Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 16-1805

WILLIAM C. O'HARA,

Appellant

v.

NIKA TECHNOLOGIES, INC.,

Appellee

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Statement of Interest

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA has over 300 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C., and Maryland. MWELA's purposes include promoting the efficiency of the legal system, elevating the practice of employment law, and promoting fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

MWELA has an interest in the disposition of this case because the lower court's holding opens the door for employers to immunize themselves from whistleblower retaliation claims whenever they retaliate against employees who raise concerns about frauds committed by others. MWELA members often need to counsel their clients about the advantages, risks and means of coming forward with compliance concerns. If a client's employer could lawfully fire the client for reporting a fraud committed by an outside entity, it will become exceedingly difficult to encourage clients to raise their concerns. Employees will face a Hobson's choice between letting a fraud against the taxpayers mushroom even larger or losing their jobs for taking the taxpayers' side.

MWELA declares that no party or party's counsel: (a) authored any portion of its Brief, or (b) contributed money that was intended to fund preparing or submitting its brief. MWELA further declares that (c) no person other than MWELA or its members or the undersigned counsel contributed money that was intended to fund preparing or submitting the brief.

Summary of the Argument

By focusing on the circumstances of the Appellant's disclosure, rather than its content, the District Court falls into the same trap as other courts that have interpreted whistleblower protection statutes.[1] The plain language of the American Reinvestment and Recovery Act ("ARRA"), Pub. L. 111-5, Section 1553; 48 C.F.R. § 3.907, and sequence, and the federal False Claims Act ("FCA"), 31 U.S.C. §3730(h), clearly state the kinds of disclosures that are protected by each law. ARRA protects disclosures that an employee reasonably believes is evidence of gross mismanagement, gross waste, a danger to public health, an abuse of authority, or a violation of law, rule or regulation, related to money provided by ARRA. The FCA protects all "lawful acts . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."

1 Appellant does an excellent job analyzing the flaws in the district court's opinion, which MWELA endorses and adopts. This brief will instead focus on the dangers presented by the District Court's decision.

Neither law limits protection in any way to the circumstances under which the disclosure is made or action is taken.

Unfortunately, this is exactly what the District Court has done. An analysis of whether an employee is protected by ARRA or the FCA must begin and end with whether the employee has satisfied the statutory requirements for protection. By making protection contingent upon the employment relationship between the employee and the subject of his disclosure, the District Court has moved the goalposts and added an additional element that is present in neither the statutory language, nor the legislative history of either law. This sets a dangerous precedent that is sadly familiar to those who regularly represent whistleblowers.

The most poignant example of this danger is the trials and tribulations of the federal whistleblower protection act ("WPA"), 5 U.S.C. § 2302(b)(8). Like ARRA, the WPA protects disclosures that an employee reasonably believes is evidence of gross mismanagement, gross waste, a danger to public health, an abuse of authority, or a violation of law, rule or regulation, except that the WPA applies to disclosures about actions taken by the federal government or government contractors. Since its inception, the protections of the WPA have been systematically eroded by court-created limitations. The District Court's opinion is just such a limitation.

LEGAL ARGUMENT

I. THE DISTRICT COURT'S HOLDING THAT PROTECTED ACTIVITY MUST IMPLICATE THE WHISTLEBLOWER'S EMPLOYER IS UNSUPPORTED BY THE STATUTES AND CONTRARY TO THEIR REMEDIAL PURPOSES.

To understand the seriousness of the District Court's ruling, it is instructive to review the history of another whistleblower protection law, the WPA. This law has its origins in the Civil Service Reform Act of Civil Service Reform Act of 1978 ("CSRA"), which stated in relevant part that a public employer could not:

> take or fail to take a personnel action with respect to an employee or applicant for employment as a reprisal for –
>
> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences –
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[2]

5 U.S.C. § 2302(b)(8). Through the inclusion of this protection for whistleblowers, Congress intended the CSRA to prohibit "reprisals against employees who divulge information to the press or the public (generally known as "whistleblowers") regarding violations of law, agency mismanagement, or dangers to the public's health and safety." H.R. Rep. No. 95-1403 at 4 (1978).

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2 "Mismanagement" was later modified to "gross mismanagement" in the 1989 WPA amendments. See Pub.L. 101-12 at§ 11 (1989).

However, despite this strong statement of Congressional intent, within just a few years the Merit System Protection Board ("MSPB") and Federal Circuit dramatically narrowed the CSRA's whistleblower protection by creating exceptions that denied protection for large swaths of disclosures made by federal employees. For example, the MSPB held that an agency could take a personnel action that was motivated by retaliation for making a protected disclosure, so long as the action could also be upheld on other, unrelated grounds. *Gerlach v. FTC*, 9 M.S.P.R. 268, 276 (1981). In another case, *Fiorello v. Department of Justice*, 795 F.2d 1544, 1550 (Fed. Cir. 1986), the Federal Circuit held that an employee's disclosures were not protected because the employee's "primary motivation" was personal and not for the public good.

In response to these and other cases, Congress passed the Whistleblower Protection Act of 1989 ("WPA"), stating that it:

> intends that disclosures be encouraged. The [Office of Special Counsel], the [MSPB] and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue . . .

S. REP. NO. 100-413 at 13 (1989).

Congress reiterated this instruction in its 1994 "update" to the WPA, which specifically admonished the MSPB and the Federal Circuit for narrowing the definition of protected disclosure. As the House Report noted:

> Perhaps the most troubling precedents involve the Board's inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

H.R. REP. NO. 103-769 at 19 (1994). The Senate concurred, noting that "the plain language of the Whistleblower Protection Act extends to retaliation for 'any disclosure', regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. S. REP. NO. 103-358 at 10 (1994).

