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by Jay E. Grenig

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Issue

Does the six-year limitations period in 31 U.S.C. § 3731(b) apply to retaliatory discharge actions under the Federal False Claims Act, or should courts apply the most closely analogous state limitations period?

Facts

Karen Wilson was a part-time secretary at the Graham County Soil & Water Conservation District in North Carolina. On January 25, 2001, Wilson filed a "qui tam" action in federal district court in North Carolina under 31 U.S.C. § 1330(b) of the Federal False Claims Act (31 U.S.C. §§ 3729-3733) (FCA), alleging that several of her former coworkers had intentionally submitted false claims for reimbursement from three programs created or funded by the federal government in violation of § 3729 of the FCA. Wilson's complaint also alleged a claim for constructive discharge, claiming that, after she reported her concerns to federal authorities, her supervisors and coworkers initiated a pattern of harassment that resulted in her resignation on March 7, 1997, in violation of 31 U.S.C. § 3730(h). (A claim for "constructive discharge" requires that a plaintiff prove that the employer intentionally made plaintiff's working conditions so intolerable that a reasonable person would feel forced to resign, and that the plaintiff did in fact resign.)

Wilson claimed she had been constructively discharged in retaliation for her reporting her coworkers' allegedly improper activities. Deciding that the six-year limitations period of the Act did not apply to the retaliation claim, the district court applied North Carolina's three-year limitations period for wrongful discharge actions and dismissed Wilson's claim as untimely.

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Graham County Soil & Water Conservation District et al. v. United States ex rel. Karen T. Wilson
Docket No. 04-169

Argument Date:
April 20, 2005
From: The Fourth Circuit

Case at a Glance

Karen Wilson filed a Federal False Claims Act suit in 2001 claiming that her former employer had submitted false claims and alleging that she had been constructively discharged from her job in 1997. The Supreme Court is asked to determine which limitations period applies to her retaliation claim: the six-year limitation period provided by the federal Act or the three-year limitation provided by state law.

Wilson then appealed to the U.S. Court of Appeals for the Fourth Circuit. Reversing the district court, the Fourth Circuit held that the application limitations period was the six-year statute of limitations provided by the FCA. 367 F.3d 248 (4th Cir. 2004). Pointing out that § 3731(b) could have provided that a "civil action under section 3730(a) or (b) may not be brought more than six years from the date the violation of § 3729 is committed," the Fourth Circuit observed that Congress did not do so. Stating that an action under § 3730(h) protesting retaliation is a "civil action under § 3730," the Fourth Circuit concluded that the plain language of § 3731(b) compelled the conclusion that the six-year limitation period in that section applies to retaliation claims.

The Supreme Court agreed to hear the Conservation District's appeal. 125 S.Ct. 823 (2005).

Case Analysis

Originally enacted in 1863, the Federal False Claims Act imposes civil liability upon any person who, among other things, knowingly presents or causes to be presented to an officer or employee of the United States government a false or fraudulent claim for payment or approval. The defendant is liable for up to treble damages and a civil penalty of up to $10,000 per claim.

An FCA action may be commenced in one of two ways. First, the government may bring an action under § 3730(a) against the alleged false claimant. Second, under § 3730(b), a private person (the "relator") may bring a civil action known as a "qui tam" action "for the person and for the United States Government" against the alleged false claimant "in the name of the Government." ("Qui tam" is an abbreviation for the Latin phrase *qui tam pro domine nege qua pro sic ipso in hoc sequitur,* meaning "who pursues this action on our Lord the King's behalf as well as his own." It is called a qui tam action because the plaintiff states that he sues for the government and for himself.) The relator receives a share of any proceedings from the action—generally between 15 percent to 25 percent if the government intervenes in the action and from 25 percent to 30 percent if it does not.

A "claim" means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property that is requested or demanded. The FCA reaches beyond claims that might be legally enforced to all fraudulent attempts to cause the government to pay out sums of money.

