3rd Circuit Confirms "But-For" Standard for Retaliation Claims Under the False Claims Act

Insights
2.13.18

Last month, the 3rd Circuit Court of Appeals held that an employee's protected activity must be the "but for" cause of an adverse action to support a claim for retaliation under the False Claims Act ("FCA"). The Court further affirmed that the plaintiff's constructive discharge claim did not establish an adverse employment action as a matter of law.

The case, DiFiore v. CSL Behring, LLC, No. 16-4297 (3rd Cir. January 3, 2018), involved an employee who complained that the employer had marketed drugs for off-label uses, meaning uses other than those that have been approved by the FDA. After her complaint, the plaintiff was issued two warning letters, received a performance review with a "needing improvement" score, was placed on a performance improvement plan, and allegedly suffered deteriorating relationships and a change of duties. Ultimately, the plaintiff resigned.

The District Court judge dismissed the plaintiff's wrongful discharge claim under Pennsylvania common law on summary judgment, finding that she could not establish a constructive discharge claim as a matter of law. Similarly, the judge held that the granting of summary judgment regarding constructive discharge foreclosed the plaintiff's argument that constructive discharge was an adverse action under the FCA. Therefore, only the other actions alleged above remained at issue.

At trial, the judge said the plaintiff had to prove that her complaint was the "but-for" reason for the employer's actions. The jury found in favor of the employer. The plaintiff appealed, among other things, the District Court's granting of summary judgment and the use of a but-for standard.

The 3rd Circuit upheld the judge's instruction to the jury to use a but-for standard, noting that the anti-retaliation language of the FCA mirrors that of the ADEA and Title VII's anti-retaliation provision. In light of the Supreme Court's holdings in Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) and Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013), requiring but-for causation under the ADEA and in retaliation claims under Title VII, respectively, the 3rd Circuit found that the District Court got it right when applying the but-for standard to the anti-retaliation provision of the FCA.

The 3rd Circuit similarly upheld the dismissal of plaintiff's constructive discharge claim, stating that the plaintiff "may have been subjected to difficult or unpleasant working conditions, but these

conditions fall well short of unbearable. Importantly, [the plaintiff] did not sufficiently explore alternative solutions or means of improving her situation."

The DiFiore case provides needed clarification to many employers subject to FCA retaliation claims. It also provides an employer-friendly reminder that constructive discharge claims must in fact establish that working conditions were so intolerable that an employee is forced to resign. If they do not, they are not an appropriate basis for a retaliation claim.

Should you need any assistance related to these types of claims, please reach out to your Fisher Phillips attorney.

Related People

Samantha Sherwood Bononno
Partner
610.230.2172
Email