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## First Circuit Limits Inference of Pretext for FCA Retaliation Claims

On February 22, 2016, the First Circuit affirmed a grant of summary judgment for pharmaceutical maker GlaxoSmithKline (“GSK”) on a False Claims Act retaliation claim by a former employee. In *United States ex rel. Hamrick v. GlaxoSmithKline LLC*, 814 F.3d 10 (1st Cir. 2016), the court held that the employee had failed to create a jury question on whether GSK’s proffered reasons for terminating him were pretextual. The court’s decision refused to credit a series of implausible theories advanced by the employee, and placed an important limit on the principle that pretext can be inferred based on the temporal proximity of protected conduct and termination.

**Attorneys**  
[Kirsten Mayer](#)  
[John P. Bueker](#)  
[Mark Gaioni](#)

### Background

Relator Blair Hamrick (“Hamrick”) worked for GSK as a senior executive sales representative. In 2002, GSK Compliance interviewed Hamrick in connection with off-label marketing allegations raised by another GSK employee, Gregory Thorpe. Hamrick corroborated the allegations, and he and Thorpe subsequently filed a qui tam action against GSK.

At the same time, Hamrick’s personal and professional life began to fall apart. Over the next several months, Hamrick engaged in a range of angry, irrational behaviors, including repeated violent threats against coworkers. GSK initiated severance discussions, but when Hamrick refused to engage in the process, he was eventually terminated. After his firing, Hamrick amended his FCA complaint to add a retaliation claim under 31 U.S.C. § 3730(h). The district court granted summary judgment to GSK on this claim.

### First Circuit Decision

On appeal, Hamrick conceded that GSK had satisfied its burden of advancing a non-retaliatory motive for terminating him. He contended, however, that GSK’s explanation was pretextual, and that the district court had erred in finding no genuine question of material fact on this issue when it granted summary judgment to GSK. The First Circuit affirmed.

The court’s decision patiently debunked a series of increasingly far-fetched narratives advanced by Hamrick. For example, the court gave no credence to Hamrick’s contention that GSK’s delay in firing him showed that it did not find his behavior objectionable, and it rejected out of hand his theory that the company had sent him to a conference hoping that he would have an outburst there.

More significantly, the court also rejected Hamrick’s argument that a retaliatory inference could be drawn from the temporal proximity between GSK’s identification of Hamrick as a whistleblower and its decision to fire him. The court explained that while this inference might be justified in some cases – as in its earlier decision in *Harrington v. Aggregate Indus.-Ne. Region, Inc.*, 668 F.3d 25, 33 (1st Cir. 2012) – it was not warranted here, where Hamrick’s actions had already placed him well along the road to termination by the time this identification allegedly occurred.

Ultimately, the First Circuit held, none of Hamrick’s counter-narratives created a jury question in the face of the evidence supporting GSK’s proffered motive – that Hamrick’s unhinged behavior made him a danger to himself and

others. As the court observed, “no reasonable jury could in this case be swayed by Hamrick’s largely speculative attempts to dislodge GSK’s asserted motivation from its grounding in record evidence.” Hamrick, 814 F.3d at 23.

### Implications

While the facts in Hamrick are rare, the decision nevertheless places broadly applicable limits on relators’ ability to reach a jury on retaliation claims. The First Circuit makes clear that where the defendant has advanced substantial evidence of poor performance, a relator must provide more than speculation to avoid summary judgment. The decision should prove particularly useful to defendants in countering a frequent argument by relators: that the close temporal proximity between alleged protected conduct and their termination raises an inference of pretext. This inference may be justified in some cases, but as Hamrick clarifies, it is not boundless.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.