CASE NO. 05-2624

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY SCOTT,

Plaintiff-Appellant,

v.

METROPOLITAN HEALTH CORPORATION, *et. al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Southern Division

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

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, *Amicus Curiae* Taxpayers Against Fraud Education Fund makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?
   No
2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?
   No

_____ _____

Joseph E. B. White — Date
Attorney for *Amicus Curiae*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund (TAFEF) files this *amicus curiae* brief in support of the Appellant. TAFEF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion of the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* and the support of whistleblowers who use the Act. The *qui tam* provisions of the Act permit a private relator to file suit on behalf of the United States alleging violations of the Act. In addition, the Act provides retaliation protection for the *qui tam* relator who brought the case. Frequently, employers who are accused of violating the Act's retaliation provision will grasp for nonretaliatory reasons to cover up their true retaliatory intentions. TAFEF therefore has a strong interest in ensuring that relators are given a full and fair opportunity to challenge the defendant-employer's stated reasons.

TAFEF is familiar with the questions involved in this case and the scope of their presentation and believe there is a necessity for additional argument on these points. TAFEF feels that it would be helpful to the Court, and important to the public, to file this *amicus curiae* brief in order to assist the Court in the resolution of this case. TAFEF has a profound and abiding interest in ensuring that the employment retaliation protections in the False Claims Act are appropriately interpreted and applied.

STATEMENT OF THE ISSUE

Whether the district court erred in ruling that the Plaintiff-Employee had brought a "frivolous" 31 U.S.C. § 3730(h) claim where the Plaintiff was supposedly aware that the Defendant-Employer could raise a "valid, non-discriminatory" reason for firing the her, and the Plaintiff insisted on raising an argument that the termination was motivated, at least in part, on her bringing a successful False Claims Act *qui tam* suit against the Employer.

SUMMARY OF THE ARGUMENT

The lower court's order should be vacated. The decision not only misinterprets the federal False Claims Act (FCA) by impermissively legislating a restrictive "[solely] because of" requirement into Section 3730(h) FCA liability, but it also erroneously levies sanctions against the Plaintiff for even challenging the Defendants' stated excuse for terminating her.

The False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, provides a cause of action for an employee who is "discriminated against in the terms and conditions of employment" by her employer "because of" the employee investigating, bringing, or otherwise assisting in bringing an FCA *qui tam* action. 31 U.S.C. § 3730(h). The applicable legislative history broadly defines "because of" to not only include those actions taken exclusively because of the employee's *qui tam* activities, but also those actions motivated, "in part," by the employee's *qui tam* activities. S. Rep. No. 99-345, at 35 (1986), *reprinted in* 1986

U.S.C.C.A.N. 5266, 5300.

The district court ruled, however, that the Plaintiff pursued a "frivolous" Section 3730(h) suit because she was supposedly aware that she may not have been terminated "[solely] because of" her protected activity. This reading of the statute is inconsistent with its plain meaning, irreconcilable with established case law, and at odds with the purpose of the Act. Moreover, the district court's decision, by failing to recognize that an employer's retaliatory intentions are oftentimes clothed in innocuous, non-retaliatory reasons, significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, withdrawing retaliation protection and leaving the livelihoods of America's courageous whistleblowers in jeopardy. The decision to penalize the Plaintiff is legally unsustainable and should be vacated.

ARGUMENT

THE DISTRICT COURT ERRED IN RULING THAT A FALSE CLAIMS ACT RETALIATION SUIT IS FRIVILOUS WHERE THE PLAINTIFF SUPPOSEDLY KNOWS THAT HER TERMINATION WAS NOT EXCLUSIVELY MOTIVATED BY HER SUCCESSFULLY PURSUING A MULTI-MILLION DOLLAR FALSE CLAIMS ACT *QUI TAM* ACTION AGAINST HER EMPLOYER.

A. The District Court's Ruling Ignores The Plain Language And Applicable Legislative History Of The False Claims Act.

In 31 U.S.C. § 3730(h), the False Claims Act imposes civil liability upon any employer who retaliates against an employee "because of" the activities an employee takes in furtherance of a False Claims Act *qui tam* action. *Id.* § 3730(h). The lower court, in labeling the Plaintiff's claim as "frivolous," ruled that, under this provision, action taken against an employee does not fall within the scope of the False Claims Act unless it was solely motivated by the employee pursuing an FCA *qui tam* action against the employer.

By its terms, Section 3730(h) protection extends to cover all retaliatory actions taken "because of" the employee's protected activity. The lower court edits an additional requirement into Section 3730(h), attaching liability only when the employer's retaliatory acts were taken "[solely] because of" the employee's whistleblowing activities. While this insertion admittedly adds credence to the lower court's decision, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting the rules that

Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1978).

Moreover, the district court ignores the relevant legislative history, which declares that a wronged employee need only show that the "retaliation was motivated, *at least in part*, by the employee engaging in protected activity." S. Rep. No. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300 (emphasis added). Thus, Congress, in using the broad causal language of Section 3730(h), explicitly clarified that a revengeful employer cannot escape liability by simply arguing that their decision to terminate the whistleblower was also motivated by a host of neutral, nonretaliatory reasons. Thus, the lower court's heightened *ad hoc*, post-dismissal review of the Plaintiff's claim is based on a cursory, legally unsustainable interpretation.

