U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

EDNA D. FORDHAM,

COMPLAINANT,

v.

FANNIE MAE,

RESPONDENT.

ARB CASE NO. 2021-0029

ALJ CASE NO. 2010-SOX-00051

DATE: July 19, 2021

Appearances:

For the Complainant:
Thad M. Guyer, Esq.; Stephani L. Ayers, Esq.; *T.M. Guyer and Ayers & Friends, PC*; Medford, Oregon

For the Respondent:
Madonna A. McGwin, Esq.; Damien G. Stewart, Esq.; *Fannie Mae*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Randel K. Johnson and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. 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, 18 U.S.C. § 1514A (2010) (SOX), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2020).

On April 28, July 27, and September 14, 2009, Edna D. Fordham filed complaints alleging that Fannie Mae disciplined her, and discharged her from employment in retaliation for engaging in SOX-protected activities. The Occupational Safety and Health Administration investigated and dismissed the complaints. Fordham requested a hearing on her complaints, and an Administrative Law Judge (ALJ) conducted a hearing in August 2011. Following the hearing, the ALJ issued a Decision and Order concluding that Fordham's SOX-protected activities did not contribute to any adverse employment actions taken by Fannie Mae.

Fordham appealed the ALJ's ruling to this Board. On October 9, 2014, the Board issued a Decision and Order of Remand (Remand), remanding the case to the ALJ. According to the Remand, the ALJ committed legal error by allowing Fannie Mae's "legitimate business reasons" for its actions to "negate [Fordham's] proof that protected activity contributed to" those actions."[1] The Board directed the ALJ to reconsider her ruling consistent with the legal standard presented in the Remand.

On September 30, 2016, the Board issued a ruling in a different case overturning the legal standard presented in the Remand.[2] A new ALJ was assigned to this case and on March 31, 2021, he issued a Decision and Order on Remand (D. & O.). The ALJ concluded that Fordham engaged in SOX-protected activity that contributed to her being placed on administrative leave prior to discharge. But he also concluded that Fannie Mae "established by clear and convincing evidence that it would have taken the same adverse actions in the absence of Fordham's protected activities."[3]

The Secretary of Labor has delegated to the Board his authority to review ALJ decisions under the SOX.[4] In SOX cases the Board will affirm the ALJ's factual

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[1] *Fordham v. Fannie Mae*, ARB No. 2012-0061, ALJ No. 2010-SOX-00051, slip op. at 23 (ARB Oct. 9, 2014).

[2] *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017).

[3] D. & O. at 24.

[4] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

findings if supported by substantial evidence but reviews all conclusions of law de novo.[5]

Upon review of the record and briefs on appeal, we conclude that the ALJ conducted his analysis of this matter within the procedural scope of the Remand, and consistent with the proper legal standards. The D. & O. is a well-reasoned decision based on the facts and the applicable law. As a result, we **ADOPT** and **ATTACH** the ALJ's D. & O and, accordingly, we **DISMISS** Fordham's complaints.

SO ORDERED.

[5] 29 C.F.R. § 1980.110(b); *Burns v. The Upstate Nat'l Bank*, ARB No. 2017-0041, ALJ No. 2017-SOX-00010, slip op. at 2 (ARB Feb. 26, 2019) (citation omitted).

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 31 March 2021

In the Matter of:

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v.

FANNIE MAE,
Respondent.

Case No. 2010-SOX-00051

DECISION AND ORDER ON REMAND

Appearances:

Thad M. Guyer, Esquire
T.M. Guyer and Ayers & Friends, PC
Medford, Oregon
For the Complainant

Damien G. Stewart, Esquire
Fannie Mae
Washington, D.C.
For the Respondent

Before: **THEODORE W. ANNOS**
Administrative Law Judge

I. INTRODUCTION

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Act" or "SOX") as implemented by 29 C.F.R. Part 1980. This statutory provision, in part, prohibits an employer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders.

The SOX is governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.[1] To prevail, a SOX complainant must establish by a preponderance of the evidence that: (1) the complainant engaged in a protected activity; (2) the complainant suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.[2] If a complainant satisfies this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[3]

II. PROCEDURAL HISTORY

Complainant Edna Fordham ("Fordham" or "Complainant") filed an initial complaint on April 28, 2009, and supplemental complaints on July 27, 2009 and September 14, 2009, with the United States Department of Labor Occupational Safety and Health Administration ("OSHA") in which she alleged that her former employer, Respondent Fannie Mae ("Fannie Mae" or "Respondent"), had placed her on administrative leave and subsequently terminated her employment in retaliation for raising issues she reasonably

[1] 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b)(2)(B). *See Perez v. Citigroup, Inc*., ARB No. 2017-0031, ALJ No. 2015-SOX-00014 (ARB Sept. 30, 2019).

