

# Administrative Review Board Clarifies Causation Burdens in Sarbanes-Oxley Whistleblower Cases

Article By:

Steven J Pearlman

Rachel S Fischer

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The ARB recently clarified the competing burdens of proof on issues of causation for whistleblower retaliation cases arising under SOX Section 806 and other whistleblower protection statutes. In particular, in [\*Fordham v. Fannie Mae\*](#), ARB No. 12-061 (Oct. 9, 2014), a 2-1 decision, the ARB reversed an ALJ's decision that had considered the Respondent's affirmative defense in deciding that an employee had not demonstrated that her whistleblowing was a "contributing factor" in the termination of her employment.

## Background

Complainant Edna Fordham (Complainant) was employed by Fannie Mae (Respondent) as an IT Risk Specialist in its SOX Technology Department. In December 2008, she allegedly raised concerns regarding what she considered weaknesses in Respondent's SOX Technology Program. She also allegedly informed her supervisor that she believed there were problems with the documentation supporting the remediation status of SOX-related internal control deficiencies. Complainant received her 2008 year-end performance review in March 2009, which was critical of her performance. She was warned that she could face disciplinary action, including termination, if her performance did not improve. In the weeks that followed, Complainant missed or was late to critical meetings, was often absent from work, and repeatedly failed to meet deadlines for an IT training project. In April 2009, her supervisors decided to initiate proceedings terminating her employment, which were not communicated to Complainant at that time.

Complainant filed complaints with the SEC, OSHA, and the Federal Housing Finance Agency (FHFA) the same week that Respondent contemplated her termination. She subsequently informed her supervisors that she had made complaints to the SEC and FHFA. Soon after, Complainant was told that Respondent was considering terminating her employment but that she would be put on paid administrative leave while it gathered and reviewed documentation to ensure the decision was fair. Her employment was ultimately terminated in July 2009 for performance and attendance issues.

Complainant filed a complaint alleging that Respondent violated Section 806 of SOX. An ALJ found that her protected activity was not a "contributing factor" in the decision to terminate her

employment. However, in making this determination, the ALJ considered both the evidence proffered by Complainant and that offered by Respondent in support of its affirmative defense that it would have taken the adverse action in the absence of protected activity.

## **The ARB's Ruling**

According to the ARB, the question of whether the employer would have taken the same adverse action regardless of the alleged protected activity is considered only after it is concluded that the employee's protected activity contributed to an adverse action. The ARB ruled that, by taking into account evidence proffered by the Respondent with respect to its affirmative defense in considering whether Complainant showed that her alleged protected activity contributed to her discharge, the ALJ effectively considered the Respondent's evidence under the preponderance standard rather than the higher clear and convincing standard. The ARB vacated and reversed the ALJ's Decision and Order and remanded the case to the ALJ for reconsideration.

## **Implications**

This decision clarifies previously conflicting DOL decisions, and employers should expect that SOX whistleblower plaintiffs will seek to capitalize on it in trying to establish the causation prong of their affirmative defense. It is important to appreciate that this decision does not deprive employers of the affirmative defense that they would have taken the same adverse action in the absence of protected activity. Still, it's apparent that the ARB wants that analysis to be considered outside of a determination of whether a prima facie case has been established.

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National Law Review, Volume IV, Number 303

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