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Fifth Circuit Holds It Lacks Subject Matter Jurisdiction to Review False Claims Act Retaliation Claim by Former Contractor Employee

Client Alerts

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In a case that underscores the judiciary's deference to the executive branch's broad power to protect national security and control access to classified information, a three-judge panel of the US Court of Appeals for the Fifth Circuit affirmed a district court's decision that the court lacked subject-matter jurisdiction to consider a former employee's retaliation claim against a defense contractor under the False Claims Act ("FCA") because the government's decision to revoke his security clearance was the reason for his termination. The case, *United States ex rel Johnson v. Raytheon*, shows that courts are reluctant to second-guess national security decision-making even in the context of a private employment dispute.

Dana Johnson was employed by Raytheon as an engineer providing support to the Navy on an Advanced Sensor Technology ("AST") contract, a Special Access Program ("SAP") that requires that personnel hold top-secret security clearances. Johnson witnessed conduct that led him to believe that Raytheon had made fraudulent representations to the Navy, and Johnson reported his concerns to supervisors. Johnson claims that Raytheon then retaliated against him by reporting him to the Navy for suspected security violations, triggering a Navy investigation and then the government's revocation of his top-secret security clearance. After the Navy completed its investigation, Raytheon conducted its own disciplinary investigation based on the Navy's findings and terminated Johnson's employment, despite Johnson's claim that he could have been transferred to other projects that did not require a security clearance. Johnson filed a *qui tam* action on behalf of the United States and a retaliation claim under the FCA's whistleblower provision, which encourages those with knowledge of fraud against the government to come forward and provides various forms of relief if faced with retaliation. Johnson also alleges that he was qualified to work on other projects for Raytheon that did not require a security clearance, and therefore he should not have been terminated.

A majority of the judges agreed with the district court that it did not have subject matter jurisdiction to consider the merits of the case. The court reasoned that it could not scrutinize whether Raytheon's proffered reasons for monitoring, reporting, and ultimately terminating Johnson were

pretextual. In this regard, considering these reasons would necessarily require scrutinizing the Department of Defense's ("DoD") reasons for revoking his security clearance. The Fifth Circuit cited *Department of the Navy v. Egan*, 484 U.S. 518 (1988), a case concerning a *federal* employee who held a position with the Navy that required a security clearance and who was consequently terminated when the Navy denied him a clearance. There, the Supreme Court held that the Merit System Protection Board lacked authority "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action" taken against a federal employee. In *Egan*, the Court reasoned that the decision to grant or revoke a security clearance "is a sensitive and inherently discretionary judgment call" with intrinsic national security concerns, and so these decisions are "committed by law" to the discretion of the relevant Executive Branch agency and cannot be reviewed by courts. *Id.* at 527.

Acknowledging that here, unlike in *Egan*, the suit was against a private contractor, not a government actor, the court held that it nonetheless could not consider the case because doing so would require it to "question the government agency's motivation behind the decision to deny the plaintiff's security clearance," which "is just as relevant in a case against a private employer as against the government itself."

Regarding the plaintiff's claim that Raytheon should have transferred him to another position rather than terminate his employment, the Fifth Circuit noted that Johnson "introduced no evidence concerning whether transfer to a non-sensitive position was feasible."

The opinion drew a focused dissent: Judge Higginson pointed out that extending *Egan* to bar Article III judicial review in a private-sector whistleblower employment-termination dispute would "essentially immunize government contractors from any liability in cases involving employees whose security clearances are revoked or denied." The dissent noted that government contractors employ over 2.9 million people with access to classified information, highlighting the potential reach of extending *Egan*.

Following the ruling, on February 29, 2024, Johnson petitioned the Fifth Circuit court to reconsider the case *en banc*, arguing that the ruling's expansion of the constitutional restriction on judicial review to private-sector whistleblower employment-termination disputes under the False Claims Act presented a question of exceptional importance and that the full court should instead adopt the position of the dissent. The Fifth Circuit denied the request for rehearing on March 19, 2024.

Analysis

Johnson v. Raytheon is the latest opinion in a line of cases building on the Supreme Court's decision in *Egan*. In the years since *Egan* was decided, courts have extracted a broader principle from the case, namely, that the Executive Branch's constitutional powers "to classify and control access to [national security] information," including to make decisions about whether an individual can be trusted with such information, are shielded from judicial review. *Egan*, 484 US at 527. Applying this

principle, courts have expanded *Egan*'s reach beyond claims by federal employees directly challenging adverse security clearance decisions to employment discrimination, wrongful termination, and now FCA claims by private employees of federal contractors, where an adverse employment action is tied to the denial or revocation of the employee's security clearance.

Egan's Expanding Reach

Title VII discrimination and retaliation claims brought by federal employees whose jobs require security clearances have been at the forefront of *Egan*'s expanding reach. The Third and Fifth Circuits have found they lacked jurisdiction to review Title VII discrimination and retaliation claims brought by federal employees, respectively, that were ultimately precipitated by Executive Branch agencies' revoking the federal employees' security clearances. *See Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008) (concerning a former TSA employee's claim of discriminatory suspension without pay); *Perez v. F.B.I.*, 71 F.3d 513, 514 (5th Cir. 1995) (concerning a former FBI employee's claim of retaliatory and discriminatory firing). Applying *Egan*, the Fifth Circuit explained that "any Title VII challenge to the revocation" would have required the court to review "the merits of the revocation decision," which is reserved to the exclusive discretion of the Executive Branch under *Egan*. *Perez*, 71 F.3d at 514–15. Agreeing with the Fifth Circuit, the Third Circuit likewise found that because the decision to suspend the plaintiff was a direct consequence of the decision to revoke his security clearance, the court could not review the reasons for his suspension. *See Makky*, 541 F.3d at 216. The Third Circuit also went a step further, rejecting the plaintiff's argument that he could have been transferred to a position that did not require a security clearance, stating that "TSA had no legal obligation to do so." *Id*.

