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## EMPLOYMENT LAW

# False Claims Act Case Addresses Causation Discrimination Cases

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*Special to the Legal*

Claims brought under the False Claims Act (FCA) are rarely discussed in this column. The U.S. Court of Appeals for the Third Circuit's recent decision in *DiFiore v. CSL Behring*, 879 F.3d 71 (3d Cir. 2018) is instructive, not just for FCA claims, but for a lengthy discussion of the causation standards under Title VII, the Age Discrimination Employment Act and Family and Medical Leave Act. The case also addresses the standard for successfully stating a claim of constructive discharge.

### WHISTLEBLOWING ABOUT OFF-LABEL DRUG MARKETING

Marie DiFiore was associate director, and subsequently director of marketing for CSL Behring (CSL) from 2008 until her resignation in 2012. CSL is a drug manufacturer. DiFiore was promoted to the director position in August 2011. Throughout her employment, but most particularly in late 2011, DiFiore was concerned that CSL was engaged in off-label



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marketing of its drugs. "Off-label use is the unapproved use of an approved drug or the use of a drug for purposes other than those that have been approved by the Food and Drug Administration." DiFiore brought these concerns to her supervisors which, she claimed, caused the retaliation resulting in her ultimate resignation.

Specifically, between January and May 2012, DiFiore received two warning letters, a poor performance review and was removed from a committee on which she had previously served. This alleged deterioration of her

relationship with CSL culminated in a performance improvement plan in May 2012. Shortly after receiving the PIP, DiFiore resigned. DiFiore subsequently brought suit claiming that she had been retaliated against under the FCA and wrongfully discharged. Her wrongful discharge claim and part of her retaliation claim were both based on the theory that she had been "constructively discharged" from her employment.

After discovery, and CSL's motion for summary judgment, the court granted judgment to CSL on DiFiore's wrongful discharge claim and held that she could not rely upon constructive discharge as an adverse action in her FCA claim. The court denied, however, CSL's motion with respect to DiFiore's claim that she had been retaliated against for engaging in acts protected by the FCA - that is, essentially, being a whistleblower under the act. The jury found in favor of CSL and DiFiore appealed.

### 'BECAUSE OF' STANDARD MEANS 'BUT-FOR' UNDER FCA

The initial, and most broad-reaching, issue addressed by the appellate

court was the causation standard under the FCA. The court found that “to prove retaliation under the FCA, a plaintiff must show that he engaged in protected conduct and that he was discriminated against *because of* his protected conduct.” The district court found that DiFiore was required to show her that her protected activity was the “but-for” cause of the alleged adverse action. DiFiore argued that the lower “motivating factor” standard should have been applied.

The Third Circuit’s discussion of this issue focused on the decision of *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d Cir. 2001), in which the appellate court upheld application of the “motivating factor” standard to an FCA claim. In *DiFiore*, the Third Circuit found that *Hutchins* had predated the U.S. Supreme Court’s decisions *Gross v. FBL Financial Services*, 557 U.S. 167, 176 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). The importance of *Gross* and *Nassar* is that in both cases (brought under the ADEA and Title VII retaliation, respectively), the Supreme Court held that the statutory requirement that an individual show that the adverse action occurred “because of” her protected status “required a plaintiff to prove that [either Title VII retaliation or] age was the ‘but-for’ cause of the employer’s adverse action.” In contrast, the *DiFiore* court observed that in *Nassar*, the Supreme Court held that “the motivating factor test only applied to status discrimination under Title VII because the language of the statute explicitly required it. Because such language was not present in

the anti-retaliation provisions of Title VII [in *Nassar*], ‘but-for’ causation applied.”

Further, the court contrasted the FCA “because of ‘but-for’ causation standard with that of the FMLA which prohibits employers from considering the use of FMLA as a negative factor” in an employment decision. In *Egan v. Delaware River Port Authority*, 851 F.3d 263 (3<sup>rd</sup> Cir. 2017), the Third Circuit held that the phrase “a negative factor” resembled that used in Title VII status discrimination claims. The court found that “un-

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like the language of the FMLA anti-retaliation regulation, the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*.” As such, the court affirmed that the district court had used the correct causation standard under the FCA and affirmed judgment on behalf of CSL.

## **DETERIORATING EMPLOYMENT SITUATION NOT ENOUGH**

The court then addressed DiFiore’s claim that the multiple warnings,

deteriorating work environment and ultimate PIP were sufficient to state a claim of constructive discharge under Pennsylvania law. The court observed that constructive discharge occurs when “working conditions are so intolerable that a reasonable employee is forced to resign.” The court found that DiFiore essentially claimed that she had been constructively discharged by what “amounted to close or even ‘overzealous’ supervision.” This was not enough to state a viable claim. While DiFiore “may have been subjected to difficult or unpleasant working conditions ... these conditions fell well short of unbearable.” The court also observed that DiFiore made no attempt to comply with her PIP (likely because she believed it to be just a stop on the road to termination), and even declined to attend a meeting at which she was to discuss her PIP. These actions failed to demonstrate “that she had no option left but to resign.”

*DiFiore* is a useful primer on the various causation standards that employment law practitioners work with on a daily basis. It also emphasizes that resigning in the face of difficult employment circumstances—particularly without exhausting every option to stay—will not be sufficient to state a viable constructive discharge claim. •