[2] 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1980.109. *See Midamba v. Verizon Wireless Texas, LLC,* ARB No. 2019-0052, ALJ No. 2016-SOX-00003 (ARB Feb. 18, 2021).

[3] *Id.*

believed violated SEC rules and regulations. Following an investigation, on July 13, 2010, OSHA dismissed Fordham's complaints, finding no reasonable cause to believe Fannie Mae violated Fordham's rights under SOX. Fordham timely filed objections and a request for a hearing.

Over the course of seven days in August 2011, a hearing was held before Administrative Law Judge ("ALJ") Christine L. Kirby in Washington, D.C. On March 19, 2012, ALJ Kirby issued a Decision and Order dismissing Fordham's complaint, finding that while Fordham engaged in protected activity and suffered adverse personnel actions, the protected activity did not contribute to the adverse actions taken against Fordham ("D&O").[4]

Fordham appealed the D&O to the Administrative Review Board ("ARB" or "Board"). On October 9, 2014, the ARB issued a Decision and Order of Remand affirming, in part, and vacating and reversing, in part ("D&R" or "*Fordham*").[5] Specifically, the ARB affirmed ALJ Kirby's findings regarding protected activity and adverse personnel actions, but determined that her contributing factor causation determination was neither supported by substantial evidence nor in accordance with applicable law.

On September 30, 2016, the ARB issued *Palmer v. Canadian Nat'l Ry.*,[6] overturning its holding in *Fordham* concerning the legal standard to be applied to contributing factor causation.

On December 21, 2016, ALJ William T. Barto issued a Notice of Assignment and Post-Remand Order, stating that he intended to: (1) "reconsider the legal issues on remand in this case using the standard announced by the ARB in *Palmer* rather than the repudiated standard announced in the [D&R] in this matter[;]" and (2) "resolve the factual issue on remand concerning the date of [Fannie Mae's] decision to terminate [Fordham] based upon the current evidentiary record without ordering a new evidentiary hearing." ALJ Barto provided the parties 30 days to file objections or motions to reopen the record. Neither party objected or requested to reopen the record.

On February 3, 2017 and February 24, 2017, Fordham and Fannie Mae filed briefs on remand, respectively.

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[4] *Fordham v. Fannie Mae,* ALJ No. 2010-SOX-00051 (OALJ Mar. 19, 2012).

[5] *Fordham v. Fannie Mae,* ARB No. 12-061, ALJ No. 2010-SOX-00051 (ARB Oct. 9, 2014).

[6] ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017).

This case was subsequently reassigned to the undersigned due to ALJ Barto's departure from OALJ. On June 30, 2020, I issued a Notice of Reassignment and Order, informing the parties that I intended to issue a Decision and Order based upon the existing record, and that any objection or request for a supplemental proceeding shall be filed within 14 days of receipt of the Order. Neither party filed an objection or request within the specified timeframe.

III. ISSUES ON REMAND

In the D&R, the ARB held that 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." The ARB further held 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." To that end, "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." Therefore, the ARB ruled that "remand to the ALJ is required for a determination" of whether "any or all of Fordham's protected activity was a contributing factor in any or all of the adverse employment actions affirmed by this [D&R], including Fannie Mae's decision placing Fordham on administrative leave and in the subsequent termination of her employment[.]" If the protected activity was a contributing factor, "the ALJ should then determine whether Fannie Mae is nevertheless able to establish by clear and convincing evidence that it would have taken the same adverse personnel action against Fordham in the absence of her protected activity."[7]

In *Palmer*, the ARB expressly repudiated the *Fordham* contributing factor standard:

> [The] bottom line is that ***Fordham's*** interpretation is wrong, and we hereby overturn *Fordham*: nothing in the statute 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

[7] D&R at 2-3, 15, 24, 37-38.

