Administrative Review Board Holds That After-Acquired Evidence of Wrongdoing May Limit Recovery of Back Pay

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In *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Apr. 27, 2012), the Administrative Review Board ("ARB") held that the after-acquired evidence doctrine articulated by the Supreme Court in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995), applies to claims of retaliation under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). