APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES 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 antiretaliation 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, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). That analysis ends our inquiry "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' " *Id.* at 340, 117 S.Ct. 843 (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, 117 S.Ct. 843.

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.*, — U.S. —, 139 S. Ct. 1804, 1814, 204 L.Ed.2d 139 (2019); *Food Mktg. Inst. v. Argus Leader Media*, — U.S. —, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (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, 117 S.Ct. 843. 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, 117 S.Ct. 843. Second, Title VII's definition of "employee" itself has no temporal qualifier and "is consistent with either current or past employment." *Id.* at 342, 117 S.Ct. 843. 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, 117 S.Ct. 843.

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.

Beaumont also argues that the qualifier "in the terms and conditions of employment" at the end of the list of sanctionable conduct eliminates any reading that § 3730(h)(1) could provide relief to a former employee. In support, Beaumont notes that the Tenth Circuit held that the qualifier modified the word "discriminated" to make "discriminated in the terms and conditions of employment" a "catch-all phrase" that, under the *ejusdem generis* canon, restricted the meaning of all listed misconduct in § 3730(h)(1) to only activities that occurred while the plaintiff was still employed. *See Potts*, 908 F.3d at 615. With due respect to our sister circuit, we are not convinced. Even if the phrase "terms and conditions of employment" is a catch-all that applies to each listed type of misconduct in § 3730(h)(1), it does not necessarily restrict misconduct to occurrences that take place only while the plaintiff is still employed. There are many terms and conditions of employment that can persist after an employee's termination. *See, e.g.*, *Lantech.com v. Yarbrough*, 247 F. App'x 769,

771–72 (6th Cir. 2007) (referencing a noncompete agreement and confidentiality agreement); *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 528–29 (6th Cir. 2017) (holding non-solicitation provisions enforceable against employees terminated without cause); *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088–89 (5th Cir. 1987) (holding that a former employee was protected from his employer's discontinuance of severance pay under the ADEA's anti-retaliation provision). Moreover, straightforward application of the *ejusdem generis* canon cuts in favor of finding ambiguity, not clarity, because the terms "threatened" and "harassed"—which can both occur post-employment—are still specific terms that control that general catchall phrase. As in *Robinson*, here, no temporal qualifier indicates that the statute applies only to current employees.

The second *Robinson* consideration—which directs our review to the statutory and dictionary definition of "employee"—also shows that the FCA could cover former employees. The FCA does not define "employee," but in this case, dictionary definitions suffice. *See Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014) (holding that an applicant was not an "employee" under § 3730(h)'s plain meaning). Beaumont contends that the dictionary definitions cited in *Vander Boegh* confine the plain meaning of "employee" to current employees. But the Supreme Court rejected a similar argument in *Robinson*:

> The argument that the term "employed" . . . is commonly used to mean "[p]erforming work under an employer-employee relationship,"

> Black's Law Dictionary 525 (6th ed. 1990), begs the question by implicitly reading the word "employed" to mean "is employed." But the word "employed" is not so limited in its possible meanings, and could just as easily be read to mean "was employed."

519 U.S. at 342, 117 S.Ct. 843.[1] Also, that the FCA's anti-retaliation provision excludes applicants—framed in *Vander Boegh* as "potential employees"—does not mean that former employees are likewise excluded from its purview. 772 F.3d at 1062. In order to be either a current or former employee, an employment relationship must have formed. A job applicant has never performed work as an employee for the employer; both current and former employees, by definition, have.

Third, here, as in *Robinson*, other aspects of the statutory framework also support a reading that the FCA covers former employees. The FCA's remedial provision allows former employees to seek relief for post-termination retaliation.[2] For example, a former

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[1] This Court in *Vander Boegh* and the Supreme Court in *Robinson* were using different editions of Black's Law Dictionary, but the principle applies equally to both editions.

[2] The dissent notes that the term "employee" elsewhere in the FCA seems to refer only to current employees. Dissent at 438. That possibility does not remove the ambiguity of the term as used in § 3730(h), especially as *Robinson* acknowledges that the context of different sections of a statute can indicate that "the term 'employee' refers unambiguously to a current employee" without necessarily showing "that the term has the same meaning in all other sections and in all other contexts." 519 U.S. at 343, 117 S.Ct. 843. Ambiguity requires only "that the term 'employees' includes former employees in some sections, but not in others." *Id.*

employee can obtain "reinstatement" as one type of relief under the statute. *See* 31 U.S.C. § 3730(h)(2) ("Relief under paragraph (1) shall include reinstatement . . . ."). A plaintiff, by definition, must be a former employee; after all, only someone who has lost a job can be reinstated.

Likewise, the provision for special damages can provide relief to former employees. That provision explicitly remedies "discrimination"—misconduct that is not dependent on whether the plaintiff is still an employee. *See* § 3730(h)(2) ("Relief . . . shall include . . . compensation for any special damages sustained as a result of the discrimination . . . .").[3]

Also, the catch-all wording of the relief provision can support application of the FCA to former employees. The use of "shall include," especially in combination with an employee's "entitle[ment] to all relief necessary to make that employee . . . whole," demonstrates that the list of remedies is not exhaustive. § 3730(h)(1), (2); *see Samantar v. Yousuf*, 560 U.S. 305, 317, 130 S.Ct. 2278, 176 L.Ed.2d 1047

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[3] Indeed, courts have held that the provision for special damages under the FCA is broad and, therefore, can include unlisted remedies such as front pay or noneconomic compensatory damages—remedies that are not necessarily restricted to current employees. *E.g.*, *Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002); *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 (8th Cir. 2000) ("Damages for emotional distress caused by an employer's retaliatory conduct plainly fall with this category of 'special damages.' "); *Wilkins v. St. Louis Hous. Auth.*, 198 F. Supp. 2d 1080, 1091 (E.D. Mo. 2001) (awarding front pay "to effect the express Congressional intention that a claimant under § 3730(h) be made whole" even though "the FCA does not specifically include front pay as a remedy").

(2010) ("It is true that use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive.").[4] This expansive catch-all language further shows that remedies exist regardless of whether the plaintiff is still employed.

Beaumont argues that those remedies do not necessarily establish that former employees are entitled to relief. It contends, for example, that reinstatement should be limited to people who were employees when the wrongful conduct occurred. But the text does not contain that limitation. Under § 3730(h)(1), a person out of a job can get the job back as a remedy for the proscribed conduct, regardless of when the wrongful act occurred. Furthermore, the fact that the FCA explicitly creates a cause of action for wrongful discharge, while Title VII prohibits employment discrimination more broadly, is not a meaningful difference in this context. True, reinstatement can be a remedy for wrongful discharge, but that does not change the fact that it could be a remedy for post-termination retaliation as well. The Supreme Court in *Robinson* explicitly invoked the likelihood of a former employee alleging

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[4] *See also BellSouth Telecomms., Inc. v. Ky. Pub. Serv. Comm'n*, 669 F.3d 704, 713 (6th Cir. 2012) (citing *Samantar*); *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 337 (4th Cir. 2012) ("Courts have repeatedly indicated that 'shall include' is not equivalent to 'limited to.' "). Courts of Appeals have also held that similar language in the Sarbanes-Oxley Act precedes a non-exhaustive list of available relief, empowering courts to award relief for emotional distress. *See Jones v. Southpeak Interactive Corp.*, 777 F.3d 658, 672 (4th Cir. 2015); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 264–65 (5th Cir. 2014); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013).

wrongful discharge as support for the proposition that Title VII encompasses former employees, recognizing that because the remedy of reinstatement necessarily applied to former employees, former employees were covered under Title VII whether they were suing in response to a discriminatory discharge or post-employment retaliation. 519 U.S. at 342–43, 117 S.Ct. 843.

In short, we could read the statute in two ways: applying only to current employees or reaching those who have lost their jobs. We think the latter is the more accurate reading. But given the Supreme Court's guidance in *Robinson*, we ultimately hold that the term "employee," as used in the statute, is ambiguous.

When confronted with similar ambiguity, the *Robinson* Court looked to the "broader context of Title VII and the primary purpose of § 704(a)" to hold that former employees were covered by Title VII's anti-retaliation protections. 519 U.S. at 345–46, 117 S.Ct. 843. The lack of statutory clarity here compels an analogous approach. As discussed, the FCA's remedial provision indicates that former employees may sue under § 3730(h). And *Robinson* found it relevant that excluding former employees from the protections of Title VII would "effectively vitiate much of the protection afforded by [the statute]" because it would deter reporting to the government and "provide a perverse incentive for employers to fire employees who might bring Title VII claims." *Id.* So too here. The FCA is designed to "discourage fraud against the government," *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), and the purpose of the Act's anti-retaliation provision is to encourage

the reporting of fraud and facilitate the federal government's ability to stymie crime by "protect[ing] persons who assist [in its] discovery and prosecution," *Neal v. Honeywell Inc.*, 33 F.3d 860, 861 (7th Cir. 1994), *abrogated on other grounds by Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005)). If employers can simply threaten, harass, and discriminate against employees without repercussion as long as they fire them first, potential whistleblowers could be dissuaded from reporting fraud against the government. *See Haka v. Lincoln Co.*, 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008) (holding that the reasoning in *Robinson* applied equally to the FCA and that including former employees "was necessary to effectuate the provision's primary purpose: '[m]aintaining unfettered access to statutory remedial mechanisms.' " (quoting *Robinson*, 519 U.S. at 346, 117 S.Ct. 843)). We therefore hold that the anti-retaliation provision of the FCA may be invoked by a former employee for post-termination retaliation by a former employer.

We acknowledge that our decision creates a circuit split. Our analysis differs from that of the Tenth Circuit primarily with regard to *Robinson*'s first and third factors: whether the statute includes a temporal qualifier and whether other provisions envision both current and former employees. We deem it a better fit with all of *Robinson*'s considerations to construe § 3730(h)(1) to effectuate the statute's broader context and purpose.

III.

Finally, Felten argues for the first time on appeal that the "terms and conditions of employment"

provision of § 3730(h) includes blacklisting. Although the district court invoked the "terms and conditions of employment" qualifier as a reason why post-employment retaliatory action did not fall within the FCA's ambit, it did not address whether blacklisting is included as a form of prohibited retaliatory action. Thus, we do not address the issue; instead, we remand for the district court to consider the issue in the first instance. *See Child Evangelism Fellowship of Ohio, Inc. v. Cleveland Metro. Sch.*, 600 F. App'x 448, 453 (6th Cir. 2015) ("We generally do not consider issues left unaddressed by the district court.").

IV.

We vacate the district court's order granting Beaumont's motion to partially dismiss Felten's first amendment to his complaint and remand for further proceedings consistent with this opinion.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

This case asks if the word "employee," when used in the False Claims Act ("FCA"), refers to someone who is not an employee. To ask the question is to answer it. Instead of applying tried-and-true tools of statutory interpretation to their logical end, the majority rushes to find ambiguity then divines congressional intent from its own perception of which reading would best serve the FCA's "broader context and purpose." As a result, the majority's opinion creates a circuit split and contradicts the decision of nearly every other federal court that has considered whether the FCA's anti-retaliation provision extends to former employees. Because the FCA unambiguously reserves retaliation claims for only those plaintiffs who were employees when they were retaliated against, I respectfully dissent.

I.

The only question before us is whether the FCA's anti-retaliation provision prohibits retaliation against former employees. "A matter requiring statutory interpretation is a question of law requiring de novo review, and the starting point for interpretation is the language of the statute itself." *Roberts v. Hamer*, 655 F.3d 578, 582 (6th Cir. 2011) (internal quotation marks and citation omitted). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 583 (citation omitted). The FCA's anti-retaliation provision provides:

> 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.

