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Administrative Review Board Makes Proof of Causation for Complainants in Sarbanes-Oxley Retaliation Cases Substantially Easier

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Often the most crucial and hard-fought issue in any retaliation trial is the question of causation. Did the employer take adverse action against the employee "because of" his protected activity? Invariably, the individual engaged in some form of protected activity and the employer took some form of adverse action, all under circumstances that can lead to competing inferences about the employer's motivation. Temporal proximity between the events may compete with proof that the individual's performance was sub-par or that he engaged in some form of misconduct unrelated to his protected activity. At trial, the fact finder normally must evaluate all relevant evidence, assess the credibility of witnesses, and decide whether the burden of causation has been established.

In a 2-1 decision last month in *Fordham v. Fannie Mae*, ARB No. 12-061 (October 9, 2014), the Administrative Review Board ("ARB") of the U.S. Department of Labor held that for retaliation claims brought under Section 806 of the Sarbanes-Oxley Act, as amended, the approach must be different. The administrative law judge ("ALJ") is not permitted to consider the employer's evidence of motive for the adverse action when assessing whether the complainant has met her burden, according to the ARB's recent decision. The proper time for consideration of that evidence, the ARB explained, is only after a determination has been made that the complainant's protected activity was a contributing factor in the decision.

The decision is binding on ALJs who hear Section 806 retaliation claims. So as a practical matter, this decision means that employers will bear an even more substantial burden in hearings before the Department of Labor for disproving a retaliatory motive in most cases. More significantly, the decision may make it more difficult for employers to obtain dismissal of Section 806 claims before hearing. U.S. district courts hearing Section 806 claims pursuant to the kick-out provision of the 2010 amendments[1] will not be bound. So employers will be able to argue in court for a more traditional approach to the consideration of causation evidence, though many courts have given deference to ARB rulings on questions of law under the statute.

Fordham's Claim Fails After a Hearing Before the ALJ

Section 806 of Sarbanes Oxley prohibits public companies from taking adverse employment actions against an employee because he has (a) lawfully "provid[ed] information, cause[d] information to be provided, or otherwise assist[ed] in an investigation (b) regarding any conduct which (c) the employee

reasonably believes constitutes a violation of" Federal mail, wire, bank, or securities and commodities fraud statutes, "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders" when (d) that information or assistance is provided to a federal regulatory or law enforcement agency, a Member of Congress or a person with supervisory authority over the employee.[2] Claims under Section 806 must first be filed with the U.S. Department of Labor. Only where the Secretary of Labor has failed to issue a final decision on such a claim within 180 days may the complainant pursue a claim in U.S. district court, where a jury trial is then available.

In establishing the retaliation claim in Section 806, Congress decided that if an employer takes adverse action against an employee even if only in part "because of" his protected activity, it will bear a substantial burden to avoid liability using an affirmative defense. Claims are governed by the rules set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[3] The statute requires that a complainant must prove that her protected activity was "a *contributing factor* in the unfavorable personnel action"[4] in order to establish a violation of the law. This must be proved by a preponderance of the evidence. The statute also provides an affirmative defense to the employer; if the complainant succeeds in proving a violation—that is, that the employer was in part motivated by the protected activity—the employer may avoid liability if it can prove by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of that behavior."[5]

The *Fordham* case proceeded to a final decision in the Department of Labor, after an evidentiary hearing before an ALJ. The complainant proved by a preponderance of the evidence that she had engaged in protected activity over a period of time from late 2008 into the spring of 2009. The ALJ also found that she suffered the following adverse employment actions: (1) a lowered performance rating in March 2009, (2) an involuntary administrative leave starting in late April, and (3) the termination of her employment in July 2009. She failed to prove by a preponderance of the evidence, according to the ALJ, that her protected activity was a contributing factor in any of these adverse actions. Citing "overwhelming evidence of Fordham's unsatisfactory job performance during 2008," the ALJ concluded that Fordham failed to prove that her protected activity was a contributing factor in the lowered performance rating. Next, the ALJ pointed to evidence that the recommendation to terminate Fordham's employment predated her protected activity in late April 2009. From this, the ALJ concluded that the termination decision had already been made and therefore there was insufficient evidence to prove that her protected activity was a contributing factor in the decisions to place her on administrative leave and later terminate her employment. The complaint was dismissed, and Fordham appealed to the ARB.

The ARB's Decision to Reverse and Remand

The ALJ's factual findings, the ARB explained, "will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if [the ARB] 'would justifiably have made a different choice had the matter been before [it] de novo.'" (Slip Op. at 9.) Indeed, the ARB found that many of the ALJ's factual findings were supported by substantial evidence in the record, including the finding that some of what Fordham claimed were adverse actions were not. On the issue of causation, however, the ARB found reversible error in two respects.