> 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.
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> Prior to our decision in *Fordham*, this Board and federal courts of appeal had consistently permitted factfinders to consider all evidence, including evidence of the employer's nonretaliatory reasons, when determining whether the employee had established that protected activity was a contributing factor in an adverse personnel action. … The cases are legion, and they date to at least as far back as 1995 and continued until just weeks before *Fordham*. In many of those cases, not only did the factfinder consider the employer's evidence of its nonretaliatory reasons, but that evidence was also dispositive in ruling against the employee at step one. *Fordham* characterized the question as one of first impression, and some of the amici supporting Palmer characterize *Fordham* as embodying longstanding law, implying that overturning *Fordham* would change the law. Yet, neither *Fordham* nor any of the amici supporting Palmer have cited to a single case prior to *Fordham* in which this Board or a court of appeals held it was error for a factfinder to consider evidence of an employer's nonretaliatory reasons for the adverse action, when the employer's theory of the case is that the protected activity played no role at all. It is *Fordham* that attempted to 'change' the law, not only by reading into the statute what isn't there, but also by overturning decades of precedent from this Board and the federal courts of appeals.[8]

In light of *Palmer*, the parties disagree as to the scope of the issues that need to be resolved on remand. Fordham contends as follows:

> (1) The ARB has already determined most of the facts and law that will govern remand, and under the law of the case doctrine, only limited fact findings and legal conclusions from [the D&O] and record can be considered on remand; (2) the remand order does not permit any reopening of the factual record; (3) the remand is limited by the ARB's reversal of the D&O

[8] *Palmer*, ARB No. 16-035, at 15, 51-52 (citations omitted). *See also id.* at 58 (noting the "repudiation of *Fordham*").

> findings and conclusion that [Fannie Mae's] decisions to (a) place [Fordham] on administrative leave and (b) then terminate her preceded her latest protected activity; (4) the only fact determination for remand as to [Fordham's] burden of proof is whether, in view of the binding ARB findings and conclusions, [Fordham] proved that her latest protected activity was a contributing factor in the administrative leave and termination discussions; (5) upon the conclusion that [Fordham] proved contributing factor, whether the ARB fact findings and record can support a conclusion by clear and convincing evidence that [Fannie Mae's] decisions for administrative leave and termination would have been made despite the protected activity; and (6) [Fordham is] entitled to be awarded her requested relief.[9]

For its part, Fannie Mae argues that the scope of remand is not as limited as Fordham contends. Specifically, Fannie Mae asserts:

> [Fordham] mistakenly contends that the scope of the remand in this case is limited solely to a determination of whether [Fordham's] protected activities from April 23-27, 2009 contributed to Fannie Mae's decision to place her on paid administrative leave and to subsequently terminate her employment in July 2009. In making this assertion [Fordham] relies on the 'law of the case' doctrine, but misinterprets what that doctrine represents.
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> In this regard, [Fordham's] analysis of the 'law of the case' doctrine mixes apples and oranges to arrive at the conclusion that the ARB's hands are essentially tied when it comes to issues it has previously determined. That is incorrect. To the contrary, the ARB has the express ability to overrule another panel, and has done so in this case.
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> ***
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> [Fordham] turns a blind eye to the fact that the *Palmer* Board specifically stated that the *Fordham* Board's decision should be 'repudiated' and 'overturned.' Period. It did not state that it was affirming *any* portion of the prior Board decision, language that is essential to [Fordham's] suggestion that *Palmer's* mandate should be narrowly interpreted. Under the 'mandate rule' raised by [Fordham], the ALJ must comply with the instructions of the *Palmer* Board and review all decisions addressed in *Fordham.* ... As such,

[9] Fordham Brief ("Fordham Br.") at 3-4.

> this Court should … review the issues in this case under the standard articulated in *Palmer*. This includes whether: (i) [Fordham] engaged in statutorily protected activity; (ii) in view of evidence submitted by either party, did [Fordham] establish by a preponderance of the evidence that there was a causal relationship between any allegedly protected conduct and the adverse employment action taken against her; and (iii) assuming arguendo that [Fordham] can establish causation, does the record show that Fannie Mae would have terminated [Fordham] notwithstanding her allegedly protected activities.[10]

Under the law of the case doctrine – and more specifically its corollary, the mandate rule - the "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court[;]"[11] and therefore parties are foreclosed from relitigating "issues expressly or impliedly decided by the appellate court."[12] "Deviation from the mandate rule is permitted only in a few exceptional circumstances," such as when "controlling legal authority has changed dramatically[.]"[13] The rule applies to administrative agencies as well, and "binds an administrative law judge" when the ARB remands a case.[14]

In applying the mandate rule here, it is clear that *Palmer* requires a deviation because the "controlling legal authority has changed dramatically" since the D&R was issued. However, while *Palmer* overturned *Fordham*, it was not a wholesale rejection of

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[10] Fannie Mae Brief ("FM Br.") at 4-6 (emphasis in original).