The FCA underwent major revision in 1986, expanding the circumstances under which a citizen may bring suit on behalf of the government, participate in the litigation, and recover a share of the judgment. The 1986 amendments also created a cause of action for retaliation in 31 U.S.C. § 3730(h). Prior to the 1986 amendments, § 3731(b) had simply provided that "a civil action under Section 3730 of this title must be brought within six years from the date the violation of this title is committed." In 1986, § 3731(b) was amended to provide that a civil action under § 3730 may not be bought "more than 6 years after the date on which the violation of section 3729 is committed." As amended in 1986, the FCA provides protection to individuals who investigate or come forward with evidence of fraud. A retaliation claim can be maintained under the FCA even if no FCA qui tam action is ultimately successful or even filed. Relief for wrongful retaliation may include reinstatement and double the amount of back pay to which the employee is entitled plus interest, as well as any special damages suffered, including litigation costs and reasonable attorney fees.

A plaintiff asserting a retaliation claim under the FCA must show that (1) he or she engaged in protected conduct, i.e., conduct that was in furtherance of filing an action under the act, and (2) that he or she was discriminated against because of his or her protected conduct. In proving that he or she was discriminated against because of conduct in furtherance of an FCA suit, a plaintiff must show that his or her employer had knowledge that the plaintiff was engaged in protected conduct, and that the plaintiff's employer's retaliation was motivated, at least in part, by the employee's engaging in protected conduct. At that point, the burden shifts to the employer to prove that the employee would have been terminated even if the employee had not engaged in the protected conduct.

Section 3731(b) of the FCA provides that a "civil action under § 3730 may not be brought ... more than 6 years after the date on which the violation" was committed. The Conservation District argues that the text of § 3731(b) "could not be more plain." According to the District, the six-year period applies to claims brought under § 3730(a) and (b). The District contends that Congress did not intend for this limitations period to govern retaliatory discharge actions filed under § 3730(h).

Wilson disagrees, arguing that the plain meaning of § 3731(b) compels the conclusion that the six-year limitations period applies to whistleblower retaliation claims

under § 3730(h). She claims that the Conservation District "make[s] a weak attempt at arguing that 'a civil action under section 3730' somehow does not include the retaliation action set forth in section 3730(h), and thereby does not provide an express limitations period."

Even if the statutory language were ambiguous, Wilson argues, the Supreme Court has previously recognized that there is a presumption of resolving an ambiguity in favor of including the federal claim within the scope of the federal limitations period—as opposed to concluding that the claim has been given no federal limitations period. In addition, she says that when it is a practical necessity to bring two federal claims together, and if one of them has an express federal statutory limitations period while the other does not, that federal statutory period, rather than a state-law limitations period, should also be applied to the other claim.

The Conservation District claims that whether a violation of § 3729 has occurred is irrelevant to an action for retaliatory discharge, pointing out that to establish a claim for retaliatory discharge a plaintiff must merely hold a good-faith belief that a violation of the FCA has occurred. Because a claim for retaliatory discharge does not involve "a violation of section 3729," by its own terms, the District says that § 3371(b) does not apply to an action for retaliatory discharge.

Disagreeing, Wilson declares that this "is simply false." She claims that there is a crucial nexus between the two violations—a retaliation claim under § 3730 requires an alleged violation of § 3729. Furthermore, Wilson says the approach that Congress adopted achieved a "simplicity of administration" by identifying a single, readily identifiable point at which to begin the limitations periods for all actions under § 3730.

It is the Conservation District's position that Congress has used the phrase "a civil action under section 3730" to mean different things in different sections of the FCA. In certain places, the District says Congress has used the phrase to refer only to an action brought under § 3730(a), and in others to refer to a qui tam action filed under § 3730(b). According to the District, in other sections the phrase refers to actions under § 3730(a), § 3730(b), as well as § 3730(h).

Wilson responds that the District is contending that the straightforward language of § 3731(b) is ambiguous by citing purported ambiguities in other parts of the FCA employing similar language. According to Wilson, the District's ambiguity argument fails because it does not demonstrate how those other possible ambiguities render the operative language in § 3731 ambiguous on the point at issue.

The Conservation District suggests that, because a tolling provision in § 3731(b)(2) does not apply to retaliation claims, it is absurd to apply the six-year limitations period in § 3731(b)(1). Wilson responds that the application of § 3731(b)(1) is not dependent on the applicability of § 3731(b)(2). She claims that courts have applied § 3731(b)(1) to certain qui tam actions even though some of those courts have held that § 3731(b)(2) is not applicable to them.