Several federal appellate courts, including the Fourth, Eleventh, and Federal Circuits, have further found that *Egan* insulates not only the reasons underlying a security clearance determination, but also the initiation of a security clearance review in the first place, regardless of the type of employment claim alleged. This is because the initiation of the investigation itself will be "closely tied to the security clearance decision," and so reviewing the initial stages of the investigation is tantamount to reviewing the basis for the ultimate decision itself. *Becerra v. Dalton*, 94 F.3d 145, 148–40 (4th Cir. 1996) (concerning a former Navy employee's Title VII retaliation and discrimination claims); *see also Wilson v. Dep't of the Navy*, 843 F.3d 931, 935 (Fed. Cir. 2016) (concerning a former Navy employee's Uniformed Services Employment and Reemployment Rights Act ("USERRA") claim); *Hill v. White*, 321 F.3d 1334, 1335–36 (11th Cir. 2003) (concerning an Army employee's Title VII discrimination claim). Those cases, however, all concerned federal employees.

In applying these precedents to the plaintiff in *Johnson*, the Fifth Circuit has joined other courts in expanding *Egan* to security clearance investigations initiated by federal contractors. Prior to the Fifth Circuit's decision in *Johnson*, the Ninth Circuit had observed that, although "private employers can rarely avail themselves of *Egan*'s jurisdictional bar," the bar *could* apply "[i]n employment discrimination suits against private employers" if courts could not "avoid examining the merits of the government's security clearance decision." *Zeinali v. Raytheon Co.*, 636 F.3d 544, 551 (9th Cir.

2011). The Eighth Circuit addressed a similar case to *Johnson,* also involving a contractor employee with access to a SAP: *Dubuque v. Boeing Co.*, 917 F.3d 666 (8th Cir. 2019). There, the Eighth Circuit affirmed the district court's finding of subject matter jurisdiction over a contractor employee's wrongful termination claim because it did not need to inquire into "the merits of the security-clearance decision." *Id.* at 667. If the court had needed to review the Executive Branch's decision, *Egan* would have barred jurisdiction. *See id. Johnson* is thus among the first cases in which a court has affirmatively held that *Egan* barred a private contractor employee's claim because adjudication would require reviewing a security clearance decision—and apparently the first reported decision to reach this conclusion in the FCA whistleblower retaliation context.

Finally, in the rare instance where an Executive Branch agency delegates certain authority to make security clearance or access decisions to a federal contractor, the Tenth Circuit has found that there is "no compelling reason to treat the security clearance decision [by the private contractor] differently than" if the Executive Branch agency had made the decision because, in either case, the decision is made based on "authority delegated by the Executive Branch." *Beattie v. Boeing Co.*, 43 F.3d 559, 566 (10th Cir. 1994); *cf. Zeinali*, 636 F.3d at 552 ("*Beattie* is, in many ways, the exception that proves the rule that private employers can rarely avail themselves of *Egan's* jurisdictional bar. In employment discrimination suits against private employers, courts can generally avoid examining the merits of the government's security clearance decision.") Indeed, in another recent employment case against Raytheon by a former employee whose SAP access was revoked, the district court found it possessed subject matter jurisdiction over the retaliation claim because the contractor "was not responsible for making the ultimate security determination." *Washington v. Raytheon Techs. Corp.*, No. 4:22-CV-00514, 2023 WL 8699379, at *6 (E.D. Tex. Dec. 15, 2023).

Limits to *Egan*: avoiding challenges to the merits of a clearance decision

Despite courts' willingness to shield an expanding scope of employment claims brought by federal employees and contractor employees from judicial review under *Egan*, some courts have identified broad outer limits of *Egan*'s reach. While the Third Circuit in *Makky* ultimately declined to review the plaintiff's claims in that case, the court made a point to note that federal courts *can* review employment discrimination claims related to an adverse security clearance determination as long as the claims do not require the court to consider "the merits of a security clearance decision." *Makky*, 541 F.3d at 213. Conversely, the Eighth Circuit found subject matter jurisdiction over a wrongful termination claim because it did not need to examine the merits of the adverse security clearance decision. *See Dubuque*, 917 F.3d at 667 (affirming dismissal for failure to state a claim upon which relief could be granted).

The Ninth Circuit, in *Zeinali*, discussed the limits of *Egan*. There, the Ninth Circuit reviewed Title VII discrimination claims precipitated by an adverse security clearance decision, even while acknowledging that *Egan* precludes review of claims that "challenge an allegedly discriminatory security clearance decision." *Id.* at 548. But in that case, the plaintiff did not challenge the denial of

his security clearance; rather, he argued that his private employer, Raytheon, had used the denial as a pretext for firing him discriminatorily when a security clearance was *not* a requirement for his job. *See id.* at 551–52. Moreover, the plaintiff had produced evidence that Raytheon had retained other engineers who also had their security clearances revoked. *See id.* at 553. Because, the court concluded, it did not need to "inquire into the merits or motivations behind the decision to deny [the plaintiff's] security clearance," but rather "need only examine the employment decisions made by Raytheon," judicial review was appropriate. *Id.* at 552.

Following *Johnson*, courts may conclude that they lack jurisdiction to review adverse employment decisions taken by not only Executive Branch agencies, but also federal contractors if reviewing such employment decisions would require examination of an Executive Branch decision to deny or revoke an employee's security clearance. Such a review would potentially encroach upon the constitutional authority reserved to the Executive Branch. A different result may be warranted where the employment decisions of federal contractors are related, but this does not require inquiry into the underlying merits or motivations of a security clearance determination.

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