



In the Matter of:

EDNA D. FORDHAM,

ARB CASE NO. 12-061

COMPLAINANT,

ALJ CASE NO. 2010-SOX-051

v.

DATE: OCT - 9 2014

FANNIE MAE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Thad M. Guyer, Esq. and Stephani L. Ayers, Esq.; *T.M. Guyer and Ayers & Friends, PC*; Medford, Oregon; and Richard E. Condit, Esq.; *Government Accountability Project*, Washington, District of Columbia

*For the Respondent:*

Madonna A. McGwin, Esq. and Damien G. Stewart, Esq.; *Fannie Mae*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, concurring, in part, and dissenting, in part.

## DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended, 18 U.S.C.A § 1514A (Thomson/West Supp. 2014) (SOX), and its implementing regulations, 29 C.F.R. Part 1980 (2013). Complainant Edna D. Fordham filed a complaint alleging that Respondent Fannie Mae violated the SOX by retaliating against her in

several ways because of several allegedly protected activities. On March 19, 2012, an Administrative Law Judge (ALJ) issued a Decision and Order dismissing Fordham's complaint.<sup>1</sup> Fordham appealed the ALJ's ruling to the Administrative Review Board (ARB). For the following reasons we affirm, in part, and reverse and remand, in part, for further consideration consistent with this Decision and Order of Remand.

## INTRODUCTION

This case arises from Fordham's complaint that Respondent Fannie Mae violated the SOX whistleblower protection statute, 18 U.S.C.A. § 1514A, when it took several unfavorable employment actions against her in 2009 because of SOX-protected activities in which she engaged in 2008 and 2009. Of Fordham's multiple allegations of SOX whistleblower protected activity, the ALJ held that Fordham's conduct constituted SOX-protected activity in certain specific instances. The ALJ found four specific instances of adverse personnel action that Fannie Mae took against Fordham, including a poor performance review, placing Fordham on a performance action plan, placing Fordham on administrative leave, and terminating her employment. Nevertheless, the ALJ dismissed Fordham's complaint, having found no "contributing factor" causal link between Fordham's protected activity and the unfavorable employment actions.

The Board affirms the ALJ's findings regarding protected activity and adverse personnel actions. However, for the following reasons, we find that the ALJ's "contributing factor" causation determination is neither supported by the substantial evidence of record nor in accordance with applicable law. The substantial evidence of record does not support the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to Fordham's protected activities of April 23-27, 2009. We additionally hold that in finding that Fordham failed to prove by a preponderance of the evidence that her protected activity was a contributing factor in the adverse personnel action taken against her, the ALJ committed reversible error by weighing evidence offered by Fannie Mae in support of its affirmative defense that it would have taken the personnel action at issue in the absence of Fordham's protected activity for legitimate, non-retaliatory reasons. SOX statutorily imposes different burdens of proof on the respective parties,<sup>2</sup> with the respondent required to prove by clear and convincing evidence that it would have taken the same personnel action had there been no whistleblower protected activity, should the complainant prove by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action. Consequently, a respondent's evidence of a legitimate, non-retaliatory reason or basis for its

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<sup>1</sup> *Fordham v. Fannie Mae*, ALJ No. 2010-SOX-051 (D. & O.).

<sup>2</sup> 18 U.S.C.A. § 1514A(b)(2)(C) provides that SOX whistleblower actions shall be governed by the legal burdens of proof set forth under AIR 21 at 49 U.S.C.A. § 42121(b)(2)(B)(Thomson/West 2007), which requires that once the complainant has demonstrated that his or her protected activity was a contributing factor in the adverse personnel action at issue, the respondent must prove its affirmative defense by "clear and convincing evidence." See discussion, *infra*.

decision or action is not weighed against a complainant's causation evidence in the determination of whether a SOX complainant has met his or her initial burden of proving "contributing factor" causation. 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.

### **BACKGROUND STATEMENT<sup>3</sup>**

Respondent Fannie Mae (formally known as the Federal National Mortgage Association) is a publicly-traded corporation, and a government-sponsored enterprise established as a federal agency in 1938. Congress chartered Respondent in 1968 as a private shareholder-owned company, with the purpose of providing liquidity, stability, and affordability to the U.S. housing and mortgage markets. Fannie Mae funds its mortgage investments primarily by issuing debt securities in the domestic and international capital markets; consequently, it files regular, quarterly and yearly reports with the Securities and Exchange Commission (SEC). D. & O. at 3.

