**No. 19-10945-HH**

IN THE

# United States Court of Appeals for the Eleventh Circuit

---

DANA HICKMAN, et al.,

*Plaintiffs-Appellants,*

v.

SPIRIT OF ATHENS, ALABAMA, INC.

*Defendant-Appellee*.

---

On Appeal from the United States District Court
for the Northern District of Alabama, Northeastern Division
Case No. 5:16-cv-01595-MHH

---

## BRIEF OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANTS

---


Jonathan Kroner
JONATHAN KRONER
LAW OFFICE
300 S. Biscayne Blvd., Suite 3710
Miami, Florida 33131
JK@floridafalseclaim.com
(305) 310-6046

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, DC 20036
(202) 296-4826

## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rules 26.1 and 28-1(b), *Amicus Curiae* Taxpayers Against Fraud Education Fund through the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DeMar, Jacklyn (counsel for *Amicus Curiae*)

Kroner, Jonathan (counsel for *Amicus Curiae*)

*Amicus Curiae* Taxpayers Against Fraud Education Fund is a non-profit entity that does not have parent corporations. No public held corporation owns 10 percent or more of any stake or stock in Amicus Curiae.

/s/Jonathan Kroner
Jonathan Kroner

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

Other Authorities

**To the Honorable United States Court of Appeals:**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellants, Dana Hickman and Robbin Hines. A Motion for Leave to File has been filed contemporaneously herewith, and submission of this brief is subject to allowance of that Motion. The Taxpayers Against Fraud Education Fund supports the Appellants for the reasons set forth below.

## STATEMENT OF INTEREST

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. TAFEF is supported by whistleblowers and their counsel and funded by

membership dues and foundation grants. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.[1]

TAFEF submits this brief to address the district court's decision to grant the defendant's motion for summary judgment on the plaintiffs' retaliation claims. The district court's opinion applied the incorrect test for cases brought under the FCA's retaliation provision by requiring the plaintiff's to prove that they had a viable FCA case, rather than prove that they had an objectively reasonable belief that the defendant had violated the FCA. A plaintiff bringing a retaliation claim is not required to meet the particularity requirements of Rule 9(b) or to prove that the defendant in fact violated or would have violated the FCA. Instead, the plaintiff is required to show that a reasonable employee in his or her position would have believed that a violation had occurred or would occur.

Applying the incorrect standard employed by the district court would chill and delay potential relators from reporting fraudulent activity to the government, and from attempting to stop fraud from within a company, by leaving them unprotected from reprisal by their employers as a result of their efforts. Whistleblowers are integral to the government's efforts to stop fraud, and ensuring

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amicus Curiae* represents that no party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

that they can undertake efforts to root out and report fraudulent behavior early, without the fear that they will suffer retaliation, is essential to the FCA's purpose and consistent with the text and intent of the law. In this case, the plaintiffs showed that they had an objectively reasonable belief that the defendant was receiving federal funds, that that they were acting to uncover and stop fraud on the federal government, and that their employment was terminated as a result. That is sufficient to meet the requirements of the FCA's retaliation provision, whether or not the plaintiffs could actually prove a substantive FCA violation.

## STATEMENT OF THE ISSUES

Whether the District Court applied the incorrect "distinct possibility" standard when granting Summary Judgment to Spirit of Athens, Alabama, Inc. under the False Claims Act, when it should have applied the "reasonable belief" standard.

## SUMMARY OF THE ARGUMENT

A standard that requires whistleblowers to prove a substantive FCA case in order to receive the protections of the FCA's retaliation provisions would severely undermine the purpose of the FCA, which is to enlist private individuals with information about fraud to bring that information to the government's attention and

to add to the government's resources in combatting fraud.[2] To further that purpose, Congress included an anti-retaliation provision in the statute to protect the interests of the whistleblowers Congress wanted to come forward. Under 31 U.S.C. § 3730(h), plaintiffs are required to show only that they had an objectively reasonable, good faith belief that a defendant was violating or would violate the FCA, that they acted to pursue a *qui tam* action **or** stop the violation, and that they were retaliated against as a result.