31 U.S.C. § 3730(h)(1). This is not the first time that we have examined the plain meaning of "employee," as used in this provision. We have said that, for the purposes of the FCA's anti-retaliation provision, an employee is "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance," *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014) (quoting Black's Law Dictionary 639 (10th ed. 2014)), or " '[a] person working for another person or a business firm for pay,' " *id*. (quoting Random House Webster's Unabridged Dictionary 638 (2001)). *Id*. at 1062.

Thus, under our precedent and the plain language of the statute, whether a former employee falls within the definition of "employee" is a straightforward inquiry: does a former employee work in the service of his former employer under a contract of hire or for pay? The answer is "no," otherwise he would not be a

former employee. This alone mandates affirming the district court.[1]

If our precedent and the statute's plain language were not enough, the specific context in which "employee" is used also compels the conclusion that former employees are beyond the anti-retaliation provision's scope. To have a cause of action, a plaintiff must have been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment." 31 U.S.C. 3730(h)(1). Of these six categories of retaliatory acts, four can be committed only during employment: only a current employee can be discharged, demoted, suspended, or discriminated against in the terms and conditions of employment.

True, a former employer could harass or threaten a former employee. But the canon of *noscitur a sociis* requires us to temporally limit the scope of these undefined terms. This canon instructs that "the meaning of an undefined term may be deduced from

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[1] Felten argues that *Vander Boegh* supports his position that former employees may bring retaliation claims based on post-employment conduct because there we observed that one portion of the FCA's legislative history "suggest[ed] that 'employee' extends to former employees, as well as present employees." 772 F.3d at 1063. But Felten concedes that this observation is dicta, and therefore nonbinding on this panel. *See, e.g.*, *Johnson v. City of Cincinnati*, 310 F.3d 484, 493 (6th Cir. 2002). Moreover, even if *Vander Boegh*'s observation regarding the FCA's legislative history is accurate, it is irrelevant. A court may look to legislative history only when "a plain reading leads to ambiguous or unreasonable results." *United States v. Vreeland*, 684 F.3d 653, 662 (6th Cir. 2012) (citation omitted); *see also Chrysler Corp. v. C.I.R.*, 436 F.3d 644, 654 (6th Cir. 2006). Here, a plain reading of the FCA merely reserves retaliation claims for plaintiffs who were employees when they were retaliated against.

nearby words." *United States v. Miller*, 734 F.3d 530, 541 (6th Cir. 2013). This "associated-words" canon provides that, when words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). Specifically, this canon holds that "words grouped in a list should be given related meanings." *Id*. (quoting *Third Nat'l Bank in Nashville v. Impac Ltd*., 432 U.S. 312, 322, 97 S.Ct. 2307, 53 L.Ed.2d 368 (1977)).

The meanings of "threatened" and "harassed" must therefore be consistent with their neighbors, all of which are temporally limited to current employment. Thus, "threatened" and "harassed" are likewise limited to existing employer-employee relationships, which places post-employment retaliation against former employees beyond the reach of the anti-retaliation provision.

A second canon of statutory interpretation, *ejusdem generis*, further confirms this temporal limitation. *Ejusdem generis* dictates that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Miller*, 734 F.3d at 541 (citation omitted). "[W]hen a drafter has tacked on a catchall phrase at the end of an enumeration of specifics," *ejusdem generis* implies the addition of the word "similar" between the last specific and the catchall phrase. Scalia & Garner, *supra*., at 199.

The FCA's anti-retaliation provision lists five specific categories of retaliatory conduct, then

includes a catchall phrase that applies to employees who have been "in any other manner discriminated against in the terms and conditions of employment." 31 U.S.C. § 3730(h)(1). *Ejusdem generis* limits the catchall phrase's scope to discriminations that are similar to discharges, demotions, suspensions, threats, and harassment. And these general discriminations are actionable only if they occur in the terms and conditions of employment. *Id*. To comply with *ejusdem generis*, threats and harassment must also be prohibited only if they occur during the employment relationship.

We should also look to other portions of the FCA. "A standard principle of statutory construction provides that identical words . . . within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007). The FCA is not a particularly long statute, and it uses the word "employee" in only a few other provisions. None of these other uses can be reasonably read as "former employee." For example, the FCA provides that "[n]o court shall have jurisdiction over an action brought [by a private person] against . . . a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought." 31 U.S.C. § 3730(e)(2)(A). "[S]enior executive branch official" is in turn defined as "any . . . employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978," 31 U.S.C. § 3730(e)(2)(B), which includes a huge swath of the executive branch, from the President, 5 U.S.C. App.4 § 101(f)(1), to the Social Security Administration's many administrative law

judges, *id*. at § 101(f)(4). If, when used in the FCA, "employee" means "former employee," then thousands of executive branch officials receive lifetime immunity from certain *qui tam* suits on their first day of work. This immunity, which makes it *more* difficult to enforce the FCA, would not align with the statute's purported goal of reducing fraud against the government.

Or consider a provision at the very heart of the act: the definition of "claim." The FCA defines "claim" as "any request or demand . . . for money or property . . . that . . . is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2). Suppose a federal employee quits her government job and starts her own business. If one of her vendors sends her a false claim, has it violated the FCA? Of course not; she was not a United States employee when the vendor presented her with the false claim. But under the majority's interpretation of the word "employee," the vendor could be liable under the FCA for submitting a false claim to a former United States employee.

Finally, persuasive case law supports affirming the district court. Nearly every federal court that has considered whether the FCA's anti-retaliation provision is temporally limited to current employees—including a unanimous panel of the only other circuit court of appeals to have examined that question—has reached the same conclusion: the FCA's anti-retaliation provision does not apply to post-employment retaliation. *See Potts v. Ctr. for Ex-*

cellence in Higher Educ., 908 F.3d 610, 613–16 (10th Cir. 2018).[2]

II.

