

# **DOL Clarifies Burden-Shifting Framework For Whistleblowers**

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The U.S. Department of Labor Administrative Review Board's Sept. 30, 2016, decision in *Palmer v. Canadian National Railway* provides critical guidance on the two-stage, burden-shifting framework that governs whistleblower retaliation claims brought under the Federal Rail Safety Act (FRSA), the Sarbanes-Oxley Act, and several other whistleblower retaliation laws enforced by the DOL[1]. In particular, *Palmer* provides detailed instructions to DOL administrative law judges on how to assess "contributing factor" causation.

*Palmer* also overturned *Fordham v. Fannie Mae*, which held that in assessing causation, an ALJ should not consider the evidence supporting the employer's nonretaliatory reasons for an adverse action and should instead assess that evidence under the more onerous "clear and convincing evidence" standard required to prove a same-action affirmative defense. See *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). Under *Palmer*, all relevant causation evidence must be considered when determining whether protected activity was a contributing factor, regardless of which party offers the evidence.

Though all relevant evidence must be considered in assessing causation, the ARB admonished ALJs not to weigh the relative importance of the protected activity and the employer's nonretaliatory reasons when determining "contributing factor" causation. In addition, the ARB emphasized the low burden to prove "contributing factor" causation and held that a whistleblower retaliation complainant need not prove pretext to establish causation and knowledge and timing alone can suffice to prove causation in some cases.

While *Palmer* is a win for whistleblowers in several respects, it could unwittingly lower the burden for employers to prove a same-action affirmative defense. Accordingly, whistleblower advocates should be vigilant to ensure that *Palmer* does not weaken the strong protection that Congress afforded whistleblowers.

## **Factual Background and Procedural Posture**

In *Palmer*, the whistleblower worked for railroad carrier Illinois Central from February 2006 to July 2013. In May 2013, the whistleblower made a mistake at work. *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 7 (ARB Sept. 30, 2016) (en banc). The whistleblower reported his error, and the railroad scheduled a formal investigative hearing for the following month, which could have resulted in disciplinary action for the whistleblower. *Palmer*, ARB No. 16-035 at 7-8. The whistleblower sought to negotiate a resolution, and the hearing was rescheduled. *Id.* Though no final deal was reached, the parties were nearing a settlement.

In June 2013, before the rescheduled hearing, the whistleblower injured his arm at work, which he promptly reported as required. The whistleblower's supervisor was hostile and tried to

dissuade the whistleblower from reporting the injury. *Id.* Two days after the injury, the railroad scheduled a hearing into the new incident, and it withdrew from settlement negotiations regarding the May 2013 error. Palmer, ARB No. 16-035 at 9.

The May 2013 issue proceeded to hearing within a week. *Id.* After that hearing, railroad management confirmed that the whistleblower had an upcoming hearing into his recent injury and then fired him. Palmer, ARB No. 16-035 at 10.

The whistleblower brought a complaint alleging that he was unlawfully terminated in retaliation for reporting his injury. After a hearing, the ALJ concluded that the railroad had unlawfully retaliated. The ALJ relied on Fordham and similar case law and did not consider the railroad's evidence of its reason for firing the whistleblower when analyzing the contributing factor element; he instead considered that evidence only when determining whether the railroad established its same-action affirmative defense. The railroad appealed the ruling to the ARB.

### **The Palmer Holding**

In Palmer, the ARB reversed the decision below, overruled Fordham and remanded the case to the ALJ for re-examination under the clarified standard. Primarily, the ARB held that ALJs can consider an employer's evidence of its reason for taking an adverse action in determining whether the whistleblower has proven "contributing factor" causation. However, the ARB held that such evidence will rarely be dispositive where there is any evidence that the complainant's protected conduct played any role in the adverse action. Because the whistleblower need show only that the protected activity played a role in the adverse action, "the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity." Palmer, ARB No. 16-035 at 53. The ARB then elucidated how ALJs should determine whether a whistleblower complainant has established "contributing factor" causation.