## ARGUMENT

### I. The Retaliation Provision of the False Claims Act Requires That Plaintiffs Have an Objectively Reasonable Belief that the Defendant is Violating or Will Violate the Act.

To establish that a defendant violated 31 U.S.C. § 3730(h), an employee is required to show that: 1) the employee engaged in protected activity, 2) the defendant knew that the employee was engaged in protected activity, 3) the defendant retaliated against the employee, and 4) the employee was discriminated against because of the protected activity.[3] The FCA defines protected activity as "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**

[2] See S. REP. NO. 99-345, at 5267 (1986) ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease [fraud against the Government].")

[3] *United States ex rel. Miller v. Weston Ed., Inc*. 840 F.3d 494, 505-6 (8th Cir. 2016)

**violations of this subchapter** (*emphasis added*).[4] Prior to 2009, the language of the statute required that the employee's conduct be "in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section."[5] In other words, protection under the retaliation provision was conditioned on the potential for a substantive FCA case. Several circuits adopted a "distinct possibility" standard in order to determine whether a plaintiff engaged in protected activity, and held that an employee could only prove retaliation by showing that the defendant's conduct reasonably could lead to a viable FCA action or that litigation was a reasonable possibility.[6]

However, the "distinct possibility" test was not adopted in every circuit, and particularly after the amendments to the law in 2009, is no longer the appropriate legal standard. Congress specifically amended the anti-retaliation provision of the FCA to include efforts to stop violations of the FCA in order to encourage employees to report fraudulent conduct as soon as possible, without the requirement that they have sufficient information to file a substantive *qui tam*

---

[4] 31 U.S.C. 3730(h)(1)

[5] *See Childree v. UAP/GA CHEM, Inc.,* 92 F.3d 1140, 1144 (11th Cir. 1996)

[6] *Id*. at 1144-46

action.[7] As such, courts have widely adopted a "reasonable belief" standard, which requires only that the plaintiff show that his or her actions were "motivated by an objectively reasonable belief that the employee's employer is violating, or soon will violate, the FCA."[8]

### A. An Objectively Reasonable Belief Means What a Reasonable Employee in Similar Circumstances Would Believe and Does Not Require the Employee to Prove a Viable FCA Case.

The plaintiff is required to show that he or she believed their employer was violating the FCA, that the belief was reasonable based on what a similarly situated employee would believe, and that he or she took action based on that belief in order to stop a violation of the FCA. As the court noted in *Ickes v. Nexcare Health Systems, L.L.C.*:

> It is immaterial whether the conduct alleged by Plaintiff—if true—would constitute a prima facie violation of the FCA…The Act

---

[7] Speech of Hon. Howard L. Berman, June 3, 2009, Congressional Record, E1295 (explaining that the amendments were "intended to make clear that this subsection protects not only steps taken in furtherance of a potential or actual *qui tam* action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual *qui tam* action.")

[8] *United States ex rel. Wilson v. Graham Co. Soil & Water Conservation District*, 545 U.S. 409 (2005); *Carlson v. DynCorp International LLC*, 2016 WL 4434415 (4th Cir. Aug. 22, 2016), *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir.2002); *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab*., 275 F.3d 838, 845 (9th Cir.2002)

> protects an employee who is punished for his or her "efforts to stop" violations of the FCA; its protection is not limited to only those employees whose complaints turn out to prove a violation of the FCA by a preponderance of the evidence. Such an interpretation would afford little protection for (and have a significant chilling effect on) whistleblowers, who are not FCA experts and are only able to report what they suspect to be fraud or misconduct.[9]

