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On a "Clear and Convincing Day": The Administrative Review Board Gives Employers Some Helpful Guidance

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By Margaret H. Campbell and Jesse C. Ferrantella

As we have discussed in earlier posts, the Administrative Review Board (ARB) has, over the last couple of years, issued a number of opinions signaling a decidedly employee-friendly interpretation of the whistleblower statutes under its purview. One example was the original 2012 ARB decision in Zinn v. American Commercial Lines.....

As we have discussed in earlier posts, the Administrative Review Board (ARB) has, over the last couple of years, issued a number of opinions signaling a decidedly employee-friendly interpretation of the whistleblower statutes under its purview. One example was the original 2012 ARB decision in *Zinn v. American Commercial Lines*. In the closing days of 2013, however, the ARB issued another opinion in *Zinn* that handed a victory to the employer in the case. The opinion also provides guidance to all employers on how to satisfy the Sarbanes-Oxley Act requirement that an employer present "clear and convincing" evidence that it would have taken the same action against a whistleblower absent any protected activity.

The *Zinn* case began over five years ago, when an in-house attorney, Angelina Zinn, alleged that her employer retaliated against her after she raised potential U.S. Securities and Exchange Commission (SEC) reporting violations to her supervisors. Zinn claimed that shortly after she raised her concerns, her employer required her to submit to a drug test, reduced her responsibilities, and started monitoring her job performance more closely. Zinn was ultimately fired for insubordination and poor productivity. Her employer argued that the actions it had taken were consistent with its company policy.

After a two-day hearing, the Administrative Law Judge (ALJ) ruled in favor of the employer, but in 2012 the ARB vacated the order. The ARB ruled that an employee does not have to prove that the employer's reasons for taking adverse action are false and a pretext for retaliation, as she would ordinarily have to do under federal employment discrimination statutes. Instead, the ARB held that once the employee makes a bare showing that she engaged in protected activity and suffered adverse action related to that activity, the employer must show by "clear and convincing evidence" that it would have made the same decision absent

the protected activity. The ARB explained that an ALJ must weigh the evidence as a whole in assessing whether an employer met the "clear and convincing" standard. The case went back to the ALJ who, after submission of additional briefing and evidence, again found for the employer.

The legal standard the ARB set forth in the original *Zinn* opinion was not favorable to employers, but the result the ARB reached in its most recent review of *Zinn* provides both clarity and a ray of hope for employers. This time around, the ARB agreed that the employer met the "clear and convincing" evidence standard by showing that Zinn had been fired for insubordination and poor performance.

The recent *Zinn* opinion has two important implications. First, it shows that employers can satisfy the "clear and convincing" standard by documenting the reasons for their actions, including evidence of employee misconduct or performance issues. Employers thus should have clear procedures in place to document employee conduct, and make sure that their policies are implemented evenhandedly throughout the company to improve their chances of defending against potential claims.

Second, it may be that as the ALJs and ARB apply *Zinn* to rule in favor of employers, the number of cases pursued through the administrative process at the U.S. Department of Labor will decline, reversing the trend encouraged by employee-friendly opinions broadening the scope of protected activity, relaxing the pleading standard, and liberally construing the term "adverse action." We will be monitoring the impact of *Zinn* over the coming year and keep you advised.

AUTHORS

Margaret H. Campbell

Shareholder, Atlanta

Jesse C. Ferrantella

Shareholder, San Diego

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