Published on *The National Law Review* https://natlawreview.com

Proving SOX Whistleblower Retaliation - Chapter 6

Article By:

Jason Zuckerman

"A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Id. (quoting Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04-149, 2006 WL 3246904, at *13 (DOL May 31, 2006)).

In proving that protected activity was a contributing factor in the adverse action, a complainant need not necessarily prove that the respondent's articulated reason was a pretext. See Henderson v. Wheeling & Lake Erie Railway, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012) (citing Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006)). A complainant can prevail by showing that the respondent's reason, while true, is only one of the reasons for its adverse conduct and that another reason was the complainant's protected activity. Klopfenstein, ARB No. 04-149 at 19.

What is a whistleblower's burden to prove retaliation under SOX?

A whistleblower must demonstrate that their protected activity was a contributing factor in the decision to take an adverse action, i.e., that it was "more likely than not" played "any role whatsoever" in the allegedly retaliatory action.[1] And "any role whatsoever" is no exaggeration—the protected activity need not amount to a "significant, motivating, substantial or predominant" factor in the adverse action.[2]

A whistleblower may meet this burden by proffering circumstantial evidence, such as:

- Direct evidence of retaliatory motive, i.e., "statements or acts that point toward a discriminatory motive for the adverse employment action."[3]
- Shifting or contradictory explanations for the adverse employment action.[4]
- Evidence of after-the-fact explanations for the adverse employment action. "[T]he credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision."[5]
- Animus or anger towards the employee for engaging in a protected activity.

- Significant, unexplained or systematic deviations from established policies or practices, such as failing to apply a progressive discipline policy to the whistleblower.[6]
- Singling out the whistleblower for extraordinary or unusually harsh disciplinary action.[7]
- Disparate treatment or proof that employees who are situated similarly to the plaintiff, but who did not engage in protected conduct, received better treatment.
- Close temporal proximity between the employee's protected conduct and the decision to take an actionable adverse employment action.
- Evidence that the employer conducted a biased or inadequate investigation of the whistleblower's disclosures, including evidence that the person accused of misconduct controlled or heavily influenced the investigation.
- The cost of taking corrective action necessary to address the whistleblower's disclosures and the decision-maker's incentive to suppress or conceal the whistleblower's concerns.
- Corporate culture and evidence of a pattern or practice of retaliating against whistleblowers.

If the whistleblower proves "contributing factor" causation by a preponderance of the evidence, then the burden shifts to the employer to prove clearly and convincingly that it would have taken the same adverse action in the absence of the employee's engagement in protected activity.

In a mixed-motive case (where there is evidence of both a lawful and unlawful motive for the adverse action), does the evidence of a legitimate justification for the adverse action negate the whistleblower's evidence that whistleblowing partially influenced the decision to take the adverse action?

A SOX whistleblower will typically prevail in a mixed-motive case because the SOX whistleblower's burden is merely to show that protected activity played "any role whatsoever"—i.e., that it was a "contributing factor"—in the adverse employment action. If the decision-maker placed any weight whatsoever on the protected activity, then the whistleblower will establish causation.

The ARB has instructed ALJs to apply the following analysis in mixed-motive cases:

If the ALJ believes that the protected activity and the employer's non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer's non-retaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the only reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.[8]

Is a SOX whistleblower required to prove that the employer's justification for the adverse action is false (otherwise known as pretext)?

A SOX whistleblower is not required to disprove the employer's allegedly legitimate, non-retaliatory

reason for taking an adverse employment action.[9] But proof of pretext can prove causation. As the ARB observed in Palmer, "[i]ndeed, at times, the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason."[10]

Is a SOX whistleblower required to prove that the employer had a retaliatory motive?

A SOX whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employer to establish that protected activity was a contributing factor to the personnel action.[11] But evidence of a retaliatory motive, e.g., statement of retaliatory animus or resentment of the complainant's whistleblowing, is relevant circumstantial evidence to prove retaliation.

Is close temporal proximity sufficient to establish causation?

Yes, close temporal proximity between the protected conduct and the adverse action is sufficient to establish causation.[12] The Ninth Circuit has held that "[c]ausation can be inferred from timing alone when an adverse employment action follows on the heels of protected activity."[13]

Does subjecting an employee to heightened scrutiny evidence retaliation?

Under certain circumstances, yes. Where an employer jumps on an employee's first instance of misconduct or poor performance and subjects the employee to heightened scrutiny, the employer's reliance on that alleged change in performance can be deemed a pretext for retaliation.