A plaintiff can show that he or she was engaged in protected activity by showing that he or she "in good faith believes, and a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government."[10] An employee is not required to fully investigate suspicions of potential fraud or provide evidence of an actual FCA violation in order to prove that he or she was engaged in protected activity,[11] rather, the retaliation provision protects employees "while they are collecting information about a possible fraud, before they have put all the pieces of the fraud together."[12]

---

[9] 178 F.Supp.3d 578, 593-94 (E.D. Mich. 2016)

[10] *Fanslow v. Chi. Mfg. Ctr., Inc*., 384 F.3d 469, 480 (7th Cir.2004) (finding that summary judgment in favor of the defendant was inappropriate where there was evidence that the relator had a good faith belief that the defendant was committing fraud and that the defendant was covering up its conduct.); *Moore v. Cal. Inst. Of Tech. Jet Propulsion Lab*, 275 F.3d 838, 845 (2002).

[11] *Jones-McNamara v. Holzer Health Systems*, 630 Fed. Appx. 394, 398 (6th Cir. 2015)

[12] *U.S. ex rel. Yesudian v. Howard Univ*., 153 F.3d 731, 740 (D.C.Cir.1998).

The Supreme Court has specifically held that a plaintiff can engage in protected activity "even if the target of an investigation or action to be filed was innocent," and noted that it is "well-established among the circuits" that proving a violation of the substantive FCA provisions is not an element of a retaliation claim.[13] In fact, it is not necessary for the employee to even know that the FCA or its retaliation provisions exist at the time of the protected activity.[14]

Plaintiffs in retaliation cases are not required to prove that an FCA violation occurred or to meet the requirements of Rule 9(b). As this Circuit held in *U.S. ex rel. Sanchez v. Lymphatx, Inc*., "[i]f an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that the employer could have feared being reported to the government for fraud or sued in a *qui tam* action by the employee, then the complaint states a claim for retaliatory discharge

---

[13] *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 416 (2005); *see also Holzer Health,* 630 Fed. Appx. at 399 ("Under the new version of § 3730(h) extending protection to 'lawful acts done ... in furtherance of an action under this section or other efforts to stop' a FCA violation, the requirement that conduct could develop into a 'viable FCA action' no longer accurately reflects the statutory language."); *U.S. ex rel. Sanchez v. Lymphatx*, *Inc.,* 596 F.3d 1300, 1303 n.6 (11th Cir. 2010)

[14] *See Yesudian,* 151 F.3d at 741 (noting that protected activity does not require specific awareness of the FCA and that if it did, "only lawyers – or those versed in the law – would be protected by the statute, as only they would know from the outset that what they were investigating could lead to a False Claims Act prosecution."); *Fanslow v. Chicago Mfg. Center, Inc*., 384 F.3d 469, 479-80 (7th Cir. 2004) ("An employee need not have actual knowledge of the FCA for her actions to be considered "protected activity" under § 3730(h).")

under § 3730(h)."[15] Here, the plaintiffs did report their concerns to the government, and were terminated as a result. (Doc. 31, pg. 13).

### B. The District Court Applied Too Rigid a Standard For Determining Whether the Plaintiffs Engaged In Protected Activity.

The district court observed that the plaintiffs were required to "demonstrate that they had a reasonable belief that Spirit of Athens violated the FCA," and, in a footnote, that "Section 3730(h) 'protects an employee's conduct even if the target of an investigation or action to be filed was innocent.'" (Doc. 36, pg. 11-12). However, it failed to correctly consider whether the plaintiffs had a good faith basis for their beliefs and what a reasonable employee would believe in similar circumstances. Instead, the court articulated the requirements for finding substantive FCA liability, determining that the plaintiffs could not prove retaliation because they could not prove that the Spirit of Athens submitted a claim or submitted false information to the federal government. (Doc. 36, pg. 13). The court found that the plaintiffs could not have had a reasonable belief that Spirit of Athens received federal funds. However, the record showed that similarly situated employees at the company also believed that the funds received from the Tennessee Valley Authority (TVA) were federal funds and described them as such,

[15] 596 F.3d 1300, 1304 (11th Cir. 2010) (finding that while the plaintiff's substantive claims failed to meet the requirements of Rule 9(b), she was not required to meet Rule 9(b) standards to successfully plead her retaliation claims.)

and that financial documents showed income from TVA directly. (Doc. 31, pg. 3-11). The district court's failure to consider the plaintiffs reasonable belief that Spirit of Athens was violating the FCA was in error.