In response to this overwhelming authority, the majority contends that we are bound to follow "guidelines," purportedly established in *Robinson v. Shell Oil*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), that "determine[e] when a statute's meaning is not plain in the context of protections for employees[.]" I see nothing in *Robinson* that exempts the word "employee" from its plain meaning or the tools of statutory interpretation that I apply above. Nor does anything in that case suggest that the

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[2] *See also, e.g.*, *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 208 (D.D.C. 2011) ("The plain language . . . clearly establishes that Section 3730(h) applies only to the employment context and, therefore, cannot extend to claims for retaliatory action occurring solely after a plaintiff has been terminated from his job."); *United States ex rel. Complin v. North Carolina Baptist Hosp.*, 2019 WL 430925, at *10 (M.D.N.C. Feb. 4, 2019*); Elkharwily v. Mayo Holding Co.*, 84 F. Supp. 3d 917, 927 n.7 (D. Minn. 2015), *aff'd on other grounds*, 823 F.3d 462 (8th Cir. 2016); *United States ex rel. Tran v. Computer Scis. Corp*., 53 F. Supp. 3d 104, 138 (D.D.C. 2014); *Weslowski v. Zugibe*, 14 F. Supp. 3d 295, 306 (S.D.N.Y. 2014); *Master v. LHC Group Inc.*, No. 07-1117, 2013 WL 786357, at *6 (W.D. La. March 1, 2013); *Bechtel v. Joseph Med. Ctr.*, No. MJG-10-3381, 2012 WL 1476079, at *9–10 (D. Md. Apr. 26, 2012); *Poffinbarger v. Priority Health*, No. 1:11-CV-993, 2011 WL 6180464, at *1 (W.D. Mich. Dec. 13, 2011); *United States ex rel. Davis v. Lockheed Martin Corp*., 2010 WL 4607411, *8 (N.D. Tex. 2010); *United States ex rel. Wright v. Cleo Wallace Ctrs.*, 132 F. Supp. 2d 913, 928 (D. Colo. 2000). The minority of courts have, like my colleagues, mistakenly transplanted *Robinson* from the Title VII context to the FCA context. *See Ortino v. Sch. Bd. of Collier Cty.*, 2015 WL 1579460, at *3–4 (M.D. Fla. April 9, 2015); *Haka v. Lincoln Cty*., 533 F. Supp. 2d 895, 917 (W.D. Wis. 2008).

Supreme Court was inventing new theories of interpretation that apply only to "protections for employees." And it is odd that the majority cites *McKnight v. General Motors Corp.*, 550 F.3d 519 (6th Cir. 2008), for this remarkable assertion. The "roadmap" that we described *Robinson* as laying out in that case related only to run-of-the-mill principles of statutory interpretation, such as looking first to a statute's plain language. *See id*. at 524–25. We have never recognized *Robinson* as establishing special rules for employee protections. In fact, we have explicitly concluded that "*Robinson* did not alter the rules of statutory interpretation," and have declined to extend *Robinson*'s reasoning beyond the Title VII context. *Id*. at 527–28. Simply put, the majority's belief that *Robinson*—a Title VII case—created employee-specific interpretative "guidelines" that compel reversal in this FCA case is baseless.

Nor does *Robinson*'s reasoning "appl[y] with equal force to the FCA's anti-retaliation provision." As the majority notes, *Robinson* relied on three considerations to find that Title VII's anti-retaliation provision's use of the word "employee" was ambiguous. First, the Court noted that "there is no temporal qualifier in the statute such as would make plain that [42 U.S.C. § 20000e-3(a)] protects only persons still employed at the time of the retaliation." *Id*. at 341, 117 S.Ct. 843. Second, the Court noted that Title VII's general definition of "employee" as "an individual employed by an employer," "likewise lacks any temporal qualifier and is consistent with either current or past employment." *Id*. at 342, 117 S.Ct. 843 (quoting 42 U.S.C. § 2000e(f)). The Court reasoned that "employed" could just as easily be read to mean

"was employed" as "is employed." *Id*. (emphases omitted). Third, the Court noted that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.' " *Id*. The Court then resolved this ambiguity in favor of including former employees into the anti-retaliation provision's definition of "employee." The Court concluded that this interpretation was more aligned with Title VII's broader context and the anti-retaliation provision's primary purpose. *Id*. at 345–46, 117 S.Ct. 843.

None of the three *Robinson* considerations are present here. First, the FCA's anti-retaliation provision has a temporal limitation. To have a retaliation claim, a person must have been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment." 31 U.S.C. 3730(h). [3] As explained above, these categories limit plaintiffs to those people who were employees when they were subject to retaliation. Second, the FCA does not contain a general definition for "employee" (ambiguous or otherwise) so we must apply that word's "ordinary and natural meaning." *United States v. Lumbard*, 706 F.3d 716, 723 (6th Cir.

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[3] In contrast, Title VII's anti-retaliation provision provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

2013). And the plain meanings of "employee" that we have previously recognized have temporal limitations that denote a present, continuing employer-employee relationship. *Vander Boegh*, 772 F.3d at 1060, 1062. Third, in contrast to Title VII, no other provision of the FCA uses the term "employee" to mean anything different or more inclusive than its ordinary meaning.

The majority contends that the anti-retaliation provision's remedies section, § 3730(h)(2), shows that Congress intended former employees to qualify for relief. In particular, the majority highlights that the non-exhaustive list of remedies available to retaliated-against employees includes reinstatement and special damages. But the majority's consideration of this section misses the point. Nobody disputes that former employees *can obtain relief* under the anti-retaliation provision. For example, the FCA creates a specific cause of action for retaliatory discharge, which can be brought only by discharged (former) employees. Or an employee might quit or retire after their employer mistreats them because of their FCA-protected activity. These former employees, however, would have been current employees when they were retaliated against. The relevant consideration is not the employment status of the plaintiff at the time of suit, but rather the employment status of the plaintiff at the time of retaliation. *See Potts*, 908 F.3d at 614 ("[W]hat matters is the employee's employment status when the employer retaliates."). Thus, the remedies provision is perfectly consistent with the statute's reservation of claims to employees.