For example, in Colgan v. Fisher Scientific Co., an age-discrimination case, the Third Circuit held that Jack Colgan established pretext where Fisher Scientific terminated his employment shortly after Mr. Colgan declined an offer of early retirement, based on a single performance evaluation that was inconsistent with his thirty-year tenure at the company. Throughout his entire career as a machine operator with Fisher Scientific, Mr. Colgan regularly and consistently received positive performance evaluations. When he declined the company's request that he retire, he was assigned substantial additional responsibilities and then the company gave him a surprise, premature evaluation, the worst he had received during his tenure at the company. The Third Circuit held that, in the context of Mr. Colgan's long and well-rated service at Fisher Scientific, the single negative review was "compelling circumstantial evidence" that the company's reliance on Mr. Colgan's supposed performance issues was pretextual.

Employer Affirmative Defense

What is the employer's burden in a SOX whistleblower-retaliation case?

An employer must prove clearly and convincingly that it would have taken the same adverse employment action even if the employee had not engaged in protected activity. The operative phrase here is "would have." An employer fails to meet its burden if it establishes merely that it could have taken the same adverse action. "Clear and convincing" evidence can be quantified as establishing the probability of a fact at issue "in the order of above 70%."[16]

DOL ALJs assess the same-action affirmative defense using three discrete components.[17]

- First, the employer's evidence must meet the plain meaning of "clear" and "convincing." The employer must present a "highly probable," unambiguous explanation for the adverse employment action. As the Supreme Court has held, evidence is clear and convincing only if it "immediately tilts the evidentiary scales in one direction."[18]

- Second, the employer's evidence must subjectively indicate that the employer "would have" taken the same adverse action absent the employee's protected activity.

- And finally, material facts that the employer relied on to take the adverse personnel action must not change in the hypothetical absence of the protected activity. Here, the court evaluates how relevant facts would have differed without the protected activity.

That said, the employer bears this onerous burden only if an employee establishes that their protected activity contributed to the employer's decision to take the adverse action against them.

For instance, an employer may rely on evidence that:

- the whistleblower recently performed poorly or otherwise gave the employer reason to take action;

- the employer's reason for taking the adverse action materialized before the company allegedly engaged in misconduct or the employee blew the whistle; or

- the whistleblower's personnel file supports the employer's explanation and details the employer's intent to take the adverse action.

To learn more about SOX whistleblower law, download the new eBook Sarbanes-Oxley Whistleblower Law: Robust Protection for Corporate Whistleblowers.

---

1 *Palmer v. Canadian National Railway*, ARB No. 16-035 at 53 (citations omitted).

2 *Allen v. Stewart Enters., Inc.*, ARB Case No. 06-081, slip op. at 17 (U.S. Dep't of Labor July 27, 2006).

3 William Dorsey, An Overview of Whistleblower Protection Claims at the United States Department of Labor, 26 J. Nat'l Ass'n Admin. L. Judiciary 43, 66 (Spring 2006) (citing Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004)).

4 *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, at 9, ALJ No. 2004-AIR-11 (ARB May 26, 2010) (footnotes omitted).

5 Id. at 9-10 (footnotes omitted).

6 *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014).

7 See *Overall v. TVA*, ARB Nos. 98-111 and 128, slip op. at 16-17 (Apr. 30, 2001), aff'd TVA v. DOL, 59 F. App'x 732 (6th Cir. 2003).

8 *Palmer v. Canadian National Railway*, ARB No. 16-035 at 56-57 (citations omitted).

9 *Zinn v. American Commercial Lines, Inc*., ARB No. 10-029, ALJ No. 2009-SOX-025, 2012 WL 1143309, *7 (ARB Mar. 28, 2012); Warren v. Custom Organics, ARB No. 10-092, ALJ No. 2009-STA-030, 2012 WL 759335, *5 (ARB Feb. 29, 2012); Klopfenstein v. PCC Flow Tech., Inc., ARB No. 04-149,

ALJ No. 04-SOX-11, 2006 WL 3246904, *13 (ARB May 31, 2006).

10 Palmer, ARB No. 16-035 at 54 (citations omitted).

11 *Marano v. U.S. Dep't of Justic*e, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

12 *Vannoy v. Celanese Corp*., ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011).

13 *Van Asdale v. International Game Technology*, 577 F.3d 989, 1003 (9th Cir. 2009).

14 *Colgan v. Fisher Scientific Co*., 935 F.2d 1407 (3d Cir. 1991) (en banc), cert denied 502 U.S. 941, 112 S. Ct. 379 (1991).

15 See *Menendez v. Halliburton, Inc*., ARB Case Nos. 09-002, 09-003, 2011 WL 4915750, at 6 (Sept. 13, 2011).

16 *Palmer v. Canadian National Railway*, ARB No. 16-035 at 57.

17 *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014).

18 *Colorado v. New Mexico*, 467 U.S. 310 (1984).

National Law Review, Volume VII, Number 261

Source URL:https://natlawreview.com/article/proving-sox-whistleblower-retaliation-chapter-6