[11] *In re DNA Ex Post Facto Issues*, 466 Fed. Appx. 235, 238 (4th Cir. 2012). *See also U.S. v. Alston*, 722 F.3d 603, 606 (4th Cir. 2013) ("The 'mandate rule' is a specific application of the law of the case doctrine that prohibits a lower court from reconsidering on remand issues laid to rest by a mandate of the higher court.").

[12] *U.S. v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012) (citation and quotation marks omitted).

[13] *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005). *See also Gunther v. Deltek, Inc.*, ARB No. 15-074, ALJ No. 2010-SOX-049, slip op. at 3 (ARB Aug. 20, 2015) ("[T]he mandate rule will apply unless … controlling authority has since made a contrary decision of the law applicable to such issues[.]").

[14] *Levi v. Annheiser Busch*, ALJ No. 2006-SOX-00108, slip op. at 5 (OALJ Oct. 18, 2006). *See also Johnson v. Roadway Express, Inc.*, ARB No. 01-013 (Formerly 99-111), ALJ No. 99-STA-5, slip op. at 8 (ARB Dec. 30, 2002) ("We conclude that the law of the case doctrine prohibited the ALJ from entertaining new evidence[.]"); *Gunther*, ARB No. 15-074, at 3 ("[T]he law-of-the-case doctrine would preclude us from granting the requested relief.").

all the factual and legal determinations made in the D&R. *Palmer's* "repudiation" of *Fordham* was specifically related to the contributing factor causation standard.[15] Indeed, the *Palmer* Board specified that *Fordham* was being overturned because its "interpretation is wrong," as "nothing … precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question."[16] Nowhere in *Palmer* does the ARB overturn, or even mention, any of the D&R's remaining factual or legal findings, such as Fordham's protected activity and Fannie Mae's adverse actions.[17]

Accordingly, the D&R's factual and legal determinations are binding in this subsequent proceeding and may not be reexamined,[18] with the exception that *Palmer*, which remains the applicable legal standard,[19] will be applied.

[15] *See Powers v. Union Pac. R.R. Co*., ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Jan. 6, 2017) ("In *Palmer*, this Board, sitting en banc, overruled the 'contributing factor' analysis in *Fordham*[.]").

[16] *Palmer*, ARB No. 16-035, slip op. at 15.

[17] *See Palmer*, ARB No. 16-035.

[18] *See Walker v. Kelly*, 589 F.3d 127, 143 (4th Cir. 2009) (Gregory, J., dissenting) (The "district court's decision to disregard this Court's prior determinations of law and fact violated the law of the case doctrine, or more specifically, the mandate rule."); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013) ("In light of the agency's prior holdings that the court of appeals left undisturbed on remand, it is law of the case that [complainant] proved by a preponderance of evidence that his safety complaints to the company about the certification of apprentice painters at the nuclear facility were activities that the ERA protects and that his employer took an adverse action against him. The central issue in this case is whether [complainant's] protected activity was a contributing factor in [employer's] decision to suspend or terminate his employment.").

[19] *See Simpson v. Equity Transp. Co*., ARB No. 2019-0010, ALJ No. 2017-STA-00076 (ARB May 13, 2020) (quoting *Palmer*'s contributing factor causation standard).

IV. FACTUAL BACKGROUND

In the D&O, the ALJ made several findings concerning the timeline of events and the factual circumstances surrounding those events. In the D&R, the ARB utilized those findings to formulate its "Background Statement," specifically citing to D&O pages 3-5, 35-36, 61, 73-112 and 116-117.[20] Therefore, the D&O findings contained on those pages are hereby incorporated into this Decision and Order.[21] For ease of reference, the entirety of the D&R's "Background Statement" is set forth below:

> 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.
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> 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

[20] *See* D&R at 3-9. *See also id.* at 3, n.3 ("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)."). The only additional evidence "specifically noted" in the "Background Statement" were Joint Exhibits ("JX") 25, 115, 116 and 170.

[21] *See Susi*, 674 F.3d at 283 (reexamination of "issues expressly or *impliedly* decided by the appellate court" prohibited under mandate rule) (citation and quotation marks omitted) (emphasis supplied); *DeJoria v. Maghreb Petroleum Exploration, S.A*., 935 F.3d 381, 394 (5th 2019) (mandate rule extends "to matters decided expressly or by necessary *implication*) (emphasis supplied); *Speegle*, ARB No. 11-029-A, slip op. at 9 ("[A]gency's prior holdings that the court of appeals left undisturbed on remand, … is law of the case.").