In sum, our precedent, dictionary definitions, the canons of statutory interpretation, and persuasive case law indicate that "employee" does not mean

"former employee," and *Robinson* neither compels nor supports a contrary conclusion. The word "employee," as used in the FCA, is not ambiguous. Because plaintiff was not an employee when he was allegedly blacklisted, we should affirm the district court.

III.

One final note. After the majority finds ambiguity, it determines which result the FCA should achieve. In doing so, it engages in unauthorized, unnecessary purposivism. *See* Scalia & Garner, *supra*., at 18 ("Where purpose is king, text is not—so the purposivist goes around or behind the words of the controlling text to achieve what he believes to be the provision's purpose."). Purposivism "suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous 'purpose' that happens to match with the outcome one party wants." *Arangure v. Whitaker*, 911 F.3d 333, 345 (6th Cir. 2018). But Congress establishes a statute's purpose "by negotiating, crafting, and enacting statutory text," and "[i]t is that text that controls, not a court's after-the-fact reevaluation of the purposes behind it." *Id.* The majority is well-aware of the dangers of purposivism yet proceeds to replace Congress's judgment with its own. Although attempting to discern a statute's purpose might be permissible when, as in *Robinson*, the text is ambiguous, the circumstances of this case do not authorize such an amorphous inquiry. Congress unambiguously told us that the anti-retaliation provision applies only to "employees," so this Court lacks the authority to rewrite that term to define anything broader, narrower, or different than its plain meaning. That task should be left to Congress.

IV.

For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA
and STATE OF MICHIGAN,

Plaintiffs,

ex rel. DAVID FELTEN, M.D., Ph.D., et al.,

Plaintiffs/Relators

v.

WILLIAM BEAUMONT HOSPITALS, et al.,

Defendants.

Case Nos. 2:10-cv-13440
2:11-cv-12117
2:11-cv-12515
2:11-cv-14312

Dated: July 1, 2019

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER GRANTING DEFENDANT WILLIAM BEAUMONT HOSPITALS' MOTION TO PARTIALLY DISMISS RELATOR FELTEN'S FIRST AMENDMENT TO COMPLAINT [114]

STEPHEN J. MURPHY, III, United States District Judge

On August 27, 2018, after the parties settled and stipulated to dismissing the majority of the case, Relator David Felten, M.D., Ph.D., filed an amended complaint and added more recent allegations to his retaliation claim. ECF 97.[1] On October 26, 2018, Defendant William Beaumont Hospitals ("Beaumont") filed a motion to partially dismiss Felten's amended complaint. ECF 114. Beaumont argues that the majority of the allegations in Felten's amended complaint are either (1) untimely, or (2) beyond the scope of conduct that 31 U.S.C. § 3730(h) covers. *Id.* at 1770–71. Beaumont does not seek to dismiss Felten's claim for retaliation based on Beaumont allegedly halving Felten's budget while still expecting him to accomplish the same goals prior to Felten filing the complaint. *See id.* at 1771. The Court reviewed the briefs and finds that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(f). For the reasons below, the Court will grant the motion.

BACKGROUND

On August 30, 2010, Felten filed a qui tam complaint and alleged that Beaumont was violating the federal False Claims Act ("FCA") and the

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[1] All case citations are to 2:10-cv-13440.

Michigan Medicaid False Claims Act ("MMFCA") and was retaliating against him in violation of both federal and Michigan law. *See generally* ECF 1. Felten alleged that Beaumont paid improper remuneration to various physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients to Beaumont in violation of the Anti-Kickback Statute ("AKS")[2] and Stark Laws. *Id.* He also alleged that Beaumont retaliated against him in violation of 31 U.S.C. § 3730(h) and Mich. Comp. Laws § 400.610c by "continuously and increasingly marginaliz[ing him] due to his insistence that the laws and regulations of the United States be complied with." *Id.* at 91, 95–96.

The Government intervened, and the parties settled most of the case. The Court, on stipulation of the parties, dismissed all claims except the Relators' claims for attorneys' fees and costs and for retaliation. ECF 87, 88. Felten then amended his complaint to add allegations to his retaliation claim regarding conduct that occurred after he filed his initial complaint. ECF 97. Beaumont filed a motion to partially dismiss the amended complaint. ECF 114. Beaumont now seeks to dismiss all of Felten's claims except his claim for retaliation based on his marginalization before he filed the qui tam complaint, which is similar to the retaliation claim in his initial complaint. *See id.* at 1771.

STANDARD OF REVIEW

When analyzing a motion to dismiss under Civil Rule 12(b)(6), the Court views the complaint in the light most favorable to the plaintiff, presumes the

[2] 42 U.S.C. § 1320a-7b(b)(1)–(c)

truth of all well-pleaded factual assertions, and draws every reasonable inference in favor of the non-moving party. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). To survive a motion to dismiss, "the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 468 (6th Cir. 2005) (citation omitted). It must allege facts "sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.' " *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

The Court must analyze a Rule 12(c) motion for judgment on the pleadings with the same standard it would employ for a 12(b)(6) motion to dismiss. *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008) (citation omitted). The Court accepts as true all well-pleaded material allegations and draws reasonable factual inferences in favor of the non-moving party, but "need not accept as true legal conclusions or unwarranted factual inferences." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581–82 (6th Cir. 2007) (quoting *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)). The complaint must not only "give the defendant fair notice of what the claim is and the grounds upon which it rests," *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)), but also " 'raise a right to relief above the speculative level,' and … 'state a claim to relief that is plausible on its face.' " *Hensley*, 579 F.3d at 609 (quoting *Twombly*,

550 U.S. at 555, 570). It is not enough to merely offer " 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action[.]' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

DISCUSSION

Beaumont seeks judgment on the pleadings as to several of Felten's retaliation allegations because the allegations are time-barred. ECF 114, PgID 1770–71. Beaumont also seeks to dismiss several of Felten's additional retaliation allegations for failure to state a claim under Rule 12(b)(6) because the allegations include conduct after the end of Felten's employment at Beaumont and the relevant retaliation statute covers only current employees. *Id.* at 1771. The Court will address each argument in turn.