Fannie Mae operates in the U.S. secondary mortgage market. Rather than making home loans directly to consumers, Fannie Mae works with mortgage bankers, brokers and other primary mortgage market partners to help ensure that they have funds to lend to home buyers at affordable rates. At all times relevant to this litigation, Fannie Mae had three complementary businesses: the Single-Family Mortgage business, Multifamily Mortgage Business, and the Capital Markets group. As a publicly-traded corporation, with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, Fannie Mae is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d), and is subject to the whistleblower protection provisions of SOX, 18 U.S.C.A. § 1514A. D. & O. at 4.

Complainant Fordham began working for Fannie Mae in May 2006 as an IT Technical Risk Specialist in its SOX Technology Department, which was responsible for monitoring and executing Respondent's SOX Technology Management Program. This program involved the testing of IT platforms, applications, and end-user computing, some of which the parties stipulated were financially relevant. Fordham's assigned work responsibilities included defining test conditions, collecting and tracking evidence from the Technical Risk Leads of business groups (whose applications and IT platforms were being tested), responding to quality reviews of external consultants, and engaging in SOX Management testing and remediation. D. & O. at 4.

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<sup>3</sup> Unless otherwise specifically noted, the Background Statement is extracted from the ALJ's Decision and Order Dismissing Complaint, slip op. at pp. 73-112 (Findings of Fact).

During her employment with Fannie Mae, Fordham interacted with many individuals and reported to different supervisors. For approximately the first six months of 2008, Fordham's immediate supervisor was Robert Leonard, Director of Fannie Mae's SOX Technology Program, who was assigned to the Washington, D.C. office. Mid-2008, Nancy Hall, Manager of Fannie Mae's SOX Technology Program, assumed responsibility for Fordham's supervision. In early 2009, Fordham, together with Hall and other co-workers, were placed under the supervision of Stephanie Bahr, Director of SOX Technology, Washington, D.C. office. As a result, from approximately February 2009 until Fannie Mae terminated her employment, Fordham continued to report directly to Hall, who in turn reported to Bahr. Bahr reported to Patricia Black, Senior Vice President, Chief Audit Executive, Washington, D.C. office, who in turn reported to Jackie Wagner, Senior Vice President and General Auditor. During 2008 and 2009, Michael Gabbay, Senior Technology Risk Analyst/Manager, frequently interacted with Fordham and supervised some of her projects, although he was on a different Fannie Mae SOX team and was not part of her chain of command in the organizational structure. D. & O. at 4-5, 74-89.

On or about December 1, 2008, Fordham submitted input for the 2008 accountability survey of Robert Leonard, her immediate supervisor up until mid-2008. She submitted her input anonymously to Leonard's manager, Mr. Barton, by electronic means. Among other things, Fordham raised concerns regarding what she considered key weaknesses in Fannie Mae's SOX Technology Program involving control self-assessments – *i.e.*, that these self-assessments did not provide organizational value because they were too general and needed to be system specific, and that Fannie Mae's SOX Technology Program lacked critical process documentation, which she asserted is commonly maintained in mature SOX programs. Fordham stated in the survey that neither concern was being sufficiently addressed. Because Fordham's concerns were submitted anonymously, neither Leonard nor Barton attributed the concerns to Fordham. D. & O. at 77-78.

In late December 2008, Fordham informed Nancy Hall (who had replaced Leonard as Fordham's immediate supervisor) that she believed there were some problems with the documentation supporting the remediation status of certain SOX-related internal control deficiencies; that she was concerned that the documentation was insufficient. Hall dismissed Fordham's concerns as not valid or relevant to her job assignment. Hall did not discuss Fordham's concerns with anyone else at Fannie Mae, and Fordham did not discuss her concerns with anyone other than Hall. Fordham testified that she did not pursue the issue further at the time because she wanted to research Fannie Mae's SEC filings and conduct due diligence before proceeding further with her accusations.<sup>4</sup> D. & O. at 77, 116-117.

The first of March 2009, Fordham received her end-of-year 2008 Performance Review, in which Hall gave Fordham a lowered performance evaluation. Fordham also received a

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<sup>4</sup> Based on her independent research into Fannie Mae's SEC filings, Fordham eventually concluded that Fannie Mae had failed to file accurate reports with the Securities and Exchange Commission. However, Fordham did not report her conclusions or concerns to anyone at Fannie Mae until after she filed a complaint with the SEC on April 23, 2009, with a similar complaint filed with the FHFA on April 26th. See discussion, *infra*.