The facts underlying this case are similar to those in the Eighth Circuit decision, *Wilkins v. St. Louis Housing Authority*, in which a former employee alleged that the defendant terminated his employment because he repeatedly reported concerns about the defendant's compliance with Department of Housing and Urban Development safety regulations.[16] The defendant argued that the plaintiff could not have engaged in protected activity because the records submitted to the government did not constitute "claims" under the FCA, and therefore, because there was no viable FCA claim, there could be no protected activity. The court explained that the defendant's argument missed "the distinction between the standards for a successful *qui tam* suit and those for an anti-retaliation claim."[17] The Eighth Circuit affirmed the district court's denial of the defendant's motion for summary judgment, finding that the plaintiff had a reasonable belief that the defendant's conduct fell "within the purview of the FCA."[18]

---

[16] 314 F3d 927, 928-29 (8th Cir. 2002).

[17] *Id*. at 933

[18] *Id*.

## II. A Standard Requiring Plaintiffs to Prove a Viable FCA Claim Under the Anti-Retaliation Provision Would Drastically Undermine the Government's Efforts to Fight Fraud.

In 1986, Congress revised and updated the FCA in the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, to make the statute a "more useful tool against fraud in modern times."[19] In the hearings that preceded the enactment of the 1986 amendments, the responsible committees of the House of Representatives and the Senate heard extensive testimony regarding the unwillingness of potential whistleblowers to expose fraud against the government for fear of reprisal.[20] Congress therefore provided the new federal right of action, 31 U.S.C. § 3730(h), "to halt companies and individuals 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."[21] In hearings before the 110th Congress, Representative Linda Sanchez noted that Congress added anti-retaliation provisions to the FCA in 1986 after

---

[19] *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No, 345, 99th Cong., 2d Sees. 2 (1986)).

[20] See S. Rep. No, 345, at 4-6, 99th Cong., 2d Sees. 2 (1986); *False Claims Reform Act: Hearing Before the Subcomm. On Administrative Practice and Procedure of the Senate Comm. On the Judiciary*, 99th Cong., 1st Sess. 48-101 (1985); *False Claims Act Amendments: Hearing Before the Subcomm. On Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 371-72, 387, 392- 416 (1986).

[21] S. Rep. No, 345, at 34.

"witnesses testified that they didn't blow the whistle on fraud because there was no anti-retaliation protection."[22] The 1986 amendments added the anti-retaliation provisions to encourage whistleblowers to come forward and report fraud and to add to the government's resources in recovering taxpayer funds.

With the more recent amendments to the FCA, as discussed above, Congress broadened the application of the anti-retaliation provisions to include not just conduct in furtherance of filing a *qui tam* action, but also any action taken to stop a potential violation of the FCA. Congress clearly intended to protect the most vital source of inside information about companies committing fraud by including the anti-retaliation provisions in the 1986 amendments to the FCA, and expanding the scope of these protections with the 2009 amendments.