I. Relation Back

First, Beaumont seeks judgment on the pleadings as to certain retaliation allegations in Felten's amended complaint because they are time-barred. The statute of limitations for a retaliation claim under 31 U.S.C. § 3730(h) and under Mich. Comp. Laws § 400.610c is three years. *See* 31 U.S.C. 3730(h)(3); *United States ex rel. Yanity v. J&B Med. Supply Co.*, No. 08–11825, 2012 WL 4811288, at *5 (E.D. Mich. Oct. 10, 2012) (finding that when the state false claims act lacks a limitations period it is governed by the state's general tort statute of limitations, and concluding that in Michigan the applicable limitations period is three years).[3] Felten filed his amended complaint on August 27, 2018. ECF 97. Any allegations that predate

[3] Felten does not dispute either statute of limitations. *See* ECF 132, PgID 2419, n.2.

August 27, 2015 are therefore time-barred unless they relate back to Felten's initial 2010 complaint.

"An amendment to a pleading relates back to the date of the original pleading when … the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The Sixth Circuit analyzes questions of relation back "not by generic or ideal notions of what constitutes a 'conduct, transaction, or occurrence,' but instead by asking whether the party asserting the statute of limitations defense had been placed on notice that he could be called to answer for the allegations in the amended pleading." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 516 (6th Cir. 2007). And here, there are several reasons why Felten's original complaint did not adequately put Beaumont on notice about the new retaliation allegations he added in his amended complaint.

First, the original complaint was sealed, so it is unclear whether that provided Beaumont sufficient notice of any of Felten's claims for purposes of relation back. *See, e.g.*, *Hayes v. Dept. of Educ. of New York City*, 20 F. Supp. 3d 438, 449–51 (S.D.N.Y. 2014). Second, the new retaliation allegations in Felten's amended complaint are based on actions taken after the original complaint was filed. *See Kellett v. Memphis Light, Gas & Water*, No. 2:11-cv-3045-JTF-tmp, 2013 WL 6418997, at *4 (W.D. Tenn. Dec. 9, 2013) (adopting report and recommendation of the magistrate judge holding that relation back does not apply to a new retaliation claim when the conduct underlying the new claim occurred after the original

complaint was filed, even though the original complaint included a retaliation claim based on other, prior conduct).

Finally, there is not a sufficient "common 'core of operative facts' " between Felten's original retaliation allegations and his newly added allegations to find that the original complaint put Beaumont on notice that it would be called to answer for the conduct alleged in the amended complaint. *Mayle v. Felix*, 545 U.S. 644, 659 (2005) (citation omitted). The relationship between the retaliation allegations in Felten's original and amended complaints more closely resembles the cases *Mayle* lists as not allowing relation back than the ones it lists as allowing relation back.*See id.* at 657–59 (collecting cases). The circuit courts have found relation back in cases when new legal theories were applied to the same facts alleged in the original complaint or when an extra time period of identical, automatically-repeating conduct was added. *See id.* (collecting cases). But they have refused to find relation back when the amendments assert additional instances of wrongful conduct by the same defendant. *Id.* (collecting cases).

Here, Felten's retaliation claim in his original complaint alleged only that Beaumont was marginalizing his influence because of his insistence that Beaumont comply with applicable laws. ECF 1, PgID 91. But the contested allegations in his amended complaint detail a series of actions Beaumont took to find out whether Felten was a whistleblower and then to suspend him, fire him, and prevent him from obtaining employment elsewhere because it discovered that he was a whistleblower. *See* ECF 97, PgID 1249–52. The new retaliation allegations

describe conduct that occurred after Felten filed his original complaint and in response to him filing the complaint. The conduct—going through his personal belongings, suspending him, and firing him—is also different in kind than the prior conduct of marginalizing his influence within the hospital. Felten's original, sealed complaint did not notify Beaumont that it would be called to answer for conduct that allegedly occurred in response to the complaint. His new retaliation allegations do not relate back to his original complaint. Beaumont is therefore entitled to judgment on the pleadings on all challenged pre-August 27, 2015 allegations.[4]

II. Timely Allegations

Felten alleges that Beaumont terminated his employment in December 2014. ECF 97, 1260–61. Felten's timely allegations—those alleging post-August 27, 2015 conduct—therefore allege post-termination conduct. Beaumont seeks to dismiss Felten's allegations regarding post-termination retaliation and submits that the retaliation provisions of the FCA and the MMFCA do not apply to actions taken after an employee is terminated. *See* ECF 114, PgID 1793–98. The FCA provides a cause of action for "[a]ny employee, contractor, or agent" who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated

[4] Nothing prevented Felten from amending his complaint to timely add his new retaliation provisions during the seal period, as evidenced by the amended complaints filed by his co-relators during that time. *See In re: Sealed Matter*, No. 2:11-cv-12117, ECF 8 (Carbone's November 9, 2011 amended complaint); *In re: Sealed Matter*, No. 2:11-cv-14312, ECF 27 (Houghton's May 27, 2016 amended complaint).

against in the terms and conditions of employment" because he took lawful action in furtherance of an FCA lawsuit. 31 U.S.C. § 3730(h)(1). And the MMFCA provides that "[a]n employer shall not discharge, demote, suspend, threaten, harass, or in any other manner, discriminate against an employee in the terms and conditions of employment" because he took lawful action in furtherance of an MMFCA lawsuit. Mich. Comp. Laws § 400.610c.