Memorandum of Concern, authored by Hall, that advised Fordham of the need for improvement and warned her of disciplinary action, including the threat of employment termination, should her job performance not improve. D. & O. at 81. The Memorandum of Concern stated in pertinent part: "Your performance will continue to be evaluated and any additional performance issues may result in more serious disciplinary action, up to and including termination of your employment." Exhibit JX-25.

Along with the Memorandum of Concern, Hall presented Fordham with a Development Goals document that identified projects Hall expected Fordham to complete during 2009, with key milestone dates. The first identified project involved a SOX Technology pilot training project that Fordham was to immediately undertake, beginning with the development of a Power Point IT training presentation. The purpose of the training was to educate Fannie Mae's SOX business team members and new technology risk specialists about the work the SOX Technology team had been performing. D. & O. at 35-36, 61, 81.

Over the ensuing weeks Fordham failed to meet training project deadlines, including a March 20th deadline for finalizing the Power Point presentation, which she attributed to Fannie Mae management's refusal to provide her with updated Scope and Approach documents that she claimed she needed to complete the presentation.<sup>5</sup> Despite receipt from Hall of the 2008 SOX Fourth Quarter Scope and Approach documents on March 18th, Fordham continued to assert that Fannie Mae management was withholding information she needed to complete the training presentation. However, Fordham never explained nor identified to management exactly what information was missing that she needed in order to complete the training presentation. D. & O. at 83-86.

The relationship between Fordham and management became increasingly volatile throughout March and into April, with Fordham accusing management of racial and gender discrimination, questioning Hall's technical qualifications, charging that Hall was resorting to unethical practices in an attempt to discredit Fordham professionally, and challenging management's competence. During this time, Fordham missed or was late to critical meetings, was often absent from work, and repeatedly failed to meet deadlines for completing the IT training project. The latter part of March, Fordham announced that she was refusing to complete her performance goals because she considered them unjustified. Fannie Mae management found that Fordham's behavior was generally disruptive and hindering completion of the IT training project in a timely and meaningful manner. Nevertheless, in an effort to reconcile the situation, after consultation with Fannie Mae Human Resources (Darlene Slaughter), Bahr removed Hall from management of Fordham's work on the IT training project. However, Hall's replacement, Michael Gabbay, fared no better in securing completion of the training project or in resolving management's conflicts with Fordham. In response to management's continued efforts to get her to complete the Power Point training presentation and criticism of her non-performance, Fordham accused management of incompetence, purposefully attempting to undermine her

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<sup>5</sup> The SOX Technology team compiles the Scope and Approach documents quarterly. The documents address, among other matters, the scope of application and platform testing for the quarter.

performance, and creating a hostile work environment. She threatened suit if management did not stop the alleged harassment. D. & O. at 83-94.

As of April 1, 2009, Fordham had not completed the Power Point training project, had not met deadlines on other projects to which she had been assigned, and had not met key Development Goals milestone dates that Fannie Mae had established. D. & O. at 90-92, 99. Sometime between April 1 and 14, Bahr began contemplating possible termination of Fordham's employment. *Id.* at 99. On April 15, Bahr and Darlene Slaughter, Director of Human Resources and Chief Diversity Officer of Fannie Mae's Washington D.C. office met with Fordham. They informed her that she was being removed from the IT training project because of the lack of progress,<sup>6</sup> and that she was to focus on two other projects under Gabbay's management supervision. Also discussed was Fordham's attendance. Slaughter informed Fordham that if she did not complete the other projects to which she was assigned, or if things continue to remain "heated" between herself and management, at some point they would be having a "different conversation." Mentioned was the prospect of Fordham being placed on administrative leave should that prove necessary. *Id.*

In follow up to the April 15th meeting, Fordham addressed a memorandum to Slaughter in which she accused Bahr of making false and defamatory statements during the meeting, of bullying, and of retaliation because she had filed an EEOC complaint in early March alleging sex and age discrimination. Fordham also denied responsibility for the delays in completing the IT training presentation, charging Bahr and management with deliberately impeding her efforts to meet project goals. D. & O. at 100.

Following the April 15th meeting, Fordham failed to meet completion deadlines for the new projects to which she was assigned, for which she blamed Gabbay – asserting that he was deliberately withholding needed information and setting her up for failure. Issues concerning Fordham's attendance also continued to arise. D. & O. at 99-103.

