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Fourth Circuit Clarifies Broadened Scope of Protected Conduct Under the False Claims Act

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On December 26, 2018, the U.S. Court of Appeals for the Fourth Circuit revived whistleblower David Grant's False Claims Act ("FCA") retaliation claim against his former employer United Airlines because the lower court applied the wrong standard. The Court reasoned that the 2010 amendments to the FCA broadened the scope of protected conduct. The key issue in this case, United States ex rel. Grant v. United Airlines, Inc., was whether Mr. Grant's complaints to United that various employees had failed to properly perform repairs on a U.S. Air Force fleet of military transport airplanes, in violation of binding regulations, met the FCA's post-amendments standard for protected conduct. The Court determined that Mr. Grant's complaints to United constituted protected conduct and that his complaint also provided sufficient facts to demonstrate that United had retaliated against him by terminating him shortly after he made complaints.

Background on the Airline Whistleblower's Case

From 2008 to 2014, Mr. Grant was a Lead Aviation Maintenance Technician for United at Charleston Air Force Base, where United provides engine maintenance services for the U.S. Air Force's locally-based fleets. In the course of his work, Mr. Grant discovered that United was certifying repairs in violation of federal regulations. Specifically, Mr. Grant observed United employees "pencil whipped" repairs, meaning that they certified that maintenance work – such as conducting engine inspections – had been completed when it had not. Mr. Grant told his superiors at the time that this practice was especially problematic because United is the only company in the world with the expertise to properly maintain the engines used in the Air Force fleets. In March 2014, Mr. Grant complained to United managers that workers were not properly following through on their duties and that they were using uncalibrated and uncertified tools on maintenance jobs. That same month he was escorted out of the building when he was caught taking pictures of a piece of equipment in furtherance of his complaints. On May 5, 2014, Mr. Grant sent an email to the Managing Director of Maintenance warning that these shoddy practices could lead to "catastrophic" engine failure. United fired Mr. Grant the next day.

The district court dismissed Mr. Grant's FCA *qui tam* and retaliation claims for failure to state a claim. In its decision on the FCA retaliation claim, the court reasoned that Mr. Grant had not alleged that he engaged in the type of activity protected by the FCA.

The district court's decision rested on an older standard that no longer applies to all retaliation claims after recent amendments to the FCA. Prior to 2010, the statute only protected employee complaints that were in furtherance of an FCA action, "including investigation for, initiation of, testimony for, or assistance" in an FCA action. Courts held that "in furtherance" of such an action meant there had to be a "distinct possibility" of an FCA suit. Specifically, courts had held that a retaliation suit under the FCA would only pass muster if "an employee engages in protected activity when litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when . . . litigation is a reasonable possibility." Amendments to the FCA in 2009 and 2010, however, broadened coverage of

the provision, creating two prongs of protected conduct: (1) "lawful acts done by the employee . . . in furtherance of an action under [the FCA]"; and (2) "other efforts to stop 1 or more violations" of the FCA.

Fourth Circuit Adopts "Objective Reasonableness" Standard to FCA Case

In its dismissal, the district court applied the same "distinct possibility" standard to the second category of protected activity. The Fourth Circuit rejected this application and instead adopted an "objective reasonableness" standard for protected activity under the second prong, noting that if the "distinct possibility" standard applied to both prongs, Congress would have accomplished nothing by amending the statute. Under the objective reasonableness standard, Mr. Grant sufficiently pled that he engaged in protected activity because he had an objectively reasonable belief that United had been violating the FCA and he complained to United to stop at least one violation of the FCA. The Court noted that Mr. Grant's complaints were not mere "concern[s] about regulatory non-compliance," but rather referred to specific illegal, fraudulent conduct against the U.S. government.

Though the court was unanimous in its decision on Mr. Grant's retaliation claim, Judge Barbara Keenan said in partial dissent that she would have revived Grant's fraud claim as well, noting that "[b]y declining to review claims by relators like Grant, we close the courthouse doors to allegations of dangerous misconduct . . . Without relators like Grant, such fraudulent schemes might never be brought into the light of day, contrary to the intent of Congress in enacting the FCA." Judge Keenan stated that the majority's standard requiring Mr. Grant to allege specific facts demonstrating a false claim was made to and paid by the government set too high a bar, arguing that whistleblowers should be allowed to rely on circumstantial evidence to raise an inference that a false claim was presented.

The Fourth Circuit's decision adds to the circuit case law clarifying the broad scope of protected conduct under the FCA and, specifically, adopting the "objective reasonableness" standard. This standard allows for successful retaliation claims regardless of whether a plaintiff could also assert a viable FCA action.

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