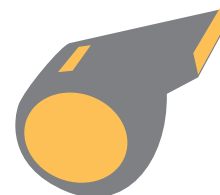


# SOX Whistleblower Team Management Alert



## First Circuit Adopts *McDonnell Douglas* Burden-Shifting Analysis For False Claims Act Whistleblower Cases

On February 7, 2012, the First Circuit, in *Harrington v. Aggregate Industries-Northeast Region, Inc.*, Case No. 11-1511, adopted the *McDonnell Douglas* burden-shifting framework in the context of a False Claims Act (“FCA”) whistleblower retaliation case. The First Circuit, recognizing that its decision was a case of first impression, is the first federal appellate court to do so in a published opinion. The plaintiff had alleged that his employer, Aggregate Industries-Northeast Region, Inc. (“Aggregate”) terminated him in retaliation for bringing a *qui tam* action against Aggregate under the FCA. The district court granted Aggregate’s motion for summary judgment. On appeal, the First Circuit adopted and applied the *McDonnell Douglas* burden-shifting framework to the plaintiff’s retaliation claim and, based on that analysis, vacated and remanded the case.

### Background

The plaintiff and a fellow employee filed an FCA suit under 31 U.S.C. § 3730(h)(1) against Aggregate based on Aggregate’s unlawful supply of substandard concrete to the “Big Dig” highway project in Boston, a project that was largely supported by federal funds. The federal government intervened in the *qui tam* action and reached a settlement with Aggregate. A few days after the plaintiff signed the settlement agreement, Aggregate fired him for refusing to take a drug test. The plaintiff sued Aggregate, alleging that Aggregate’s explanation for terminating the plaintiff was pretextual, and that true reason for his dismissal was retaliation for his whistleblowing activities.

The district court granted summary judgment against the plaintiff on the grounds that the plaintiff had failed to present evidence of a causal connection between his whistleblowing activities and Aggregate’s decision to terminate his employment.

### *McDonnell Douglas* Burden-Shifting Analysis Applies To FCA Anti-Retaliation Claims

The First Circuit, recognizing that no prior appellate court had articulated the standard to be applied in FCA retaliation cases, applied the *McDonnell Douglas* burden-shifting framework that has been applied to claims under Title VII, among other anti-retaliation statutes. The First Circuit reasoned that this framework “provides a principled mode for analyzing retaliatory intent.” As applied to the FCA’s anti-retaliation provision, the First Circuit stated that a plaintiff must initially establish a *prima facie* case of retaliation, which can be met by establishing the employer’s knowledge of protected activity (*i.e.* the filing of an FCA claim by the employee), an adverse employment action, and a causal connection between the two. Once the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to set forth a legitimate, nonretaliatory reason for the adverse employment action. Once the defendant proffers a legitimate, nonretaliatory reason, the burden shifts

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back to the plaintiff to show that the defendant's reason is pretextual, and that the actual motive was retaliation. "In such circumstances, an inquiring court looks to the record as a whole to determine whether there is sufficient evidence of 'pretext and retaliatory animus' to make out a jury question."

As applied to *Harrington*, the First Circuit concluded that the first two prongs of the *McDonnell Douglas* test were satisfied. Furthermore, the First Circuit concluded that the record as a whole, including Aggregate's multiple and questionable efforts force the plaintiff to take a drug test and the temporal proximity between the date the plaintiff signed the settlement agreement and the date he was terminated, raised triable issues about whether Aggregate's proffered reason for firing the plaintiff was pretextual. Accordingly, the First Circuit vacated the entry of summary judgment and remanded the case to the district court for further proceedings.

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