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.

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. 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 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. 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 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, 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 deliberatively 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 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) (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 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.[22]

[22] D&R at 3-9 (footnotes omitted, emphasis and alterations in original).

V. PROTECTED ACTIVITY

Based on the D&O findings,[23] as affirmed in the D&R,[24] Fordham's conduct constituted SOX-protected activity in the following instances:

> On or about December 1, 2008, 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 and later openly submitted to Slaughter and Fischman on April 27, 2009 (hereinafter, "*December I* protected activity");
>
> • In or around late-December 2008, verbally reporting to her immediate supervisor (Hall) that she believed there existed insufficient documentation to support Fannie Mae's assertion that internal control deficiencies had been remediated (hereinafter, "*December II* protected activity");
>
> • On April 23, 2009, reporting 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;
>
> • On April 23, 2009, filing a complaint with the SEC in which Fordham reported deficiencies in the Deficiency Management System 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;
>
> • On April 26, 2009, reporting SOX violations to the FHFA (formerly OFHEO);
>
> • On April 27, 2009, informing Fannie Mae officials (Fischman and Slaughter) that she was reporting to the SEC and the FHFA her concerns

[23] D&O at 116-120.

[24] D&R at 2, 13, 37.

that SOX Technology Division management had deliberately withheld information from the company's board of directors and regulators; and

• On April 28, 2009, reporting in a retaliation complaint filed with OSHA that she had suffered whistleblower retaliation for making reports of SOX violations.[25]

VI. ADVERSE ACTION

Based on the D&O findings,[26] as affirmed in the D&R,[27] the following constituted adverse personnel actions: (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) on April 29, 2009, placing Fordham on involuntary administrative leave; and (4) on July 18, 2009, terminating Fordham's employment.[28]

VII. CONTRIBUTING FACTOR CAUSATION

The ARB's rationale in remanding this case was two-fold, determining that the ALJ's contributing factor causation finding was neither in accordance with applicable law nor supported by the substantial evidence of record.[29] In terms of the "applicable law" proclaimed in the D&R, that legal standard was expressly repudiated by the Board's subsequent decision in *Palmer*, as explained above in Section III. However, in what appears to be an independent rationale for remand that is separate and distinct from the now repudiated legal standard, the ARB also determined that 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."[30] In all, the ARB ruled that "remand to the ALJ is required for a determination" of whether "any or all of Fordham's protected activity was a contributing factor in any or all

[25] D&R at 11-12; D&O at 116-120.

[26] D&O at 121.

[27] D&R at 2, 13, 37.

[28] D&O at 121; D&R at 12.

[29] D&R at 2.

[30] D&R at 14.

of the adverse employment actions affirmed by this [D&R], including Fannie Mae's decision placing Fordham on administrative leave and in the subsequent termination of her employment[.]"[31]

To establish a violation under SOX, a complainant must prove by a preponderance of the evidence that protected activity was a contributing factor in the adverse action.[32] "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."[33] Because complainants are generally "at a severe disadvantage in access to relevant evidence," a complainant may meet her burden with circumstantial evidence.[34] Therefore, "contributing factor in a whistleblower case is not a demanding standard."[35]

Fordham has met her burden. As summarized above, Fordham engaged in several protected activities between April 23, 2009 and April 27, 2009, including the filing of a complaint with the SEC and the reporting of SOX violations to the FHFA.[36] Fannie Mae became aware of the SEC and FHFA complaints on April 27, 2009 when Fordham informed Slaughter and Fischman.[37] Fordham was subsequently placed on administrative leave on April 29, 2009, which was determined to be an adverse action.[38] The exceptionally close temporal proximity of the protected activities, Fannie Mae's knowledge of those activities, and the ensuing administrative leave, is significant circumstantial evidence that Fordham's protected activities were a contributing factor in the adverse action.

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[31] D&R at 15, 37-38.

[32] 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1980.109(a).

[33] *Brucker v. BNSG Ry. Co.,* ARB Nos. 2018-0067 & 2018-0068, ALJ No. 2013-FRS-00070, slip op. at 7 (ARB Nov. 5, 2020) (quoting *Coates v. Grand Trunk W. R.R. Co*., ARB No. 2014-0019, ALJ No. 2013-FRS-00003, slip op. at 3 (ARB July 17, 2015)) (internal quotation marks omitted).