### **Contributing Factor Causation is a "Broad and Forgiving" Standard**

The FRSA, like many of the whistleblower protection provisions under the DOL's jurisdiction, incorporates the standards used in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Those standards apply a two-step framework. First, the fact finder must determine whether the employee has proven, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. Palmer, ARB No. 16-035 at 35.

In other words, the ALJ assesses whether it is "more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action." *Id.* If the employee prevails at the first step, the fact finder must determine whether the employer has proven by clear and convincing evidence that it would have taken the same adverse action even if the employee had not engaged in protected activity. *Id.* at 35.

During the first step or phase of the analysis, the ALJ can consider any relevant, admissible evidence offered by either party to determine whether the complainant has proven that protected conduct contributed to the adverse action. However, the ARB emphatically reiterated the core analysis at this first stage: "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.” Id. at 53 (citations omitted). This core analysis proceeds on the recognition that employees are often at a severe disadvantage in accessing relevant evidence.

A whistleblower may prove causation through circumstantial evidence. Such evidence can include “motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.” *Bobreski v. J. Givoo Consultants Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014).

### **Proving Contributing Factor Causation**

In cases where employers rely on both protected activity and legitimate reasons when deciding to take an adverse action, an employee will always be able to prove contributing factor causation. While Palmer permits an ALJ to consider the alleged nonretaliatory reasons for an adverse action at the causation stage, such evidence is inconsequential if it fails to show that the employer acted only for legitimate reasons. The ARB explained:

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.

Id. at 53 (citations omitted).

### **Whistleblowers Need Not Demonstrate Pretext**

Because a whistleblower will establish contributing factor causation if she shows that her protected activity was one of many reasons for an adverse action, a whistleblower need not prove pretext. In other words, though an ALJ can consider the employer’s alleged nonretaliatory reasons when determining causation, a whistleblower need not disprove those alleged nonretaliatory reasons.

The ARB reiterated that though whistleblowers are not required to prove pretext, they may choose to rely on evidence of pretext to establish contributing factor causation. As the Palmer decision states, “Indeed, at times, the fact finder’s belief that an employer’s claimed reasons are false can be precisely what makes the fact finder believe that protected activity was the real reason.” *Palmer*, ARB No. 16-035 at 54 (citations omitted).

### **The Causation Stage**

At the causation stage, ALJs should not weigh the employer’s nonretaliatory reasons against the

employee's protected activity.

In *Palmer*, the ARB admonished ALJs not to weigh the relative importance of the protected activity and the employer's nonretaliatory reasons when determining "contributing factor" causation. As discussed above, the contributing factor standard is met if the protected activity was only one of many reasons for the adverse action. The protected activity need only play some role, however small, in the decision. See *Palmer*, ARB No. 16-035 at 55. It is therefore inconsequential if the nonretaliatory reasons were of great importance to the decision maker, while the protected activity had little weight. See *id.* Under the contributing factor standard, the only question to be answered is whether the decision maker placed any weight whatsoever on the protected activity. See *id.* If so, the whistleblower will establish causation.

### **The Same-Action Affirmative Defense in Whistleblower Cases is Onerous**

Once a whistleblower establishes contributing factor causation, the employer faces an onerous burden to prove an affirmative defense:

- It is not enough for the employer to show that it could have taken the same action; it must show that it would have. *Palmer*, ARB No. 16-035 at 57.
- ALJs must apply the "clear and convincing" standard of proof to employers' affirmative defense. *Id.* "Clear and convincing" is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt." *Id.*
- It requires evidence showing that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. *Id.*
- "Clear and convincing" evidence can be quantified as establishing the probability of a fact at issue "in the order of above 70 percent ..." *Id.*

### **Palmer Could Muddy the Waters**

By overturning *Fordham*, the ARB rejected a bright-line rule barring ALJs from considering an employer's evidence supporting an adverse action when assessing whether a whistleblower retaliation complainant has proven contributing factor causation. This rule ensured that, consistent with Congressional intent, the employer's evidence is assessed under the more stringent "clear and convincing" evidence standard. Though *Palmer* provides specific guidance to ALJs that should preserve the favorable burden-shifting framework for whistleblowers, it also creates some potential confusion that could ultimately weaken whistleblower protection laws adjudicated at the DOL.