By close of business on April 21, Bahr had decided, after consultation with Slaughter and Patricia Black (to whom Bahr reported), to initiate proceedings terminating Fordham's employment due to unsatisfactory performance and attendance issues. Working with Slaughter, Bahr began preparing the necessary documents, including drafting an employment termination request memorandum. D. & O. at 103.

The afternoon of April 23, 2009, Fordham submitted a project status report to Gabbay, copied to Hall, in which she asserted that they were missing necessary documentation, that it did not appear that work had been performed in 2008 to document IT Application Controls to support the intended procedure, and that SOX Technology needed to address some severe information gaps. Fordham also stated that Fannie Mae's methodology did not test at a sufficient level to gain the assurance it needed for system specific IT Application Controls which, in turn, had a direct impact on Fannie Mae's financial statements. That evening, Fordham faxed a

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<sup>6</sup> The IT training project was reassigned to Hall, who completed it before the end of April. D. & O. at 99.

complaint to the Securities and Exchange Commission (which she supplemented with documentation on May 19, 2009), in which she asserted, among other things, that Fannie Mae did not have Risk and Control Activities documented for its financially significant applications. At the time of Fordham's filing of the SEC complaint no one at Fannie Mae was aware of its submission. D. & O. at 104-105.

On Friday, April 24, Slaughter provided Bahr with a draft of the proposed termination request memorandum, addressed to Wagner, and asked for Bahr's review and comment. D. & O. at 105. The memorandum, dated April 24, 2009, and captioned "Request for Termination for Edna Fordham," was addressed from Bahr to Chief Audit Executive Wagner, Fannie Mae's Chief Audit Executive. In the memorandum Bahr stated: "I am requesting your approval to terminate Edna Fordham's employment from the Internal Audit department." Exhibit JX 116. The memorandum indicated that they were "working through performance and attendance issues with Fordham," but that she "continued to dispute her performance review" and had repeatedly violated the company's attendance policy "through her excessive and unauthorized absenteeism." *Id.* The memorandum concluded by requesting Wagner's approval, stating: "Human Resources [Slaughter], Legal, and Compliance and Ethics are aware of this request and approve of this action to terminate Edna Fordham. If you agree with this action, please provide your approval as well." *Id.* Bahr informed Slaughter that she was fine with the draft, whereupon Slaughter indicated that she was working with Fannie Mae's legal department to tighten the memorandum, and proposed that Bahr meet with her on Monday, April 27, to finalize the document. D. & O. at 105; Exhibit JX 115.

On Sunday, April 26, Fordham filed a complaint by e-mail with the Federal Housing Finance Agency (FHFA)<sup>7</sup> (which she subsequently supplemented), in which she alleged that Fannie Mae had deliberately withheld information from its board of directors and regulators regarding the true state of its IT Application environment by downplaying issues and indicating that they are relying on compensating controls to support Financial Reporting Systems. No one at Fannie Mae was aware of Fordham's complaint to the FHFA at the time of its submission. D. & O. at 105-106.

Fannie Mae became aware of Fordham's SEC and FHFA complaints on April 27, 2009, when Fordham informed Slaughter and Fischman (an investigator with Fannie-Mae's Compliance and Ethics Department) that she was reporting to the SEC and FHFA her concerns that management was deliberately withholding critical information from the company's Board of Directors and Regulators. Concurrently, Fordham provided Fischman and Slaughter with a copy of the accountability survey comments she had anonymously submitted to Fannie Mae management the first of December 2008. D. & O. at 78, 106-107.

On April 28, 2009, Fordham filed a complaint with OSHA, alleging employment retaliation because she engaged in SOX-protected whistleblower activity, *i.e.*, for having reported, internally and to federal agencies, SOX violations by Fannie Mae. Fannie Mae did not

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<sup>7</sup> The Federal Housing Finance Agency was formerly known as the Office of the Federal Housing Enterprise Oversight (OFHEO). D. & O. at 105, n.9.

learn of the OSHA complaint until May 13, 2009, when OSHA informed Fannie Mae of the complaint. D. & O. at 106-107, 109.