[34] *Powers*, ARB No. 2013-0034, slip op at. 9 (citing *Palmer*, ARB No. 2016-0025, at 59).

[35] *Brucker*, ARB Nos. 2018-0067 & 2018-0068, at 8 (quoting *Menendez v. Halliburton, Inc*., ARB No. 2012-0026, ALJ No. 2007-SOX-00045, slip op. at 13 (ARB Mar. 15, 2013)) (internal quotation marks omitted).

[36] D&O at 116-120; D&R at 11-12.

[37] *Id.*

[38] D&O at 121; D&R at 12.

There is also direct evidence that Fordham's SEC and FHFA complaints were a contributing factor to placing her on administrative leave. Specifically, in the July 17, 2009 termination letter, Slaughter communicated that while she had intended to terminate Fordham prior to their April 29, 2009 meeting, because of the concerns raised in the whistleblower complaints, Slaughter had instead placed Fordham on administrative leave pending her review of those concerns.[39]

The record is certainly not without contradictory evidence showing Fannie Mae's legitimate nonretaliatory reasons for its actions in placing Fordham on administrative leave and eventually terminating her employment. Indeed, the record is replete with documentation noting issues with Fordham's performance, conduct, and attendance.[40] The record is also clear that *prior* to becoming aware of Fordham's protected activities, Fannie Mae contemplated putting Fordham on administrative leave and terminating her employment, and even started internal proceedings to effectuate the leave and termination.[41] Nonetheless, Slaughter's termination letter and the close temporal proximity of the activities and action, tends to show that the SEC and FHFA complaints had some effect on Fannie Mae's decision to place Fordham on administrative leave, and is therefore sufficient to meet the non-demanding contributing factor causation standard.[42]

Accordingly, I find that Fordham has established by a preponderance of the evidence that the SEC and FHFA complaints were a contributing factor in the adverse action of placing her on administrative leave on April 29, 2009.

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[39] D&R at 8, 15; D&O at 110; JX 170.

[40] *See* D&R at 4-6; D&O at 79-81, 83-84, 87-88, 96-97; JX 25, 26, 36, 37, 45-47, 52-54, 56, 79, 81, 82, 90, 100, 101, 125-127, 177; Fannie Mae Exhibit ("FM") 556, 557, 644, 646, 648, 649, 651; Hearing Transcript ("Tr.") at 93, 100, 104-105, 585, 1020-1022, 1032-1037, 1055-1058, 1257-1270, 1656-1661, 1698-1702.

[41] *See* D&R at 5-7, 14; D&O at 81, 95, 99; JX 25, 26, 77, 104-105, 115, 125, 126; Tr. at 93, 100, 585, 1011, 1020-1022, 1032-1037, 1257-1278, 1656-1661, 1715-1721, 1729-1731, 1738, 1743-1745, 1756-1757, 1770.

[42] *See Palmer*, ARB Case No. 16-035, at 72-73 (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.") (citation and internal quotation marks omitted); *Brucker,* ARB Nos. 2018-0067 & 2018-0068, slip op. at 7 ("The Board has held that while close temporal proximity alone does not compel a finding of contributing factor causation, an ALJ's finding of causation may be affirmed when the ALJ relies on a large variety of both direct and indirect evidence in making his causation determination and does not rely on temporal proximity alone.").

VIII. SAME-ACTION DEFENSE

If a complainant proves that a protected activity was a contributing factor in an adverse action, the respondent may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse actions in the absence of the protected activities – i.e. the "same-action defense."[43] The burden for clear and convincing evidence "rests between preponderance of the evidence and proof beyond a reasonable doubt."[44] It "denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[45] "Clear evidence means the employer has presented an unambiguous explanation for the adverse action in question. Convincing evidence is that which demonstrates a proposed fact is highly probable."[46]

Applying that standard here, Fordham's work record and the "full timeline of the events" clearly and convincingly establishes that Fannie Mae would have taken the same adverse actions in the absence of Fordham's protected activities.[47]

With respect to the adverse actions of the lowered performance evaluation and memorandum of concern, Fordham's persistent performance, conduct, and attendance issues from mid-2008 through February 2009 makes it highly probable that Fannie Mae

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[43] 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1980.109(b).

[44] *Gatto v. General Utilities*, ALJ No. 2018-STA-00003, slip op. at 4 (OALJ November 1, 2018) (citations and internal quotation marks omitted).

