Insight

IN-DEPTH DISCUSSION

OCTOBER 13, 2016

Restoring Decades-Old Precedent, the DOL Blows the Whistle on Fordham's "Fundamental Error"

BY COOPER SPINELLI, SUSAN FITZKE, AND KEVIN GRIFFITH

On Friday, September 30, 2016, U.S. Department of Labor's (DOL's) Administrative Review Board (ARB) issued its highly anticipated decision in *Palmer v. Illinois Central Railroad Company*, ARB No. 16-035 (2016), correcting its much-criticized decision in *Fordham v. Fannie Mae*, ARB No. 12-061 (2014). In *Fordham*, the ARB held that, when analyzing whistleblower claims under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as "AIR-21" framework, a fact-finder may not consider an employer's evidence when determining whether the employee's alleged protected activity was a contributing factor in the challenged adverse employment action. As predicted when *Fordham* was issued,[1] this was particularly problematic for employers. Evidence necessary to prove the employer's affirmative defense under the AIR-21 framework—i.e., that the employer would have taken the same action irrespective of the employee's protected conduct—is not so easily segregated from the question of whether that protected activity contributed to the adverse action in the first instance. In a win for employers, after almost two years of perplexity and dissension, the ARB overruled *Fordham*.

The AIR-21 Framework

The AIR-21 evidentiary framework applies to claims made under the Sarbanes-Oxley Act (SOX) (at issue in *Fordham*), the Federal Railroad Safety Act (FRSA) (at issue in *Palmer*), and under most other whistleblower retaliation provisions administered by the DOL. When a case is before the Office of Administrative Law Judges (OALJ) or a federal court, AIR-21 prescribes that the fact-finder "may" find a violation "only if" the employee "demonstrate[s]" that his or her protected activity was a contributing factor in the adverse action. This is step one. At step two,

1 See Kevin E. Griffith and Edward T. Ellis, *Seminal Decision Could Make it Harder for Publicly Traded Employers to Defeat Sarbanes-Oxley Whistleblower Claims*, Littler Insight (Oct. 27, 2014).

relief "may not be ordered" if the employer demonstrates by "clear and convincing evidence" that it would have taken the same adverse action regardless of the protected activity.

For decades, it was well established that to "demonstrate" is to prove by a preponderance of the evidence. *Fordham*, however, cast doubt on whether the term "demonstrate" had the same meaning in step one of the AIR-21 framework. The question for the Board in *Palmer* was whether employees could shift the burden of proof to employers by merely producing some evidence, or whether an employee's evidence would have to be weighed against the employer's. In other words, does "demonstrate" mean to offer or to prove?

Fordham and its Aftermath

In *Fordham*, the ARB broke with established usage and decades-old precedent to decide that "to demonstrate" really means to make an initial or prima facie showing, at least at step one. The Board held that, because each party bears different evidentiary burdens, it was reversible error for a fact-finder to consider any of the employer's evidence at step one. The Board stated that to hold otherwise would render meaningless the "clear-and-convincing" burden.

Thus, even though "demonstrate" appears in both AIR-21 provisions at both steps, the *Fordham* Board read "demonstrate" in only step one as a *prima facie* showing. This effectively rendered plaintiff's burden of proof as one of production and shifted the ultimate burden to the employer to prove by clear and convincing evidence that it was not liable. In effect, *Fordham* grafted onto the statute what might be viewed as a presumption of liability to be disproved by the employer.

Perhaps reacting to criticism of *Fordham*, the Board waffled in *Powers v. Union Pacific Railroad*, ARB No. 12-044 (2015). The *Powers* Board effectively affirmed *Fordham*, but qualified its holding to allow for limited consideration of an employer's "relevant" evidence at step one. In applying this qualification, however, the Board redefined relevance to exclude much of what would otherwise be relevant. Applying *Fordham*, the Board held that persuasive management testimony that had been found by an ALJ to outweigh the employee's evidence was "subjective" and, therefore, of "highly questionable relevance to contribution."

Following *Powers*, the Board offered conflicting interpretations of its reach and holding.[2] After sowing increasing confusion, the Board announced a surprise: a member of the Powers' majority had communicated ex parte with counsel for the *Powers'* complainant before the issuance of the decision. The Board then vacated Powers and eventually set an en banc hearing, with a new Board member, to revisit the issue in *Palmer*.

The ARB Overrules *Fordham*

In a welcome change of course—but one that required 68-pages and 270 footnotes—*Palmer* overturned Fordham and held that the fact-finder must consider at step one "the employer's evidence of its non-retaliatory reasons" where the employer asserts that the alleged protected conduct played no role in the adverse employment action. On page 52 of its decision, the Board succinctly stated:

> The AIR-21 burden-of-proof provision requires the fact-finder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance.

2 See *Keeler v. J.E. Williams Trucking, Inc.*, ARB No. 13-070, ALJ No. 2012-STA-49 (ARB June 2, 2015) (holding that the ALJ erred in weighing employer's "affirmative-defense" evidence "supporting a non-retaliatory reason or basis for the personnel action at issue against a complainant's causation evidence" at [step one]); *Ledure v. BNSF Railway Co.*, ARB No. 12-044, ALJ No. 2012-FRS-020, slip op. at 8 (June 12, 2015) (holding that "The ALJ has the right to consider [at step one] any evidence that is relevant to the question of causation, including the employer's explanation for why it did what it did.").

> For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Critically, the plurality faulted *Fordham's* "fundamental error" of treating steps one and two as two sides of the same question. The plurality further recognized that if *Fordham* were to survive, the step one burden of proof would collapse into one of production, which was not consistent with the statute. Relying upon the canon of consistent usage, the Board aptly concluded that the term "demonstrate" could not mean an employer's burden of proof that considers all the evidence at step two, but simply a prima facie showing at step one.

The *Palmer* plurality cited canon, history, and logic to demonstrate the error of *Fordham*. Yet Judge Luis A. Corchado was more direct in his concurring opinion, noting that the conclusion plainly follows from the text. As a general proposition, in his view, one cannot determine causation without considering all the evidence. And fact-finders especially cannot determine causation if not allowed to consider the defendant's evidence, as they must determine what caused the defendant to act.

Palmer also appears to have restored the usual meaning of relevance. Although the plurality referred to relevant evidence without qualification ("all relevant evidence" must be considered), the plurality was also clear that the statute imposes no limitations "at all" on the evidence an ALJ may consider. For his part, Judge Corchado's short concurrence took care to define relevance twice, in the text and the footnotes, as any evidence with "any tendency" of making a "contributing factor" more or less probable. With the plurality's categorical language and the concurrence's express definition, a future panel intent on redefining relevance faces a considerable hurdle.

Takeaways

Palmer is helpful for employers defending whistleblower suits under the AIR-21 framework. *Fordham* had created a presumption of liability where none existed before or was provided by statute. *Fordham* would likely have affected the defense of SOX, FRSA, and other federal whistleblower claims administered by the DOL in the federal courts, especially if the federal courts deferred to the Board's tortured analysis in *Fordham*. Now that the Board has changed course, however, *Palmer*, which is more consistent with the approach taken by a majority of federal courts, should be accepted as law.

The only certainty of *Palmer* is that it restores the pre-*Fordham* status quo. Employers are once again allowed to meet the employee's step-one evidence with their own evidence that the protected activity played no part in the adverse-action decision. Employers should also feel confident that relevant evidence retains its regular definition of that which tends to make a fact more or less probable, regardless of its source; a seemingly non-controversial point that had been mired in confusion but, thankfully, no longer.