The Conservation District claims that the legislative history of the 1986 amendments to the FCA confirms that Congress did not intend for § 3731(b) to apply to an action for retaliatory discharge. The District asserts that the whistleblower provision in § 3730(h) was modeled after eight other federal statutes. Noting that these statutes provide for a limitations period of 180 days or less and the limitations period accrues with the act of discharge or retaliation, the District contends that the Fourth Circuit's construction of the FCA is incongruent with every other whistleblower statute enacted by Congress. Wilson disagrees with the District's legislative history analysis. She says that none of the history that the District cites directly addresses the issue.

According to the Conservation District, the Fourth Circuit's interpretation "produces a result that is not only odd, but absurd." Responding, Wilson argues that the District in effect is contending that the Supreme Court should disregard the plain language because it results in a limitations scheme that is unusual and that, in the District's view, leads to undesirable results.

Arguing that Congress has not expressly provided for a limitations period for a retaliatory discharge action under § 3730(h), the Conservation District concludes that federal courts should apply the most closely analogous state statute of limitations. Wilson responds that the Supreme Court has directed that the limitations period of the most closely analogous state cause of action not be used if it would interfere significantly with the purpose of the federal statute.

SIGNIFICANCE

The debate over the proper interpretation of § 3731(b) has divided the federal circuits. The Ninth Circuit has held that § 3731(b) does not apply to retaliation actions. The Fourth and Seventh Circuits have determined that § 3731(b) applies

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to actions alleging a retaliation claim. Of course, the Supreme Court's decision will resolve this conflict among the circuits.

In *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034-36 (9th Cir. 1998), the Ninth Circuit held that § 3731(b) does not apply to retaliation claims under the FCA. The Ninth Circuit reasoned that the 1986 amendments, while adding a provision "created the retaliation claim but provided no specific statute of limitations for such claims." According to the Ninth Circuit, in light of this perceived absence of a congressionally prescribed statute of limitations, "the most closely analogous statute of limitations under state law must fill the void."

In contrast, in *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994), the Seventh Circuit applied the six-year limitation period in § 3731(b) to retaliation claims under § 3731(h). The employer in *Neal* argued that § 3731(b)(1) could not apply to retaliation claims, as a literal application of its terms would lead to absurd results. The Seventh Circuit disagreed, holding that the revised language of § 3731(b)(1) reflected Congress's decision to prioritize "simplicity of administration" and that the employer had mischaracterized the consequences of a literal reading of § 3731(b).

According to the Conservation District, tying the commencement of the limitations period in a retaliatory discharge action to anything other than the act of discharge or retaliation imposes a "tremendous burden on employers and employees. It would also produce a myriad of bizarre outcomes (*e.g.*, an employee [sic] being barred from bringing a retaliatory discharge action based upon the statute of limitations when the act of discharge or retaliation has not yet occurred)."

Wilson, on the other hand, claims that the limitations period of the "most closely analogous" state law would impose the onerous burden on the whistleblower of making an often difficult analysis of which statute would apply, a burden compounded by a complex choice of law analysis. She says placing such additional burdens on the whistleblower would undercut one of the key purposes of the 1986 Amendments to the FCA—to increase the incentives to the whistleblower to file a qui tam claim.

Attorneys for the Parties

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Amicus Briefs

In Support of Graham County et al.

International Municipal Lawyers Association and National League of Cities (John Charles Thomas (804) 788-8200)

Equal Employment Advisory Council and Chamber of Commerce of the United States (Ann Elizabeth Reesman (202) 789-8600)

National Defense Industrial Association, Aerospace Industries Association, and Professional Services Council (Mark R. Troy (213) 688-1000)

In Support of United States ex rel. Karen T. Wilson

National Employment Lawyers Association et al. (Ann Lugbill (513) 784-1280)

United States (Paul D. Clement, Acting Solicitor General (202) 514-2217)

In Support of Neither Party

National Workrights Institute (Gregory Stuart Smith (202) 383-0100)