[45] *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS- 009, slip op. at 8 (ARB Sept. 30, 2015).

[46] *Lancaster v. Norfolk S. Ry. Co.*, ARB No. 2019-0048, ALJ No. 2018-FRS-00032, slip op. at 8 (ARB Feb. 25, 2021).

[47] *See id.* (An "employee's work record" is evidence that "can be used to prove what an employer 'would have done' in its efforts to prove its affirmative defense."); *Palmer*, ARB Case No. 16-035, at 60-61 ("[T]he ALJ does not appear to have considered the full timeline of the events, and in particular, the fact that [employer] had already scheduled the formal investigation hearing before [complainant] reported his injury [the protected activity]. Indeed, if … the hearing had not been postponed, it would have occurred … six days before the injury report. … [T]he fact that [employer] was well along the way to disciplining Palmer is certainly relevant to the question of what it would have done if [complainant] had not reported his injury: it definitely would have done everything it did in fact do prior to Palmer's June 18th injury report."); *Thibodeau v. Wal-Mart Stores, Inc.*, ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 17 (ARB Dec. 17, 2020) (ALJ's finding that respondent "proved by clear and convincing evidence that it would have terminated [complainant's] employment in the absence of his alleged protected activity" was supported by substantial evidence, which consisted of (1) complainant's "history of poor communication, brusque and unacceptable interactions with both colleagues and contractors, and multiple instances of disobeying his supervisor's instructions or requests[,]" and (2) employer's "measured progression through a discipline policy that ended with the termination of [complainant's] employment.").

would have taken those same adverse actions in the absence of Fordham's protected activity. That is, Fordham's work record during that timeframe conclusively demonstrates that Fannie Mae would have still given Fordham a lower performance rating and memorandum of concern in the absence of the *December II* protected activity.[48]

Starting in around mid-2008 and continuing, Fordham failed to attend meetings, was late to meetings, did not participate during meetings when she was present, surfed the internet during meetings, failed to timely respond to requests, sent emails that were inappropriate and unprofessional in tone, and submitted a substandard work product for an employee at her level. Fordham was counseled regarding these issues, but to no avail.[49] By November 2008, these same issues were recurring and caused her manager, Hall, to inform human resources that Fordham was not performing strongly and therefore would likely receive a low performance rating. Also in November 2008, Hall obtained a sample memorandum of concern for attendance and tardiness.[50] From December 2008 through February 2009, the same problems continued. Fordham had numerous unexcused absences, showed up late to meetings, pushed back on assignments, and continued to send emails that were inappropriate and unprofessional in tone. Fordham was again counseled regarding these issues but her performance did not improve,[51] and on March 4, 2009 Fordham was given a low rating and provided with the memorandum of concern.

The low performance rating and memorandum of concern was consistent with Fannie Mae's attendance policies and how it evaluated employees' performance pursuant to the new accountability standards articulated by its CEO in December 2008.[52] Another similarly situated employee was also given a comparable rating, in part, because of that

[48] The *December II* protected activity is the only activity that Fannie Mae (i.e. Hall) had knowledge of prior to the March 2009 performance evaluation and memorandum of concern. Although the *December I* protected activity occurred on or around December 1, 2008, Fannie Mae did not become aware of that activity until April 27, 2009. The remaining protected activities all occurred in April 2009. D&R at 4-9, 11-12; D&O at 72-78, 116-120.

[49] D&O at 74-75; JX 19; Tr. at 804-806, 809, 822-829, 962-963, 990-995; 1131, 1313-1314; 1560, 1580-1581.

[50] D&O at 76; JX 21, 22, 125, 128; FM 555; Tr. at 998-999, 1149.

[51] D&O at 79-81; JX 125, 127, 178; Edna Fordham Exhibit ("EF") 686; FM 555-557, 640, 644, 648, 649, 651; Tr. at 1024-1028, 1115-1120, 1126-1131.

