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# Recent Decision Shows Employer's Small Acts Can Add Up to Retaliation

April 26, 2016

How badly does an employer have to treat an employee before its conduct is considered retaliatory under the False Claims Act (FCA)? That was the question before a federal court in *Difiore v. CSL Behring, U.S., LLC*, No. CV 13-5027, 2016 WL 1073115 (E.D. Pa. Mar. 17, 2016), a recent case involving an employee who raised concerns about the off-label marketing of pharmaceutical products. The answer the court provided was that even small acts, when taken together with other small acts, can constitute retaliation that is barred by the FCA.

Cases like this one illustrate an important point that is relevant not just to employees claiming retaliation under the FCA, but also to those making retaliation claims under other whistleblower and antidiscrimination statutes: Employers cannot avoid liability for retaliation just by choosing not to terminate or demote an employee. Rather, as the court explained in *Difiore*, employers cannot take *any* actions that would dissuade a reasonable employee from reporting wrongdoing.

## What Happened in Difiore v. CSL Behring

In *Difiore*, the plaintiff reported concerns about her employer's off-label marketing of a drug on several occasions, only to be rebuffed. In the months that followed the instances in which she voiced her concerns, she was subjected to several acts she considered retaliatory.

First, following a complaint to her supervisor that a coworker had spoken to her in an unprofessional manner, human resources issued both the plaintiff and the coworker warning letters based on their conduct. Soon after, she received another warning letter for her failure to make timely payments on her company credit card, an action that she viewed as a disproportionate response to the situation. Finally, she received a negative mid-year performance review and was consequently placed on a performance improvement plan (PIP).

Facing these conditions, the plaintiff chose to resign from her position.

The plaintiff then sued her employer for unlawful retaliation in violation of the FCA and for wrongful discharge under state law. The court dismissed all of the plaintiff's claims related to wrongful discharge because she had voluntarily resigned from her position and had not been fired. The court concluded that the plaintiff could not show that her employer made her working conditions so intolerable that they rose to the level of "constructive discharge."

The only remaining question for the court, then, was whether the actions the defendant took against the plaintiff constituted an "adverse employment action," which would give rise to a retaliation claim under the FCA.

## Can Aggregate Actions Constitute Retaliation?

A retaliation claim under the False Claims Act requires the plaintiff to show that she engaged in protected conduct by reporting potential fraud against the government, that she then suffered an

adverse employment action, and that there was a causal connection between the protected conduct and the adverse employment action. In *Difiore*, the only question before the court was whether the actions the defendant took amounted to an adverse employment action. Because the court had already concluded that the plaintiff had not been constructively discharged, she had to show that the warning letters, the negative mid-year review and the PIP constituted an adverse employment action.

In analyzing the question, the court referred to *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006), a Title VII case in which the Supreme Court clarified what actions constitute adverse employment actions. In *Burlington Northern*, the Court held that an adverse action is one that might dissuade a reasonable employee from engaging in protected conduct. Id. at 68.

Although *Difiore* was an FCA case, not a Title VII case, the court applied the same test in analyzing the actions taken against the plaintiff. While it found that none of the actions taken against the plaintiff – on their own – constituted an adverse employment action, the court explained that it had to consider all the actions in the aggregate, and that when added together, they amounted to an adverse employment action. The court concluded that a reasonable employee could be dissuaded from reporting potential FCA violations if she knew that her employer would respond to that reporting by becoming "hypercritical" of her work performance.

## What Is the Takeaway for Whistleblowers?

This holding illustrates an important point for employees who face retaliation after engaging in protected activity under the FCA or other statutes.

All employees understand that there are many actions an employer can take that will make their jobs and their lives more difficult. Some of these actions are big, such as a termination or demotion. But most of these actions are small, like micromanaging, arbitrary disciplining or negative performance reviews. Although any one of those actions considered in isolation might not be enough to give rise to a retaliation claim, when they are part of a larger pattern, it becomes more likely that the employee can assert a claim against her employer.

The court's decision in *Difiore* demonstrates that an employee's bar for proving she has been retaliated against is not so high that she must have been fired or demoted in order to state a claim. Instead, courts will take a pragmatic approach and consider whether the actions taken against an employee are such that they make it less likely that an employee would engage in protected conduct in the future.

Employees have to feel free to vindicate their rights under the law, whether that involves reporting potential fraud against the government, complaining to human resources about sexual harassment by a superior or raising concerns about information a company is providing to shareholders. The law is designed to protect employees who engage in that type of activity from retaliation by their employers.