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ASAP®

October 27, 2014

Seminal Decision Could Make it Harder for Publicly Traded Employers to Defeat Sarbanes-Oxley Whistleblower Claims

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Long awaited in Sarbanes-Oxley Act (SOX) whistleblower circles, on October 9, 2014 the U. S. Department of Labor's Administrative Review Board (ARB) issued a split 2-1 panel decision in *Fordham v. Fannie Mae*, ARB No. 12-061, reversing in part and remanding an administrative law judge's post-hearing dismissal of a former employee's Section 806 whistleblower retaliation claim. The ARB's decision in *Fordham* is significant because it addresses squarely, and at length, how ALJs and OSHA investigators should apply the separate and two-stage burden of proof required under Section 806 whistleblower retaliation claims. The result of the ARB's *Fordham* decision likely will energize the plaintiffs' bar, and could make it more difficult for covered employers—and their contractors and subcontractors based on *Lawson v. FMR LLC*—to obtain dismissals of SOX Section 806 whistleblower retaliation claims, whether at the investigatory stage or following a full-blown evidentiary hearing before an ALJ. If the ARB's decision is appealed but withstands judicial review, *Fordham v. Fannie Mae* could lead to a sea change in publicly traded employers' and their contractors' and subcontractors' involvement in, and potential exposure to, SOX whistleblower claims.

In its 47-page decision—supported by 117 footnotes(!) and a strong dissent attacking the overall "unfairness" of the majority's decision—the ARB reversed and remanded the ALJ's dismissal of the Section 806 whistleblower retaliation claim. Section 806 of SOX provides a federal cause of action for employees who allege their employers retaliated against them for reporting violations of federal securities laws. In *Fordham*, the claim was brought by a former IT technical risk specialist who worked in the employer's SOX Technology Department. The ARB's reversal comes over *two-and-a-half years* after the March 19, 2012 ALJ dismissal of the former employee's claim. Noting that its decision addressed "a matter of first impression," the ARB in *Fordham* attempted to clarify the ARB's, ALJs' and reviewing courts' often conflicting approaches to how Section 806's two separate burdens of proof should be applied. In doing so, the ARB extensively analyzed the legislative history of Section 806 and the current body of Section 806 ARB and court decisions that have interpreted its burden of proof provisions. In addition, the ARB extensively analyzed the legislative history and case law interpretations of the burden of proof models under the Aviation Investment Reform Act (upon which Section 806 was modeled), the Energy Reorganization Act, and, ultimately, the federal employment Whistleblower Protection Act and its supporting case law.

While the ARB mentioned the first three elements of the Section 806 whistleblower's prima facie burden: (1) protected activity; (2) the employer's knowledge; and (3) adverse employment action, the *Fordham* decision deals primarily and extensively with the burden of proof applicable to element (4)—*i.e.*, the complainant's burden of showing that her protected activity was a "contributing factor" in the employer's adverse decision. The new decision's key holding addresses the treatment of evidence supporting the employer's affirmative defense that it would have taken the same action against the employee even if the employee had not engaged in protected SOX activity. The ARB held that such evidence cannot be taken into account by the ALJ until the ALJ first decides whether the SOX complainant has met her burden of proving, by preponderance of the evidence, that her conduct was a "contributing factor" in the employer's adverse decision. According to the ARB, allowing otherwise would permit ALJs to weigh the employer's evidence by a preponderance of the evidence standard and not by SOX's required clear and convincing standard. Thus, in the end, the ARB's final holding in *Fordham v. Fannie Mae* is that Section 806 claims have two separate burdens of proof: a preponderance of the evidence burden for the whistleblower, and a higher, clear and convincing burden for the employer. In addition, ALJs and OSHA investigators are to apply the burdens of proof in two separate stages.

As the ARB held:

> The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving "contributing factor" causation, the respondent's affirmative defense evidence is then to be taken into consideration, subject to the higher "clear and convincing" evidence burden of proof standard, in determining whether or not the respondent is liable for violation of SOX's whistleblower protection provisions.

The ARB in *Fordham* reversed and remanded the ALJ's dismissal order because the ARB determined the ALJ committed reversible error by improperly "weighing evidence offered by Fannie Mae in support of its affirmative defense…against [the] complainant's causation evidence" of how her SOX-protected activity purportedly was a contributing factor in the employer's adverse employment action against her. According to the ARB, mixing and weighing the evidence in this fashion impermissibly resulted in applying to the employer's evidence the lower preponderance of the evidence standard that is only properly applicable to the complainant's evidence, rather than applying the higher clear and convincing evidence standard required to be applied to the employer's evidence. As the ARB further clarified:

> …should a respondent seek to avoid liability by producing evidence of a legitimate, non-retaliatory basis or reason for the personnel action at issue, the respondent must prove, not by a preponderance of the evidence, but *by clear and convincing evidence*, that its evidence of a non-retaliatory basis or reason for its action was the sole basis or reason for its action; that it would have taken the same personnel action based the demonstrated non-retaliatory reasons even if the complainant had not engaged in the protected activity.

An obvious problem with the ARB's holding is that evidence in most cases is not as easily compartmentalized as this opinion appears to presume. Often evidence that establishes a legitimate reason for terminating an employee (the defense's burden) will deprive the complainant of the quantum of proof necessary to demonstrate that the activity protected by SOX was a contributing factor in the adverse employment action (the complainant's burden). Eliminating other events occurring in the workplace during the relevant time period means that the finder of fact may consider two factors: (a) direct evidence of unlawful animus, and (b) temporal proximity. Since (a) is rare, most cases at this stage of the analysis will turn on timing.

The *Fordham* decision provides other guidance on the terms "protected activity" and "adverse employment action" under Section 806. The decision also contains a vigorous dissent, which likely has set the stage for judicial review. So, stay tuned.

A final takeaway from *Fordham* pertains to employer investigations of employee complaints. The ARB's statement of facts does not paint a sympathetic picture of the complainant. Rather, the facts show she exhibited significant performance, conduct and attendance problems over a period of time. When the employer attempted to address those problems, the complainant lashed out and accused management of race and gender discrimination, incompetence, and trying to intentionally undermine her employment. She also began raising complaints about the sufficiency of, and deficiencies in, the employer's SOX-related internal controls and methodologies for testing those controls. The facts do not

indicate that the employer ever investigated the employee's complaints or brought them to a resolution. Then, after the employer later informed the employee that it was taking her off her main IT project due to her lack of progress, it also threatened that, if she did not turn around her performance and behavior issues, the employer would be having a "different conversation" with her. The facts show that this communication provoked the employee to intensify her SOX-protected complaints to management, and even resulted in her faxing a complaint to the SEC and filing a Section 806 retaliation complaint with OSHA. Subsequently, the employer informed the complainant it was considering terminating her employment but wanted to gather more data. So, it placed her on paid administrative leave, but told her it was not due to her performance; rather, it was due to her violation of the employer's attendance policy. Two-and-a-half months later, the employer sent the employee a letter informing her that it had decided to terminate her employment due to "unacceptable performance, conduct and attendance issues."

We made some general recommendations to employers regarding handling internal investigations in an October 13, 2014 ASAP titled, "Government's Message to Corporate America—'We Want Your Whistleblowers!'" The recommendations included the importance, in light of the rapidly expanding federal and state law protections for whistleblowers, of taking every employee complaint of unlawful conduct seriously, investigating such complaints promptly and thoroughly and resolving each such complaint. The challenging facts of this case illustrate why properly and promptly conducting an investigation is important to help protect the employer in the event future litigation occurs.

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