First, the ARB explained that only a "recommendation" to terminate Fordham's employment predated her late April protected activity and that recommendation required additional approvals, which came much later. Therefore, it held that it was error to find that the decision predated the protected activity.

Second, and more significantly, the ARB held that "the ALJ committed reversible error . . . [i]n weighing Fannie Mae's causation evidence against Fordham's evidence of causation …." (Slip Op. at 35.) This conclusion, the ARB explained, is rooted in the proof paradigm dictated by Congress in the statute.

Fordham argued before the ARB that she was not required to prove that the employer "*actually* considered her protected activity" but only that she demonstrate "*an inference* of contributing factor." (Slip Op. 16.) The ARB agreed. "It would thus seem self-evident from this statutory scheme," the ARB explained, that the employer's evidence regarding its reasons for taking the adverse action "is not to be considered at the initial 'contributing factor' causation stage where proof is subject to the 'preponderance of the evidence' test." (Slip Op. 22.) Otherwise, it suggested, the employer would be relieved of the higher, clear and convincing burden, which applies to the causation issue on its affirmative defense. Curiously, the ARB described its holding as an "evidentiary methodology," one that "differs from the traditional evaluation of evidence …whereby findings of fact are based on the weighing of all the evidence introduced by both parties." (Slip. Op. 35.) Nonetheless, it remanded the case to the ALJ for a new determination consistent with the opinion.

Impact of the ARB's Decision

The ARB's holding is binding on ALJs unless or until it is reversed. It is flawed, however, for a variety of reasons, many of which are cogently set forth in the dissent. Fundamentally, the decision "alters the statutory affirmative defense to mean that ALJs cannot consider all the relevant evidence in deciding the question of contributory factor" which, the dissent predicts, "will lead to skewed findings of whistleblower violations." (Slip Op. 38-39 (dissent).)

A violation of Section 806 only occurs if the protected activity was a contributing factor in the adverse employment action. Absent such a finding, there is no need to consider whether the employer can establish its affirmative defense. That is the very nature of an affirmative defense. Suppose, for example, that the employer's evidence were to show conclusively that all of the adverse actions were actually taken before any of the protected conduct. In such a circumstance, it would not be possible for a retaliatory motive to have been "a *contributing factor* in the unfavorable personnel action." And in the absence of such a retaliatory motive, there is no need to consider whether Fannie Mae proved by clear and convincing evidence that it would have acted the same in the *absence* of such a motive. But according to the ARB, the ALJ is not permitted even to consider whether retaliation was, in fact, "a *contributing factor* in the unfavorable personnel action" because it is not permissible for the ALJ to consider evidence of any other possible factors. That is, in making a determination on the "contributing factor" question, the ARB held that the ALJ is not permitted to consider any evidence about what else might have motivated the employer. That "evidentiary" approach leaves the ALJ only with the complainant's evidence and, potentially, a foregone conclusion that a violation occurred.

How this decision will impact Section 806 hearings before ALJs is hard to predict. Despite its length, the decision gives little practical guidance to ALJs for approaching the causation questions in future hearings. It does not clearly explain what constitutes the employer's "causation" evidence, as opposed to other evidence that may properly be considered on the threshold "contributing factor" question. It thus remains to be seen what type of evidence an ALJ properly can cite to support a conclusion that the complainant has failed to meet her burden by a preponderance of the evidence. Likewise, it is unclear whether a complainant will be able to establish a violation, thus shifting the burden of proof to the employer, merely by showing that his or her protected activity and the adverse employment action occurred in temporal proximity, or whether the employer will even be permitted at this stage to

offer substantial proof of poor performance, misconduct, or other legitimate reasons to support the adverse action.

Potentially of greater significance is how this decision may impact pre-hearing proceedings before the DOL. It may lead ALJs to dismiss fewer cases before hearing. Fortunately, the ARB's decision is not binding on U.S. district courts, so for SOX retaliation claims pursued in that forum, employers still will be able to argue for a more traditional approach to assessing the evidence.

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1 Pursuant to 18 U.S.C. § 1514A(b)(1)(B), if the Secretary of Labor has not issued a final decision on the claim within 180 days of filing, the complainant may bring an action in U.S. district court, where she is entitled to a trial by jury.

2 18 U.S.C. § 1514A(a)(1).

3 18 U.S.C. § 1514A(b)(2) ("An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.).

4 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added).

5 49 U.S.C. § 42121(b)(2)(B)(iv).