If left undisturbed, the district court's holding would eviscerate the purpose and protection of the FCA's anti-retaliation provisions and would deter employees from making disclosures about defendants' fraud until they are certain they have evidence of an actual violation of the law. An employee who has an objectively reasonable belief that the employer is committing fraud should be encouraged to report it as soon as possible without fear of discrimination or termination. Making

---

[22] *The False Claims Act Correction Act of 2007: Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. 124 (2008).

the success of a plaintiff's retaliation claim contingent on whether he or she could collect enough evidence to prove a substantive FCA claim "could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success."[23] This is the opposite of what Congress intended in passing and amending the FCA. Further, if an employee is successful in his or her attempt to prevent a violation of the FCA, no viable *qui tam* claim has arisen, but the employee is still afforded the protection of 3730(h). The viability of a *qui tam* action cannot be a precondition of the statute's anti-retaliation protections.

Whistleblowers who come forward to report fraud should have, at the very least, legal protection from harassment and termination for trying to do the right thing. Despite the retaliation provisions of the FCA, many whistleblowers face the risk of severe consequences in their professional lives including termination, blacklisting, and worse. Many lose their jobs, health insurance, and 401(k) plans. Some face even greater financial devastation, including the loss of their homes. Coming forward can also take a personal toll including divorce, stress-induced health problems, and despondency.[24] In many instances, these stress-induced

---

[23] *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978).

[24] Aaron S. Kesselheim et al., *Whistleblowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 New England J. Med. 1832, 1836 (2010) (describing consequences of whistleblowing, including financial difficulties, divorce, and stress-related health problems "including shingles, psoriasis,

health problems are compounded due to the loss of health insurance coverage. Those who report their employers' fraud do not do so lightly, and should be lauded, rather than punished, for their willingness to do so.

## III. The Defendant's Argument That a Ruling in Favor of the Plaintiffs Will Greatly Expand Liability Under the FCA's Retaliation Provision is Misplaced.

The defendants argue in their Brief in Support of Summary Judgment that "every local organization that received TVA funds from a county government could be subjected to federal litigation under the FCA." Setting aside whether or not the TVA funds could reasonably have been believed to be federal funds, the defendant's argument is unfounded. In order to hold a defendant liable under the retaliation provision of the FCA, a plaintiff must prove that 1) the employee engaged in protected activity, 2) that the defendant knew that the employee was engaged in protected activity, 3) the defendant retaliated against the employee, and 4) that the employee was discriminated against because of the protected activity. Simply finding that the plaintiffs here had a reasonable belief that the defendant was defrauding the federal government does not negate the requirement that plaintiffs in any similar case will have to prove that *their* beliefs were objectively reasonable, that their employers knew about the plaintiffs' protected activity, that

---

autoimmune disorders, panic attacks, asthma, insomnia, temporomandibular joint disorder, migraine headaches, and generalized anxiety").

they suffered retaliation as a result of that activity, and that their protected activity was the reason for the retaliation. Similarly situated employees at Spirit of Athens believed the TVA funds were federal funds. It is entirely possible that employees at other local organizations receiving TVA funds never have any confusion about the source of the TVA funds, cannot reasonably believe that federal money is at issue. Taking into account all of the elements of a retaliation case, unless all of the entities receiving TVA funds terminate employees who raise concerns about potentially illegal practices, application of the proper legal standard here will not give rise to a sudden risk of undue litigation for those entities.

## CONCLUSION

The Court should reverse the district court's decision granting summary judgment in favor of the defendant, and remand with instructions to apply the reasonable belief standard to decide whether the plaintiffs engaged in protected activity under the FCA.

Dated: April 29, 2019

Respectfully submitted,

By_____

Jonathan Kroner

Jonathan Kroner
JONATHAN KRONER LAW OFFICE
300 S. Biscayne Blvd., Suite 3710
Miami, Florida 33131
305.310.6046

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, DC 20036
(202) 296-4826

## CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2019, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund in Support of Appellants to be served via the Court's ECF Filing System Notification. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jonathan Kroner
Jonathan Kroner

Counsel for *Amicus Curiae* Taxpayers Against Fraud Education Fund

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,628 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point typeface.

/s/ Jonathan Kroner
Jonathan Kroner

Counsel for *Amicus Curiae* Taxpayers Against Fraud Education Fund