Despite these clear congressional instructions, the administrative and federal courts continued to narrow the definition of protected disclosure by consistently ignoring the statutory test of whether the employee reasonably believed that the disclosure evidenced wrongdoing, and instead focusing on the circumstances of the disclosure. For example, shortly after the 1994 amendments, the Federal Circuit held disclosures of wrongdoing are not protected if they are made to the alleged wrongdoer. *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (holding that such disclosures were not "viewable as whistleblowing"). In another case, in deciding that the disclosure was not protected, the Federal Circuit took into

account that the employee had violated agency procedures by making his disclosure after going off duty. *Watson v. Department of Justice*, 64 F.3d 1524, 1530-31 (Fed. Cir. 1995). Similarly, the Federal Circuit held that disclosures are not protected if they are part of an employee's ordinary job duties. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). The Federal Circuit also held that disclosures are not protected if the disclosed formation is already known by the agency. *Meuwissen v. Department of Interior*, 234 F.3d 9, 12 (Fed. Cir. 2000).

In response, Congress passed the Whistleblower Protection and Enhancement Act of 2012, stating "once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. REP. NO. 112-155 at 5 (2012). Congress then again admonished the courts, saying that

> These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether [the] personnel action at issue in the case occurred 'because of' the protected disclosure.

Id.

ARRA's language and intent is identical to that of the WPA, and the FCA has essentially identical intent. All three laws exist to encourage disclosures of wrongdoing, either by or against the federal government.

In 1986, Congress enacted new protections for employee whistleblowers who assist in or bring *qui tam* actions. This employment retaliation protection is found in , 31 U.S.C. § 3730(h). Congress' purpose was "to encourage any individuals knowing of Government fraud to bring that information forward."[3] The legislative history declares: "Few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation."[4]

The Senate, in its Report accompanying the 1986 Amendments, stated:

> [T]he committee believes protection should extend not only to actual *qui tam* litigants, but to those who assist or testify for a litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.[3]

The case law interprets 31 U.S.C. § 3730(h) to broadly protect employees who assist in prosecuting and investigating False Claims Act violations.[5] The retaliation protections extend to whistleblowers even if a *qui tam* case is not filed and even those whistleblowers who did not fall within its literal terms.[6] Similarly, the False Claims

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3 S. Rep. No. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266.

4 *Id*. at 5300.

3 S. Rep. No. 345, 99th Cong., 2d Sess. 34, reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

5 *Hutchens v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001).

6 *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 516 (6th Cir. 2000); *Neal v. Honeywell, Inc.*, 33 F. 3d 860, 865 (7th Cir. 1994).

Act protects employees who are collecting information about possible fraud, "before they have put all the pieces of the puzzle together." *See, e.g., U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). The overall statutory scheme contained in the FCA, if narrowly interpreted, will not only prejudice the the individual employees, but also the Government will suffer greatly, since whistleblowers will be discouraged from coming forward to disclose fraud.

The District Court's opinion in the instant case is a step down the same road traveled by the MSPB and Federal Circuit. By holding that disclosures are only protected if they are made about the employee's employer, the District Court has gone beyond requirements of the statute. Upholding this ruling would only encourage other courts to consider the circumstances, rather than the substance, of disclosures under these laws and erode their protections in the same way as the WPA.

This is by no means an idle concern. Defining protection under the FCA and ARRA in terms of one's employment relationship would open the door to any number of additional restrictions. Finding that a disclosure concerning another company is not protected is not functionally different than finding that disclosures made in the course of performing one's duties are not protected, or that disclosures made after hours are not protected.

Under the Title VII, a series of courts rejected the idea that protected activity had to target the employer. *People v. Hamilton*, 125 A.D.2d 1000, 511 N.Y.S.2d 190 (1986); *Waltman v. Internation Paper Co*., 875 F.2d 468 (5th Cir. 1989); *Trent v. Valley Electric Ass'n*, 41 F.3d 524, 526 n. 1 (9th Cir. 1994); *EEOC v. Sage Realty*, 87 FRD 365 (SDNY 1980), 507 F. Supp. 599 (SDNY 1981) (harassment by public when required to wear a skimpy outfit).

The Department of Labor has responsibility to enforce 22 whistleblower protection laws.[4] It has also held that employees are protected when they disclose violations by persons other than the employer. *Samodurov v. Niagara Mohawk Power Corp*., 89-ERA-20 (Sec'y Nov. 16, 1993) (refusal to hire); see also, *Hill v. TVA*, 87-ERA-23/24, D&O of Remand by SOL, at 8 (May 24, 1989); see also *Hudgens v. NLRB*, 424 US 507, 510, n. 3 (1976); *Phelps Dodge Corp. v. NLRB*, 313 US 177, 192 (1941); *McMenemy v. City of Rochester*, 241 F.3d 279 (2d Cir. 2001).

MWELA asks this Court to apply the ARRA and FCA consistently with the text of the statutes, the remedial purposes, and the law adopted under Title VII and by the Department of Labor. We can best encourage employees to come forward with information about frauds and endangerment if we recognize the legal protection Congress created for those who do come forward.

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4 A list is available at: http://www.whistleblowers.gov/statutes_page.html

CONCLUSION

The District Court's opinion does the same thing as the board and the federal circuit did to the WPA, this circuit should not start down that road.

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I HEREBY CERTIFY that on October 5, 2016, I caused the foregoing Brief of *Amici Curiae*, to be served through this Court's electronic filing system on all counsel of record.

/s/ Richard R. Renner
Richard R. Renner

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Respectfully submitted by:

/s/ Richard R. Renner
Richard R. Renner
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Dated: October 5, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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