"The overwhelming majority of courts that have considered the issue have found that § 3730(h)(1) does not apply to post-employment retaliation." *Potts v. Ctr. for Excellence in Higher Ed.*, 244 F. Supp. 3d 1138, 1143 (D. Colo. 2017) (collecting cases). And, although the Sixth Circuit noted that the legislative history of the FCA "suggests that 'employee' extends to former employees," it did so in dicta and after concluding that 31 U.S.C. § 3730(h)(1)'s use of "employee" has a "plain meaning" that "alone is sufficient to end the inquiry." *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063, 1060 (6th Cir. 2014). The Sixth Circuit "look[s] for Congressional intent in [a statute's] clear language" when Congress speaks plainly in the statute. *Minn. Min. & Mfg. Co. v. Norton Co.*, 366 F.2d 238, 242 (6th Cir. 1966) (collecting cases). And, unlike in *Vander Boegh*, the question here is not who can bring an action under § 3730(h), but rather what type of retaliatory conduct is covered by § 3730(h).

The statute is clear that it provides relief only for certain actions taken "in the terms and conditions of employment." 31 U.S.C. § 3730(h)(1). "The plain language of this phrase clearly establishes that Section 3730(h) applies only to the employment

context and, therefore, cannot extend to claims for retaliatory action occurring solely after a plaintiff has been terminated from his job." *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 208 (D.D.C. 2011). Because the statutory language is plain, the Court need not look beyond it. Section 3730(h) does not cover Felten's retaliation claims based on conduct occurring after Beaumont terminated him. And the MMFCA's retaliation provision is also limited to actions taken "in the terms and conditions of employment." Mich. Comp. Laws § 400.610c. Neither party cites to any Michigan cases interpreting the provision, and the Court is unaware of any. There is no reason to interpret an identical phrase in the two statutes differently, especially because its meaning is plain. The MMFCA's retaliation provision therefore does not cover Felten's retaliation claims based on conduct occurring after he was terminated.

Because neither the FCA nor the MMFCA's retaliation provisions cover conduct occurring after an employment relationship is terminated, the Court will grant Beaumont's motion. Felten may proceed on FCA and MMFCA retaliation claims based on the one unchallenged allegation that, prior to Felten filing his original complaint in 2010, Beaumont cut the Research Institute's budget in half while still expecting Felten to accomplish the same goals.

ORDER

WHEREFORE, it is hereby **ORDERED** that Beaumont's motion to partially dismiss Felten's first amendment to complaint [114] is **GRANTED.**

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-0110

In re: DAVID L. FELTEN, M.D., Ph.D.,

Petitioner.

Filed: January 2, 2020

ORDER

Before: SILER, ROGERS, and LARSEN, Circuit Judges.

David L. Felten petitions for permission to appeal an interlocutory order of the district court dismissing in part his action for failure to state a claim under 31 U.S.C. § 3730(h) because that statute, by its plain terms, does not protect an employee from retaliation following termination. Defendant William Beaumont Hospital opposes the petition.

We may, in our discretion, permit an appeal to be taken from an order certified for interlocutory appeal by the district court if: (1) the order involves a controlling question of law; (2) a substantial difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially

advance the ultimate conclusion of the litigation. 28 U.S.C. § 1292(b). "These criteria, along with other prudential factors, guide our discretion to permit an appeal of the district court's order." *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017). We grant review under § 1292(b) sparingly and only in exceptional cases. *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974).

The petition raises a controlling question of law for which there is a substantial difference of opinion regarding the correctness of the decision. The petition meets the remaining requirements for certification for the reasons given by the district court. In particular, the district court reasoned that the immediate appeal would materially advance the ultimate termination of the litigation because:

> . . . . Here, if the parties litigated Felten's one remaining retaliation claim through to its conclusion and then Felten appealed and succeeded based on his post-employment retaliation argument, the Court would have to re-litigate the entire retaliation dispute between Felten and Beaumont. It would save significant judicial resources and litigant expenses to resolve the question at this stage, before proceeding with Felten's remaining retaliation claim.

The petition for permission to appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA
and STATE OF MICHIGAN,

Plaintiffs,

ex rel. DAVID FELTEN, M.D., Ph.D., et al.,

Plaintiffs/Relators

v.

WILLIAM BEAUMONT HOSPITALS, et al.,

Defendants.

Case Nos. 2:10-cv-13440
2:11-cv-12117
2:11-cv-12515
2:11-cv-14312

Dated: August 6, 2019

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART RELATOR FELTEN'S MOTION TO AMEND THE COURT'S JULY 1, 2019 ORDER AND TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL [162]

STEPHEN J. MURPHY, III, United States District Judge

On July 1, 2019, the Court issued an order granting Defendant William Beaumont Hospitals' ("Beaumont") motion to partially dismiss Relator David Felten, M.D., Ph.D.'s ("Felten") first amended complaint ("Order"). ECF 159. On July 17, 2019, Relator Felten filed a motion to amend the Order and to certify it for interlocutory appeal. ECF 162. The Court reviewed the motion and, for the reasons below, will grant in part and deny in part the motion.

BACKGROUND

The Court detailed the relevant background in the Order. *See* ECF 159, PgID 3039–40. The Court adopts that history here.

STANDARD OF REVIEW

When a federal district court determines that an order that is not otherwise appealable "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order." 28 U.S.C. § 1292(b). When a party seeks to file an interlocutory appeal of a nonfinal order in which the Court did not include the above language, the request "takes the form of a Motion to Certify an Order for Interlocutory

Appeal." *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 875 (E.D. Mich. 2012) (citations omitted). The Court applies 28 U.S.C. § 1292(b) to a motion to certify an order for interlocutory appeal and may grant the motion only if: (1) the order ruled on a question of law, (2) the question of law is "controlling," (3) there is "substantial ground for 'difference of opinion' about" the legal question at issue, and (4) "an immediate appeal [would] 'materially advance the ultimate termination of the litigation.' " *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974); *see also Newsome*, 873 F. Supp. 2d at 875 (condensing the first and second factors into one).