B. The District Court's Ruling Is Inconsistent With The Existing Employment Discrimination Case Law.

Perhaps most disturbing, the lower court deviates from the established case law by declaring the present suit "frivolous" simply because the Plaintiff challenged the Defendants' assertion that her successful multimillion dollar FCA *qui tam* action had absolutely nothing to do with her termination. In actuality, the showing necessary to demonstrate the causal aspect of a *prima facie* Section 3730(h) case is not onerous; the plaintiff "merely has to prove that the protected activity and the negative employment activity are not completely unrelated." *Mann v. Olsten Certified Healthcare Corp.*, 49 F. Supp. 1307, 1317 (M.D. Fla. 1999) (*quoting Holifield v. Reno*, 115 F.3d 1555, 1566 (11th

Cir. 1997)).

Because the lower court prematurely terminates the legal inquiry, a summary of the applicable employment discrimination case law is needed. To establish a claim for retaliatory discharge under the FCA, a relator must show that (1) she engaged in a protected activity; (2) her employer knew that she engaged in the protected activity; and (3) her employer discharged or otherwise discriminated against the employee as a result of the protected activity. *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 513-14 (6th Cir. 2000). As in federal discrimination cases, the relator has the initial burden of establishing a *prima facie* case of retaliation by a preponderance of the evidence. *See McNett v. Hardin Community Fed. Credit Union*, 118 Fed.Appx. 960, 963 (6th Cir. 2004). If she so succeeds, the burden shifts to the defendant to articulate a nondiscriminatory reason for the action taken. *Id.* (citation omitted). Once the employer has offered a legitimate reason for the adverse employment action, the burden shifts back to the relator to show that the employer's articulated reason is merely pretextual. *Id.*

In the matter at bar, however, the lower court not only overly restricts the causal element of a *prima facie* Section 3730(h) retaliation claim, but it also short-circuits the burden-shifting analysis by not even allowing the Plaintiff an adequate opportunity to challenge the Defendants' stated reasons. As the U.S. Supreme Court warned in its seminal employment discrimination decision, *McDonnell Douglas Corp. v. Green*, the employee "must be given a full and fair opportunity to demonstrate by competent

evidence that the presumptively valid reasons for his rejection were in fact a coverup for a [ ] discriminatory decision." 411 U.S. 792, 805 (1973). Furthermore, the Supreme Court cautioned the courts, in employment discrimination cases, not to usurp the jury's role, which is to make determinations of whether the evidence was sufficient to allow the plaintiff to prevail: "Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *accord*, *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998).

Thus, by dismissing the present action without a single evidentiary hearing and declaring it "frivolous," the lower court blatantly ignores the legal pronouncements and admonishments of the established case law, wrongfully sanctioning the Plaintiff for even raising a colorable argument under the FCA retaliation provision.

C. The District Court's Ruling Undermines The Purpose Of The False Claims Act Retaliation Provision.

The district court, sanctioning the Plaintiff based on a statutory interpretation that appears nowhere in the Act or the existing case law, undermines the very purpose of the False Claims Act by restricting the retaliation provision to those few wayward employers who are incapable of pointing to an alternative, nondiscriminatory reason to excuse their true retaliatory intentions. Moreover, by engaging in an *ad hoc*, post-dismissal review of the Plaintiff's claims, the court introduces a new level of uncertainty into the False

Claims Act *qui tam* community.

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." *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)). In the hearings that preceded 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.[1] 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." S. Rep. No, 345, at 34.

By engaging in a heightened *ad hoc*, post-dismissal review of the merits of the Plaintiff's Section 3730(h) retaliation claim, the lower court removes the assurances of employment protection afforded under the FCA. Indeed, the lower court's statutory revision, in all practical sense, erases the provision completely out of the Act. To further amply the message by penalizing the Plaintiff with a $1.6 million fine for not foreseeing

[1] *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).

the court's amendment sends a chilling message to would-be whistleblowers: Remain silent. Perhaps the U.S. Supreme Court said it best: "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978). This sort of logic should be discouraged.

Finally, if an employer can squelch its own personnel from bringing timely claims to redress fraud against the Government, then the task will be left to persons outside the organization. This will inevitably lead to delays that deprive the Government of monies that could be rightfully used for its programs, or keep legitimate cases from being brought in the first place. Should a courageous employee know that his or her actions in exposing government fraud would place them in additional jeopardy from the courts, it is doubtful insidious schemes would ever be exposed. It is for this reason that this Court should recognize the profound effect this ruling would have on potential relators, and the setback this will have on the False Claims Act as a whole. Thus, lower court's order should be vacated, returning the certainty of Section 3730(h) protections to America's brave whistleblowers.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated.

Respectfully submitted,

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February 28, 2006

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Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)(i)

Pursuant to Rule 32(a)(7)(C), I hereby certify that *Amicus Curiae* Taxpayers Against Fraud Education Fund's Brief complies with the type-volume limitation in Rule 32(a)(7)(B), Fed. R. App. P. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 2,004 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

_____ _____

Joseph E. B. White — Date
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief *Amicus Curiae* of Taxpayers Against Fraud Education Fund, were served by first-class mail, postage prepaid, this 28th day of February, 2006, upon:

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The Brief *Amicus Curiae* of Taxpayers Against Fraud Education Fund was filed with the clerk on February 28, 2006, pursuant to Fed. R. App. P. 25(a)(2)(B) by first-class United States Mail.

This 28th day of February, 2006.

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