In our *amici curiae* brief, we argued that an ALJ's consideration of an employer's evidence supporting an adverse action at the causation stage would force a whistleblower to prove pretext. See *Palmer*, ARB No. 16-035 at 54 n. 223. The ARB rejected this concern on the grounds that whistleblowers will always prevail at the contributing factor stage in mixed-motive cases (if

protected conduct was a factor in the decision to take the adverse action, then the whistleblower has proven contributing factor causation). *Id.* at 54-55. But as the ARB acknowledges in *Palmer*, employers more often than not argue that their nonretaliatory reasons are the only reason an adverse action was taken. *Id.* at 55. Because a whistleblower must prove that his protected activity played some role in the adverse action, when an employer argues that its causation evidence shows that it acted based solely on nonretaliatory reasons, a whistleblower's evidence must convince the ALJ that the employer's explanation is more likely than not untrue. That would essentially require the whistleblower to prove pretext.

Likewise, *Palmer* invites confusion when analyzing an employer's motives. Under *Palmer*, an ALJ should consider the employer's evidence of a nonretaliatory reason for the adverse action "but only to determine whether the protected activity played any role at all," *Palmer*, ARB No. 16-035 at 15. ALJs should not weigh the relative importance of the protected activity and nonretaliatory reasons for an adverse action, and a whistleblower need not prove retaliatory motive. Yet Judge Luis Corchado, arguably the ARB's most vocal critic of *Fordham*, demonstrated in an earlier case how this instruction could be difficult to apply. See *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 43-44 (ARB Sept. 30, 2016) (en banc) (J. Corchado dissenting) (reissued with full dissent April 21, 2015). In Judge Corchado's example, a student named Leo alleges that classmate Johnny called him a "rat" and elbowed him because he is a school crossing guard. *Id.* Johnny says it was an accident during a basketball game, that the two are friends, and that previously he protected Leo from getting beat up. *Id.*

Both accounts could simultaneously be true. For example, if Johnny were angry at Leo for being a crossing guard, tried to keep the ball away from him during the game as a result, and then tripped and accidentally elbowed Leo, Leo's status as a crossing guard would be a contributing factor. Yet, according to Judge Corchado, the teacher may choose to believe Johnny that the elbow was an accident, and "[i]n the end, the teacher chooses which story to believe to resolve Leo's complaint." *Id.* That is, the teacher could resolve the claim by believing that Johnny placed no weight on Leo's crossing guard status when elbowing him. Such a resolution would ignore the dispositive analysis of whether protected activity played any role (whether or not such impact was intentional on the decision maker's part). As this hypothetical shows, considering an employer's causation evidence while determining contributing factor issue will be susceptible to comparative weighing of mixed motives, as well as de facto requirements that whistleblowers prove pretext and retaliatory motive, all of which *Palmer* purports to prohibit.

If ALJs apply the guideposts that the ARB has provided in *Palmer*, the burden-shifting framework will remain favorable for whistleblowers — whistleblowers will prove contributing factor causation merely by showing that protected conduct played any role in the decision to take an adverse action, and an employer will avoid liability only by proving by clear and convincing evidence that it would have taken the same action absent the employee engaging in protected conduct. But whistleblower advocates should remain vigilant to ensure that *Palmer* does not lower the burden of proving a same-action affirmative defense from clear and convincing evidence to a preponderance of the evidence.

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Disclosure: Zuckerman and Hammer represented amici curiae National Employment Lawyers Association, Teamsters for a Democratic Union, Truckers Justice Center, and General Drivers, Warehousemen & Helpers Local No. 89 before the Department of Labor ARB in this matter.

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[1] Under this two-stage framework, a whistleblower need only prove that she made a protected disclosure and that the disclosure played any role whatsoever in a subsequent adverse employment action. If the whistleblower makes this showing by a preponderance of the evidence, the employer can avoid liability only by proving by clear and convincing evidence that it would have taken the same adverse employment action absent the employee engaging in protected activity.