoln Co., 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008)).

152. *See* Barlow v. United States, 51 Fed. Cl. 380, 395 (2001) ("Blacklisting occurs when 'an individual, or group of individuals acting in concert, disseminates damaging information which affirmatively prevents another person from finding employment.'") (quoting Estate of Braude v. United States, 35 Fed. Cl. 99, 112 (1996)).

153. *See* Hesch, *supra* note 5, at 226.

internalize their employer's fraud over the potentially life-changing consequences associated with termination or harassment.[154] Consequently, if § 3730(h) does not remedy former employee retaliation occurring post-termination, the effectives of the FCA will likely suffer due to fewer individuals being willing to report fraud.

Conversely, although including former employees' claims for post-employment retaliation might increase the number of *qui tam* actions, such a result will likely strengthen the government's ability to recover fraudulently lost taxpayer dollars. Much like the uptick in FCA litigation following the introduction of the anti-retaliation provision, recognizing former employees' claims for post-termination retaliation, such as black-listing, will likely increase the government's prospect of recovery.[155]

Adopting *Felten*'s application of the *Robinson* framework to protect former employees claiming retaliation after being fired likely enables the government to better recover against fraud. By protecting a larger number of individuals, including former employees' claims for post-employment retaliation in § 3730(h) could bolster the government's access to information it needs to prosecute widespread fraud. However, with-holding former employee inclusion could likewise reduce the number of individuals willing to report fraud, thereby decreasing the government's capability to recover lost taxpayer dollars under the FCA.

IV. CONCLUSION

Whether § 3730(h) includes former employees' claims for relief from post-employment retaliation is a pertinent issue at the forefront of legislative movement and judicial review.[156] While only two circuits have addressed the issue, they applied conflicting legal standards to reach opposite conclusions. Given the degree of reliance on whistleblower information and Congress' intent to protect those coming forward with evidence of fraud, the Sixth Circuit's application of the *Robinson* frame-work provides the most appropriate standard for future courts to decide whether § 3730(h) includes former employees.

Including former employees' claims for relief will likely encourage more individuals to report fraud knowing they have protection from

154. *See id.* at 227 (quoting Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1158 (2010)).

155. *See* HELMER, *supra* note 7, at 84 (noting that the FCA's 1986 amendments supplemented the DOJ's antifraud efforts, increasing *qui tam* actions and resulting in substantial recovery for the U.S. Treasury).

156. The proposed amendments in 2021 to include former employees in section 3730(h) illustrate that the issue is of importance to lawmakers. *See* False Claims Amendments Act of 2021, S. 2428, 117th Cong. (2021).

resentful employers, thereby providing the government with information to recover additional taxpayer dollars lost to fraudulent dealings. The Tenth Circuit's holding in *Potts* merely functions to protect employers from liability when they harass or otherwise discriminate against whistleblowers after the whistleblower is fired. Such inequity on its face should provide courts and the legislature with a sufficient basis to include former employees under § 3730(h). Regardless, the Sixth Circuit's analysis in *Felton* should be adopted by future courts deciding whether to include former employees' claims for relief in the absence of conclusive legislative action or guidance from the Supreme Court.