

“CONSTRUCTIVE DISCHARGE” RETALIATION CLAIMS UNDER THE FALSE CLAIMS ACT: WHAT FORM OF INTENT MUST THE EMPLOYER HAVE?

A critical element in any claim for retaliation under the False Claims Act is an adverse employment action. Most commonly, FCA retaliation claims rest on an employee’s involuntary termination due to lawful actions taken by the employee in reporting or opposing the submission of false claims to the government. In certain cases, an employee can sue even if he or she *resigned* from the job due to a “constructive discharge.” Determining whether an employer actually fired its employee is often clear. But, in claims of constructive discharge, the plaintiff must prove that a reasonable person in his or her shoes would have felt compelled to resign.

In one recent decision, the U.S. Court of Appeals for the Sixth Circuit addressed the nature of an employer’s intention in such cases. The lower court had concluded that the plaintiff’s retaliation claim could not proceed because the employer did not commit fraud with the specific intention of forcing the employee’s resignation.

The Court of Appeals rejected that proposition. Although the court said that an employer’s conscious specific intention was a consideration, it is not the only way to determine if an employer constructively discharged the plaintiff.

In *Smith v. LHC Group, Inc.*, __ F. App’x __, 2018 WL 1136072 (6th Cir., Mar. 2, 2018), the plaintiff served as a Director of Nursing and was required to oversee patient orders and complete paperwork necessary for Medicare and Medicaid reimbursements. She believed she was personally exposed to government investigation and prosecution because other employees allegedly admitted patients without proper clinical assessments and documentation and because those employees improperly changed physicians’ orders to reflect that the proper staffing was on hand to support the care. She said that management ignored her complaints about these issues and that she resigned rather than “turn[] a blind eye” to the supposed fraud.

The court held that a jury should decide whether a reasonable person in the plaintiff’s shoes would have felt compelled to resign. The Court of Appeals further explained that, while an employer must *intend* that its actions cause the employee’s resignation, that intent is ultimately an “objective” consideration. In other words, the employee’s resignation need only be “a reasonably foreseeable consequence of the employer’s actions.”

PRACTICAL TAKEAWAYS

The Sixth Circuit’s recent decision reinforces the notion that an employer’s intent is still a necessary factor in determining whether a constructive discharge FCA retaliation claim can proceed. However, it clarifies that “intent” does not necessarily contemplate a conscious specific intention to cause the employee’s resignation.

If you have questions about False Claims Act retaliation claims or the decision in the case discussed above, please contact [Jon Rabin](mailto:jrabin@hallrender.com) at jrabin@hallrender.com or (248) 457-7835 or your regular Hall Render attorney.