The proposed Monday meeting of Bahr and Slaughter did not occur. Instead, on Wednesday, April 29, Slaughter and Veith (also with Human Resources) met with Fordham. Slaughter informed Fordham, among other things, that they were considering terminating her employment, but wanted to gather more data to make sure that what they had was sufficient and fair. Slaughter informed Fordham that as a consequence they were placing her on administrative leave with pay while they reviewed the documentation. She explained that the action was *not* based on Fordham's performance, but on her violation of Fannie Mae's attendance policy. Slaughter also informed Fordham that her employment was *not* at that time being terminated, and that she would let Fordham know when a final decision was made. D. & O. at 108.

Having turned Fordham's termination over to Slaughter on April 24th, or at the latest on April 27th, and under the impression that Fordham's employment would be terminated when Slaughter met with her, Bahr was not aware until later, of Slaughter's decision to place Fordham on administrative leave on April 29, 2009. D. & O. at 108.

Fannie Mae subsequently terminated Fordham's employment effective July 17, 2009, when Fordham received correspondence dated that same day and signed by Slaughter. Contrary to the explanation Slaughter provided Fordham at their meeting on April 29th, Slaughter's letter informed Fordham that Fannie Mae "had determined to terminate your employment based upon your unacceptable performance, conduct, and attendance issues." Slaughter recounted in the correspondence that during the April 29 meeting, "I also shared with you that I had planned on terminating your employment the previous week" but that because of the concerns Fordham had raised in her complaints, she had placed Fordham on administrative leave pending her review of Fordham's concerns. Slaughter indicated that "[a]lthough I intended to address this issue earlier," her review had been delayed "due to my transition into a new position" with Fannie Mae. Slaughter concluded by stating:

Nevertheless, I have retained the responsibility for this matter and I have now completed my review of the underlying documentation supporting your termination. I have not found any information that would cause Fannie Mae to reconsider its earlier decision to terminate its employment relationship with you. Accordingly, your employment with Fannie Mae is terminated effective Friday, July 17, 2009.

Exhibit JX 170; *see* D. & O. at 110.

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under Section 806 of SOX, 18 U.S.C.A. § 1514A, and its implementing regulations. Secretary's Order No. 2-2012 (Delegation of Authority and



Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1980.110(a). The Board reviews the ALJ's findings of fact under the substantial evidence standard, 29 C.F.R. § 1980.110(b),<sup>8</sup> and reviews questions of law de novo. See *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

## DISCUSSION

Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A, as amended, in part prohibits any publicly-traded company from discharging or otherwise retaliating against an employee in the terms and conditions of his or her employment because the employee provided to the employer or the federal government information relating to alleged violations of 18 U.S.C.A. § 1341 (mail fraud), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), § 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.<sup>9</sup>

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<sup>8</sup> Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). An ALJ's factual finding will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera*, 340 U.S. at 488).

<sup>9</sup> 18 U.S.C.A. § 1514A(a), as amended by Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), expressly provides:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

An action brought under SOX's whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b). *See* 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a complainant must prove by a preponderance of the evidence that: "(1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action."<sup>10</sup> If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.<sup>11</sup>

## A. THE ALJ'S DECISION AND ORDER

### 1. ALJ's Findings of Protected Activity

Of Fordham's multiple allegations of SOX whistleblower-protected activity, *see* D. & O. at 115-116, the ALJ held that Fordham's conduct constituted SOX-protected activity in the following instances:

- Reporting weaknesses in Control Self-Assessments and the lack of critical process documentation commonly maintained in mature SOX programs in an accountability survey for the managers of Robert Leonard (Fordham's former immediate supervisor) that she initially submitted anonymously on or about December 1, 2008, and later openly submitted to Slaughter and Fischman on April 27, 2009 (D. & O. at 117);
- Verbally reporting to her immediate supervisor (Hall) in December of 2008 that she believed there existed insufficient documentation to support Fannie

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(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

<sup>10</sup> *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); *see* 29 C.F.R. § 1980.109(a).

<sup>11</sup> *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *see* 29 C.F.R. § 1980.109(b).

Mae's assertion that internal control deficiencies had been remediated (D. & O. at 116);

- Reporting to her immediate supervisors (Gabbay and Hall) on April 23, 2009, that Fannie Mae's methodology did not test at a sufficient level to gain the assurance it needs for system specific IT Applications Controls, which Fordham contended have a direct impact on the company's financial statements to shareholders (D. & O. at 119);
- Filing a complaint with the SEC on April 23, 2009, in which Fordham reported deficiencies in the Deficiency Management System (DMS) internal controls deficiency list that were not reflected in SEC disclosures available to the public, that significant internal control deficiencies were not disclosed in SEC filings, and subsequently providing documentation in support of her allegations on May 19, 2009 (D. & O. at 116-117, 118);
- Reporting SOX violations to the FHFA (formerly OFHEO) on April 26, 2009 (which Fannie Mae became aware of on April 27, 2009) (D. & O. at 119);
- On April 27, 2009, informing Fannie Mae officials (Fischman and Slaughter) that she was reporting to the SEC and the FHFA her concerns that SOX Technology Division management had deliberately withheld information from the company's board of directors and regulators (D. & O. at 116-117; 119-120); and
- Reporting in a retaliation complaint filed with OSHA on April 28, 2009, that she had suffered whistleblower retaliation for making reports of SOX violations (of which OSHA notified Fannie Mae on May 13, 2009) (D. & O. at 120).

## 2. ALJ's Adverse Action Findings

Fordham alleged that Fannie Mae took the following adverse personnel actions against her: (1) on March 4, 2009, giving Fordham a lowered performance evaluation for her end-of-year 2008 Performance Review; (2) on March 4, 2009, giving Fordham a Memorandum of Concern, which asserted that during the last six months she had been advised of unsatisfactory performance and the need for improvement; (3) removing Fordham from significant duties; (4) assigning Fordham "unachievable tasks;" (5) engaging in "intrusive surveillance" of Fordham; (6) on April 29, 2009, placing Fordham on involuntary administrative leave; (7) failing to provide Fordham with requested payroll and personnel records for her OSHA complaint; and (8) on July 18, 2009, terminating Fordham's employment. D. & O. at 121.

Of the foregoing, the ALJ found that under the standard articulated in *Menendez*, the 2008 Year-End Performance Review, the March Memorandum of Concern, placing Fordham on involuntary administrative leave, and the termination of her employment constituted adverse personnel actions. D. & O. at 121.

### 3. The ALJ's Causation Determination

Despite finding that Fordham engaged in SOX-protected whistleblower activities and that she suffered adverse personnel actions, the ALJ held that Fordham failed to prove a causal connection between her protected activity and the unfavorable personnel actions. The ALJ first addressed Fordham's 2008 performance evaluation and the memorandum of concern that Hall gave her on March 4, 2009. As of that date, the only protected activity that the ALJ found Fordham to have engaged in, of which Hall was aware, was Fordham's verbal complaint to Hall in late December that she believed that insufficient documentation existed to support Fannie Mae's assertion that internal control deficiencies had been remediated. Upon weighing the temporal proximity of the protected activity against overwhelming evidence of Fordham's unsatisfactory job performance during 2008, the ALJ held that Fordham failed to establish by a preponderance of the evidence that her protected activity was a contributing factor to the lowered performance evaluation and memorandum of concern. D. & O. at 122-125.

Regarding Fordham's placement on administrative leave on April 29, 2009, and the subsequent termination of her employment, the ALJ acknowledged that the temporal proximity of the personnel actions to the protected activity in which Fordham engaged between April 23 and April 27, 2009, of which Bahr and/or Slaughter were aware, constituted circumstantial evidence of causation. However, because the ALJ found that Fannie Mae (per Bahr) had decided prior to the protected activity to terminate Fordham's employment for legitimate, non-retaliatory reasons, the ALJ held that Fordham failed to establish that her protected activity was a contributing factor in the decisions placing her on administrative leave and terminating her employment. D. & O. at 125-127.

#### **B. ANALYSIS –**

1. The ALJ's rulings with respect to protected activity and adverse employment action are supported by the substantial evidence of record and in accord with law

We first consider Fordham's arguments on appeal challenging the ALJ's rulings regarding SOX-protected activity and adverse employment actions. Upon careful review of the evidentiary record, we find nothing that persuades us that any of the ALJ's protected activity rulings are legally erroneous. Nor are we of the opinion that the ALJ erred in rejecting all but four of Fordham's asserted claims of adverse employment action. The ALJ's rejection of Fordham's assertion that she engaged in protected activity beyond those activities that the ALJ found to be protected (*supra* at pp. 10-11) is supported by substantial evidence and is in accordance with applicable law. Similarly, we find that the ALJ's rejection of Fordham's assertion that she was subjected to adverse employment actions in addition to the 2008 performance review, the March memorandum of concern, the involuntary administrative leave, and Fordham's employment termination is supported by substantial evidence and in accordance with applicable law.

2. The ALJ's determination that Fordham failed to establish that her protected activity was a contributing factor in the decision to place her on administrative leave and the

termination of her employment is not supported by the substantial evidence of record; nor is it in accordance with applicable law

On appeal, Fordham challenges the ALJ's decisions regarding her placement by Slaughter on administrative leave and the termination of her employment. Fordham also objects in her petition for review to the ALJ's "contributing factor" determinations regarding the 2008 performance evaluation and the March 4, 2009 memorandum of concern. As discussed below, the ALJ's errors are two, both of which warrant reversal of the ALJ's decision and require remand of this case for further consideration.

Having reviewed and considered the arguments the parties raised in their respective briefs, we first turn to the question whether the substantial evidence of record supports the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to Fordham's protected activity of April 23-26, 2009. This, in turn, is followed by consideration of the legal propriety of the ALJ's weighing of Fannie Mae's evidence of legitimate, non-retaliatory reasons for the adverse personnel action at issue against Fordham's evidence of causation in determining that Fordham failed to meet her burden of proving that protected activity was a contributing factor in the adverse personnel action taken against her.

- a. The substantial evidence of record does not support the ALJ's finding that Fannie Mae made its decision to terminate Fordham's employment prior to Fordham's protected activity

In addressing the ALJ's ruling rejecting Fordham's claims that placing her on administrative leave and terminating her employment constituted retaliation for engaging in SOX whistleblower-protected activities, we view the administrative leave as part of the employment termination process, and thus address both as one.<sup>12</sup> The substantial evidence of record does not support the ALJ's finding that the decision to terminate Fordham's employment and the decision to place Fordham on administrative leave occurred prior to her protected activities on April 23, 26, and 27, 2009. While the evidence of record supports the finding that Bahr decided to initiate the employment termination process prior to Fordham's protected activities of April 23-27, the substantial evidence of record does not support a finding that Bahr's decision constituted Fannie Mae's final decision. Indeed, the ALJ's own factual findings contradict her conclusion that the decision to terminate Fordham's employment was made prior to Fordham's protected activity.

As previously noted, the ALJ found that Bahr had decided as of April 21st that Fordham's employment should be terminated. D. & O. at 103. It is clear from the record, however, that Bahr was not authorized to effect a final decision on behalf of Fannie Mae with respect to Fordham's termination. Instead, upon deciding that Fordham's employment should be terminated, Bahr began working with Slaughter to draft an employment termination memorandum in which Senior Vice President Wagner's approval to terminate Fordham's

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<sup>12</sup> Before the ALJ, Fannie Mae did not address the administrative leave as a separate action, but as part of the termination process. See D. & O. at 126.

employment was *requested*.<sup>13</sup> D. & O. at 103, 105; JX 116. The drafting of that memorandum was not completed until Friday, April 24.<sup>14</sup> D. & O. at 105. Even then, however, Slaughter indicated that Fannie Mae's legal department had yet to sign off on the memorandum, and proposed to Bahr that they meet on Monday, April 27, to finalize the document. *Id.* The Monday meeting never took place. Instead, as the ALJ found, when Slaughter met with Fordham on Wednesday, April 29, she informed Fordham that they were *in the process of making* a decision to terminate her employment, and that in the interim she was placing Fordham on administrative leave. *Id.* at 108. Slaughter informed Fordham that Fannie Mae was not terminating her employment at that time and that she would let Fordham know when a final decision was made.<sup>15</sup> Significantly, and as previously noted, the ALJ found that after Bahr turned the matter over to Slaughter on April 24th, Bahr was no longer involved with Fordham's employment termination. Indeed, the ALJ found that Bahr was not aware of Slaughter's decision to place Fordham on administrative leave and delay a decision regarding her employment termination until later, after Slaughter's meeting with Fordham on the 29th. *Id.*

The letter Fordham received, dated July 17, 2009, signed by Slaughter, in which Slaughter informed Fordham that her employment was terminated, further supports the conclusion that *Slaughter*, not Bahr, made the final decision terminating Fordham's employment, a decision made *after* Fordham engaged in the SOX-protected activities of April 23-27, 2009. Slaughter recounted in the termination letter that she had planned on terminating Fordham's employment prior to their April 29th meeting; however, because of the concerns Fordham had raised in her whistleblower complaints, she had instead placed Fordham on administrative leave pending her review of those concerns. "Nevertheless," Slaughter stated, "*I have retained the responsibility for this matter*" despite the lapse in time since their meeting.<sup>16</sup> Having completed her review, Slaughter informed Fordham that, "Accordingly, your employment with Fannie Mae is terminated effective Friday, July 17, 2009."<sup>17</sup>

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<sup>13</sup> In the memorandum to Wagner, dated April 24, 2009, Bahr states, "I am requesting your approval to terminate Edna Fordham's employment from the Internal Audit department." JX 116. After detailing the reasons in support of Fordham's discharge, the memorandum concludes: "Human Resources, Legal, and Compliance and Ethics are aware of this request and approve of this action to terminate Edna Fordham. If you agree with this action, please provide your approval as well." *Id.*

<sup>14</sup> Wagner testified that she received the request for termination (JX 116), but did not remember when. D. & O. at 27.

<sup>15</sup> Specifically, the ALJ found: "At an unspecified time [on April 29, 2009], Veith and Slaughter meet with Complainant. . . . Slaughter tells Complainant *inter alia* that they are making a decision to terminate her employment, but she wants to do more data collection to make sure what they have is sufficient and fair, so Complainant is being placed on administrative leave with pay while they review all of the documentation . . . . Slaughter tells Complainant that she is not being terminated at this point, but she will let her know when a final decision is made." D. & O. at 108.

<sup>16</sup> Exhibit JX 170 (emphasis added).

<sup>17</sup> *Id.*

Having concluded that substantial evidence does not support the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to her protected activities of April 23-27,<sup>18</sup> remand to the ALJ is required for a determination, consistent with the analysis required by this decision (per discussion, *infra*), of whether Fordham's SOX whistleblower protected activities of April 23-27, any or all, were a contributing factor in Slaughter's decision placing Fordham on administrative leave and in the subsequent termination of her employment on July 17, 2009.<sup>19</sup> If the ALJ finds upon remand that the protected activity was a contributing factor, the ALJ must then determine whether Fannie Mae's evidence clearly and convincingly establishes that it would have taken the same personnel action even if Fordham had not engaged in protected activity.

- b. The determination of whether a SOX complainant has met his or her burden of proving that protected activity was a contributing factor in the adverse personnel action at issue may not include the weighing of the respondent's evidence supporting its statutorily-prescribed affirmative defense

This brings us to the second error the ALJ committed warranting reversal and remand, *i.e.* the ALJ's weighing of Respondent's evidence of legitimate, non-retaliatory reasons for the adverse personnel action at issue against Fordham's evidence of causation in determining that Fordham failed to meet her burden of proving that protected activity was a contributing factor in the adverse personnel action taken against her.

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<sup>18</sup> Yet, even if the ALJ was correct in finding that the decision to terminate Fordham's employment was made prior to Fordham's SOX-protected activities of April 23-27, 2009, it is not the date upon which the decision is made that is necessarily controlling. In *Stone & Webster Eng'g Corp. v. Secretary of Labor*, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit affirmed the Secretary's rejection of the argument that the complainant's protected activity in that case could be ignored because it was engaged in after the adverse personnel decision had been made but before the employer's decision was communicated to the complainant. 115 F.3d at 1573.

<sup>19</sup> In reconsidering the causation issue, the ALJ should address any significant factual conflicts and/or ambiguities in the record, including but not necessarily limited to: (1) Slaughter's statement to Fordham on April 29, 2009, that she was *not* at that time being terminated, (2) the impact, if any, of the investigation Fannie Mae initiated into Fordham's allegations of SOX violations at approximately the same time that it placed Fordham on administrative leave, and (3) who else in addition to Bahr and Slaughter was involved, and to what degree and in what role, in the termination decision since the record clearly shows that others such as Jackie Wagner (to whom Bahr sent a memorandum dated April 24, 2009, requesting approval to terminate Fordham's employment), and Fannie Mae's Legal Department (who advised Slaughter to "tighten up" the memo to Wagner) appear to have been involved. Additionally, should the ALJ upon remand again credit Slaughter's testimony that her change in duties after April 29, 2009, caused an almost three-month delay in finalizing the termination letter, and that this delay is of relevance, the ALJ should expressly provide findings as to how the ALJ credits Slaughter's testimony. It may be that the record does not permit the ALJ to resolve some of these issues, but if the ALJ's decision on remand results in another appeal to the ARB, the Board needs to understand how the ALJ weighed these factual ambiguities and/or gaps in the evidence in deciding the causation question.