[52] D&O at 71, 78-80; JX 1, 27; Tr. at 1000, 1186-1190, 1203-1204, 1220, 1798, 1800-1801).

employee's attendance issues.[53] The fact that Hall was aware of the *December II* protected activity at the time of the performance review and memorandum of concern does not reduce the high probability that Fannie Mae would have taken the same adverse actions, as Hall had indicated and contemplated in November 2008 – i.e. before the protected activity – that Fordham would likely receive a low performance rating and may be provided with a memorandum of concern for attendance and tardiness issues.[54]

As for the adverse actions of administrative leave and termination, Fordham's continuing performance, conduct, and attendance issues once again makes it highly probable that Fannie Mae would have taken those same adverse actions in the absence of Fordham's protected activity. Following the March 2009 performance evaluation and memorandum of concern, where Fordham was specifically warned that disciplinary action including termination could result,[55] her performance, conduct, and attendance did not improve, and the relationship between Fordham and management became increasingly volatile throughout March and into April. During this time, Fordham missed or was late to critical meetings, was often absent from work, and repeatedly failed to meet deadlines for projects.[56] As a result, and consistent with Fannie Mae's policy to provide employees with counseling and an opportunity to turn their performance around before taking more serious action,[57] Fannie Mae began contemplating administrative leave and termination, and started internal proceedings to effectuate the leave and termination.[58]

Most compelling is the timeline of events concerning Fannie Mae's contemplation and initiation of administrative leave and termination measures in relation to Fordham's protected activities and Fannie Mae's knowledge of those protected activities.[59] On April

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[53] D&O at 44; Tr. at 1191. *See Lancaster*, ARB No. 2019-0048, at 9 ("[E]vidence of other similarly situated employees who suffered the same fate" is evidence that "can be used to prove what an employer 'would have done' in its efforts to prove its affirmative defense.").

[54] D&O at 76; JX 21, 22, 125, 128; FM 555; Tr. at 998-999, 1149.

[55] D&R at 5; D&O at 81; JX 25.

[56] D&R at 5-6; D&O at 83-104; JX 34, 35, 37, 38, 41, 43, 45-47, 52-54, 56, 58, 79-81, 90-92, 97-101, 109-111, 113, 158; Tr. at 631-634, 1049, 1055-1058, 1681-1687, 1698-1702.

[57] D&O at 48; JX 186.

[58] *See* D&R at 5-7, 14; D&O at 81, 95, 99; JX 25, 26, 77, 104-105, 115, 125, 126; Tr. at 93, 100, 585, 1011, 1020-1022, 1032-1037, 1257-1278, 1656-1661, 1715-1721, 1729-1731, 1738, 1743-1745, 1756-1757, 1770.

[59] *See Palmer*, ARB Case No. 16-035, at 60-61.

3, 2009, Slaughter warned Fordham that she may be put on administrative leave if things did not improve.[60] On April 15, 2009, Slaughter informed Fordham that if she did not timely complete her projects, they would at some point be discussing possible termination.[61] And on April 22, 2009, Bahr worked on a draft memorandum for the termination of Fordham.[62] The foregoing all occurred *prior to* Fordham's protected activities of April 23-27, 2009 and *prior to* Fannie Mae's knowledge of Fordham's protected activities, including the *December I* protected activity, which Fannie Mae did not become aware of until April 27, 2009.[63] Although Hall had been aware of the *December II* protected activity since December 2008, Hall had no input and was not otherwise consulted concerning administrative leave and termination, and no one at Fannie Mae other than Hall was aware of the *December II* protected activity at the time administrative leave and termination was being actively considered prior to April 23, 2009.[64] The fact that Fordham's termination did not occur until almost three months after being placed on administrative leave does not lessen the high probability that she would have been terminated in the absence of her protected activities. As Slaughter credibly testified, Fordham was placed on administrative leave, in part, to allow for the review of documentation relating to attendance, and the reason for the delay was due to the fact that Slaughter was transitioning to a new position, had other job responsibilities, and did not prioritize the action involving Fordham.[65]

Accordingly, I find that Fannie Mae has established by clear and convincing evidence that it would have taken the same adverse actions in the absence of Fordham's protected activities.

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[60] D&O at 95; JX 177.

[61] D&O at 47, 99; Tr. at 1270.

[62] D&O at 103; JX 115; Tr. at 1743.

[63] D&R at 4-9, 11-12; D&O at 72-78, 116-120.

[64] D&O at 77, 103; JX 126, 178; EF 226, 686, 760; Tr. at 59-82, 356-361, 372-382, 423-430, 433-441, 466-467, 477-486, 1113-1122, 1271-1278, 1715-1721, 1729-31, 1743-1745, 1756-1757.

[65] D&O at 44-49, 103; JX 186; Tr. at 1211-1289.

IX. ORDER

Based on the foregoing, **IT IS ORDERED** that the Complaint is **DENIED**.[66]

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

[66] *See* 29 C.F.R. § 1980.109(d)(2).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:
The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

Filing Your Appeal Online
Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:
https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.