

FRSA Case Could Have Big Impact on Future Whistleblower Claims

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The Administrative Review Board (ARB) of the Department of Labor (DOL) issued a remarkable decision for whistleblowers in late September, clarifying the evidence on which whistleblowers may rely in proving their cases and the [causation standard](#) by which whistleblower retaliation claims should be evaluated.

The decision came in the case of *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), a complaint filed under the whistleblower protection provision of the [Federal Railroad Safety Act](#) (FRSA). Critically, however, the opinion will impact more than FRSA cases: The ARB rightly noted that the same evidentiary standards appear in 12 other whistleblower protection provisions enforced by the DOL, meaning that the effects of this decision will be felt in several different industries across the country. The ARB's granular examination of the legal issues underlying these statutes sprawls across 72 pages and will serve as a significant precedent moving forward.

About *Palmer v. Canadian National Railway*

Kenneth Palmer began working as a conductor for Illinois Central Railroad Company (ICRC) on Feb. 20, 2006. In May 2013, Mr. Palmer failed to properly align a switch, resulting in rail equipment running through the improperly aligned switch – an issue known in the rail industry as a “run-through” or a “switch run-through.” Although the issue did not result in a derailment or other injury, Mr. Palmer reported his mistake to his supervisor, resulting in an investigation into the incident.

While the investigation was ongoing, Mr. Palmer injured his left arm while at work, and reported the injury to his supervisor. The FRSA protects workers in the rail industry from retaliation for, among other things, reporting on-the-job injuries. His supervisor responded with hostility to Mr. Palmer's report.

The investigation into Mr. Palmer's run-through mistake resulted in a finding that he would either be subject to a 60-day suspension or termination, with the punishment to be determined by ICRC's general manager. After learning that there was another investigation pending into Mr. Palmer's injury, the GM sent an email with his determination: “Dismiss. We won't need to hold the next one.”

Mr. Palmer was subsequently terminated and filed a complaint with the DOL alleging that his termination violated the FRSA anti-retaliation provision. The DOL Administrative Law Judge (ALJ) that heard the case ordered Illinois Central to reinstate Palmer and pay him lost wages, compensatory damages and punitive damages.

The ARB Decision

The ARB reversed the ALJ's decision and remanded the case to the ALJ. The Board did for two reasons: (1) a previous decision relied on by the ALJ, *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014), was incorrectly decided; and (2) the ALJ had inappropriately limited the

scope of evidence on which it could rely for determining whether Mr. Palmer's protected activity was a "contributing factor" in ICRC's decision to fire him.

The Board's decision to overturn *Fordham* requires some unpacking. First, it is important to understand the way an employee goes about proving an allegation of whistleblower retaliation under the FRSA.^[1] To prevail on an FRSA whistleblower complaint, the employee must prove by a preponderance of the evidence that:

1. he engaged in activity or conduct that FRSA protects;
2. the employer took some adverse personnel action against him; and
3. the employee's protected activity was a contributing factor in the employer's adverse personnel action.

Even if an employee establishes this, however, he is still not entitled to relief if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's protected activity. Thus, there are two different stages at which the ALJ weighs evidence.

In *Fordham*, the ARB had ruled that "[a]n employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action"; and that when determining whether protected activity was a contributing factor in an adverse personnel action, an ALJ must not weigh the employer's evidence "of a legitimate, non-retaliatory reason or basis for its decision or action . . . against a complainant's causation evidence." In other words, ALJs were precluded from viewing evidence concerning an employer's reasons for termination during stage one when they were determining whether the employee had provided sufficient evidence to show that his protected activity was a contributing factor in the employer's adverse personnel action.

In *Palmer*, the ARB expressly overturned *Fordham*. The Board found:

"[N]othing in the [FRSA or similarly structured whistleblower protection statutes] precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action."

Because the same burden of proof structure exists in all of the statutes listed in note 1, this decision will expand the evidence available to employees in making their showing that their protected activity contributed to their employers' decision to terminate them.

The second part of the ARB's decision addressed the meaning of "contributing factor" and how ALJs should evaluate an employer's reasons for termination during stage one of the causation analysis. The Board first wanted to stress the ease with which employees can meet the contributing factor standard:

We have said it many a time before, but we cannot say it enough: "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.'" We want to reemphasize how low the standard is for the employee to meet, how "broad and forgiving" it is. "Any" factor really means any factor. It need not be "significant, motivating, substantial or predominant" – it just needs to be a factor. The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices.

Elsewhere in the decision, the Board described this level of causation as “extremely low.” This language is a remarkable boon for employees because it takes years of ARB jurisprudence and consolidates them into one cohesive description explaining just how easily an employee can meet the contributing factor causation standard.

The Board next turned to how it should evaluate the evidence of an employer’s purported legitimate and nondiscriminatory reasons for terminating the employee during stage one of the burden-shifting framework:

Importantly, if the ALJ believes that the protected activity and the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer’s nonretaliatory 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.

Elsewhere, the ARB warned that “[b]ecause of this low level, ALJs should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” In other words, while ALJs are empowered to view evidence of an employer’s purported nonretaliatory reasons during stage one, there is no weighing of the competing reasons.

Importantly, other ARB decisions have made clear that ALJs can rely on the employer’s stated reasons for termination as proof that the employee’s protected activity was a contributing factor:

“[I]nconsistent application of an employer’s policies, and inconsistent explanations for the adverse personnel actions to support a finding that a complainant has met his burden to show that his protected activity was a contributing factor.” *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-2 (ARB Mar. 30, 2016).

At least for the moment, this decision is bad news for Mr. Palmer. The ALJ had ruled in his favor and granted him relief, and the ARB reversed and remanded that decision for further consideration based on its holding.

In the long run, however, this decision is good news for whistleblowers. Not only does it provide whistleblowers with a remarkably powerful and employee-friendly statement of the contributing factor standard, but it increases the scope of evidence on which the employee may rely to prove that the employee’s protected activity contributed to the employer’s adverse action against him. Barring any reversal of *Palmer* by what is sure to be a very different ARB in 2017, there is every reason to believe that the decision will be a powerful tool for whistleblowers in the years to come.

[1] An identical burden-of-proof provision applies to at least twelve other DOL-administered whistleblower protection provisions, including: the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (protecting nuclear whistleblowers); the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (protecting whistleblowers who report fraud and securities violations at publicly-traded companies); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (protecting whistleblowers in the trucking industry); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (protection of employees providing pipeline safety information); National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 (public transportation employee protections); Consumer Product Safety Act, 15 U.S.C. § 2087 (protection for whistleblowers who report consumer product safety issues); Consumer Financial Protection Act of 2010 12 U.S.C. § 5567 (protecting employees in the consumer finance industry);

Food Safety Modernization Act, 21 U.S.C. § 399d (protecting food industry employees); and Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171 (protection of employees providing motor vehicle safety information); Patient Protection and Affordable Care Act, 29 U.S.C. § 218c (protecting employees who report violations of the ACA); and Seaman's Protection Act, 46 U.S.C. § 2114 (protecting seaman and other maritime employees). That means that this ruling applies to complaints filed under those provisions as well.