DISCUSSION

Felten identified two questions addressed by the Order that he seeks to appeal. *See* ECF 162, PgID 3083. Felten frames the first question as "[w]hether a Relator who has pled a *count* of retaliation under 31 U.S.C. § 3730(h) is required, during the seal period, to amend his complaint to add additional *acts* of retaliation?" *Id.* (emphasis in original). Felten frames the second question as: "[w]hether 31 U.S.C. § 3730(h) protects a relator from defendant's retaliation after the defendant has terminated his employment?" The Court will address each question in turn.

I. Relation Back

Regarding Relator's first question, the Court will not reach the other elements of § 1292(b) because it finds that no substantial ground exists for difference of opinion. The Sixth Circuit applies the Rule 15(c)(2) standard to "new allegations in a complaint" even if they are not new claims. *See United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 516–19 (6th Cir. 2007). In *Bledsoe*, the Sixth Circuit

permitted relation back only for factual allegations that arose "out of the same conduct, transaction, or occurrence attempted to be set forth in [the relator's] prior pleadings." *Id.* at 518. The Court did not permit relation back for new allegations that merely alleged additional conduct that went to the same "cause of action" that the relator had previously alleged—namely, the relator's claim that the defendants knowingly presented or caused to be presented a false or fraudulent claim for payment or approval, in violation of 31 U.S.C. § 3729(a)(1) and (b). *Id.* at 502–03.

Relator attempts to frame the issue more narrowly by arguing that he "is aware of no case that has held that additional instances of retaliation must be added to a sealed complaint or be forfeited." ECF 162, PgID 3091 (emphasis omitted). The argument is unavailing. Relator did not explain why the sealed nature of his complaint affects the legal standard for the question he originally proposes to appeal—namely, whether specific allegations must satisfy the Rule 15(c)(2) standard or whether Rule 15(c)(2) applies only to new, separate claims. And, indeed, *Bledsoe* was a qui tam action in which the original complaint was sealed. *See Bledsoe*, 501 F.3d at 498 ("Relator filed his complaint under seal[.]"). Because the Court is bound by Sixth Circuit precedent, and the Sixth Circuit does not distinguish between new allegations and new claims for purposes of the relation-back analysis under Rule 15(c)(2), there are no substantial grounds for a difference of opinion about the Court's decision regarding relation back.

II. Post-Employment Retaliation

Relator's second question, however, merits certification for interlocutory appeal. First, whether 31 U.S.C. § 3730(h) applies to allegations of post-employment retaliatory conduct is a question of law.

Second, it is a controlling question of law. "All that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Newsome*, 873 F. Supp. 2d at 876 (quoting *Eagan v. CSX Transp., Inc.*, 294 F. Supp. 2d 911, 915 (E.D. Mich. 2003)). Here, if the Sixth Circuit holds that 31 U.S.C. § 3730(h) applies to allegations of post-employment retaliatory conduct, Felten could proceed on a set of retaliation allegations that the Court dismissed. Felten's post-employment retaliation question is therefore a controlling question of law.

Third, unlike Felten's relation-back question, his post-employment retaliation question presents substantial grounds for difference of opinion. "Substantial ground for a difference of opinion … exists 'when … the question is difficult and of first impression.' " *Id.* Although the Court held that the language of 31 U.S.C. § 3730(h) is plain, it also acknowledged that the Sixth Circuit had suggested a contrary understanding of the statute in dicta. *See* ECF 159, PgID 3045–46. Because it is a question of first impression in the Sixth Circuit and because the Sixth Circuit suggested a contrary reading to the one the Court adopted here, the Court finds that substantial grounds exist for difference of opinion.

Finally, an immediate appeal would materially advance the ultimate termination of the litigation.

"An interlocutory appeal materially advances the litigation when it save[s] judicial resources and litigant expense." *Newsome*, 873 F. Supp. 2d at 878 (internal quotations and citation omitted) (alteration in original). Here, if the parties litigated Felten's one remaining retaliation claim through to its conclusion and then Felten appealed and succeeded based on his post-employment retaliation argument, the Court would have to re-litigate the entire retaliation dispute between Felten and Beaumont. It would save significant judicial resources and litigant expenses to resolve the question at this stage, before proceeding with Felten's remaining retaliation claim. And the case as a whole is in an advanced stage of litigation, even though the parties have only recently begun litigating Felten's amended complaint. Shortly after the Court resolved a partial motion to dismiss in favor of Beaumont, Felten filed the motion to certify for interlocutory appeal. The Court has not held a scheduling conference for Felten's amended complaint and no discovery has occurred.

The Court therefore finds that Felten has met the criteria for certification of interlocutory appeal on the question of whether 31 U.S.C. § 3730(h) applies to allegations of post-employment retaliatory conduct. As discussed above, however, he has not demonstrated substantial grounds for disagreement over whether the Court can dismiss untimely allegations that do not relate back to the original complaint. The Court will therefore certify the Order for interlocutory appeal only as to Felten's post-employment retaliatory conduct argument.

ORDER

WHEREFORE, it is hereby **ORDERED** that Relator David Felten, M.D., Ph.D.'s motion to amend the Court's July 1, 2019 order and to certify the order for interlocutory appeal [162] is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the Court's July 1, 2019 opinion and order granting Defendant William Beaumont Hospitals' motion to partially dismiss Relator Felton's first amendment to complaint [159] is **CERTIFIED** for interlocutory appeal only on the question of whether 31 U.S.C. § 3730(h) applies to allegations of post-employment retaliation, and the Order is **AMENDED** accordingly.

IT IS FURTHER ORDERED that the case is **STAYED** and **ADMINISTRATIVELY CLOSED** pending an appeal of the Order, and the resolution thereof.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

No. 20-1002

Filed: June 2, 2021

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

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Griffin would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk