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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA ex rel. DAVID FELTEN, M.D., Ph.D.,

Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL,

Defendant- Appellee.

No. 20-1002

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:10-cv-13440—Stephen J. Murphy, III, District Judge.

Argued: October 20, 2020

Decided and Filed: March 31, 2021

Before: McKEAGUE, GRIFFIN, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Julie Bracker, BRACKER & MARCUS LLC, Marietta, Georgia, for Appellant. Michael R. Turco, BROOKS WILKINS SHARKEY & TURCO, Birmingham, Michigan, for Appellee. **ON BRIEF:** Julie Bracker, Jason Marcus, BRACKER & MARCUS LLC, Marietta, Georgia, for Appellant. Michael R. Turco, Jason D. Killips, Steven M. Ribiat, BROOKS WILKINS SHARKEY & TURCO, Birmingham, Michigan, for Appellee.

BUSH, J., delivered the opinion of the court in which McKEAGUE, J., joined. GRIFFIN, J. (pp. 11–18), delivered a separate dissenting opinion.

OPINION

JOHN K. BUSH, Circuit Judge. David Felten appeals the district court's partial dismissal of his first amended complaint alleging that William Beaumont Hospital ("Beaumont") violated the anti-retaliation provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h). Felten claims that Beaumont blacklisted him after he filed a qui tam complaint, in which he alleged that the hospital violated certain federal and state laws. Notably, the alleged blacklisting occurred after Felten's termination from Beaumont, and Felten's anti-retaliation claim challenges only Beaumont's post-termination actions. The district court dismissed the claim because it held that the FCA's anti-retaliation provision covers only retaliatory actions taken during the course of a plaintiff's employment. The district court certified for interlocutory appeal the question whether the FCA's anti-retaliation provision protects a relator from a defendant's retaliation after the relator's termination. That question is an issue of first impression in our circuit. Because we hold that the FCA's anti-retaliation provision protects former employees alleging post-termination retaliation, we vacate the district court's dismissal order and remand for further proceedings consistent with this opinion.

I.

On August 30, 2010, Felten filed a qui tam complaint alleging that his then-employer, Beaumont, was violating the FCA and the Michigan Medicaid False Claims Act. He alleged that Beaumont was paying kickbacks to various physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients. Felten also alleged that Beaumont had retaliated against him in violation of 31 U.S.C. § 3730(h) and Mich. Comp. Laws § 400.610c by threatening and "marginaliz[ing]" him for insisting on compliance with the law. After the United States and Michigan intervened and settled the case against Beaumont, the district court dismissed the remaining claims, except those for retaliation and attorneys' fees and costs.

Felten subsequently amended his complaint to add allegations of retaliation that took place after he filed his initial complaint. He alleged that he was terminated after Beaumont

falsely represented to him that an internal report suggested that he be replaced and that his position was subject to mandatory retirement. Felten further alleged that he had been unable to obtain a comparable position in academic medicine. This, he alleged, was because Beaumont "intentionally maligned [him] . . . in retaliation for his reports of its unlawful conduct," undermining his employment applications to almost forty institutions.

The district court granted Beaumont's motion to partially dismiss Felten's first amended complaint. In relevant part, the district court dismissed the allegations of retaliatory conduct occurring after Felten's termination, holding that the FCA's anti-retaliation provision does not extend to retaliation against former employees. The district court interpreted the qualifier "in the terms and conditions of employment" in § 3730(h)(1) to mean that the provision's coverage encompasses only conduct occurring during the course of a plaintiff's employment.

Upon Felten's request to amend the dismissal order, the district court certified for interlocutory appeal the question whether § 3730(h) applies to allegations of post-employment retaliatory conduct. We granted Felten's petition for permission to appeal.

We review de novo a district court's order regarding a motion to dismiss. *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 346 (6th Cir. 2016). We accept a plaintiff's factual allegations as true without presuming the truth of conclusory or legal assertions; then we determine whether the allegations state a facially plausible claim for relief. *Id.* at 345–46.

II.

At issue here is the temporal meaning of the word "employee" and the prohibited employer conduct in the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h)(1). That subsection states:

> 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.

§ 3730(h)(1). When this provision 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?

To answer that question, we start with the statutory text. *See Binno*, 826 F.3d at 346. We first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," relying on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). That analysis ends our inquiry "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* at 340 (quotation omitted). But if the text is unclear, we may look at the "[t]he broader context" of the statute and statutory purpose together to resolve the ambiguity. *Id.* at 345–46.

The FCA does not explicitly say whether it pertains only to current employment. However, Beaumont argues that the plain text of the FCA, when read according to relevant canons of statutory interpretation, unambiguously excludes post-termination retaliation. It urges us to adopt the approach of the Tenth Circuit—the only other court of appeals to decide the issue—in *Potts v. Center for Excellence in Higher Education, Inc.*, 908 F.3d 610, 614 (10th Cir. 2018). We respectfully disagree with Beaumont and our sister circuit's conclusion that the answer to the issue presented is clear. As explained below, the statutory text is in fact ambiguous.

We usually interpret a statute according to its plain meaning, without inquiry into its purpose. We also acknowledge the Supreme Court's recent reminders to stay away from extra-textual tools when ascertaining legislative intent. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). But *Robinson v. Shell Oil* 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 ambiguity, and we are bound to follow *Robinson*. *See McKnight v. General Motors Corp.*, 550 F.3d 519, 524 (6th Cir. 2008) (explaining that *Robinson* "laid out a roadmap for statutory interpretation").

In *Robinson*, the Supreme Court held that the term "employees" in § 704(a) of Title VII of the Civil Rights Act of 1964 is ambiguous and could be read to refer to both current and former employees. 519 U.S. at 345. That conclusion flowed from three considerations. First, Congress added "no temporal qualifier" to Title VII to clarify whether the statute includes only current employees or both current and former employees. *Id.* at 341. Second, Title VII's definition of "employee" itself has no temporal qualifier and "is consistent with either current or past employment." *Id.* at 342. Third, Title VII includes other provisions that use the term "employees" to encompass "something more inclusive or different than 'current employees,'" such as a provision authorizing "reinstatement or hiring of employees" as a remedy. *Id.* The Court acknowledged that some sections of Title VII use "employee" to unambiguously mean a "current employee," but it reasoned that that fact shows only that the term "'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts." *Id.* at 343.

Robinson's reasoning applies with equal force to the FCA's anti-retaliation provision, 31 U.S.C. §3730(h)(1). We address each consideration in turn.

First, there is no temporal qualifier accompanying the term "employee" in § 3730(h)(1), and that provision's explicit reference to "[*a*]*ny* employee," *id.* (emphasis added), could mean that it applies to any person who has ever been employed. Beaumont points to the *noscitur a sociis* canon to argue that the list of actionable conduct in § 3730(h)(1) constitutes the temporal limitation that distinguishes § 704(a) of Title VII from the FCA's anti-retaliation provision. True, the first three operative words on that list—"discharged, demoted, suspended"—refer to harm against only current employees. A person cannot be discharged, demoted, or suspended unless he or she first has a job to lose. However, current employment is not necessary for a person to be "threatened," "harassed," or "discriminated" against—the last three types of misconduct specified on the list. Thus, half of the terms on the list can refer to former employees, thereby reducing the value of the *noscitur a sociis* canon in this case. Congress may have included "threatened," "harassed," and "discriminated" in the statute to expand the temporal scope of the anti-retaliation provision because the three terms are, by their plain meaning, not restricted to a current employment relationship.

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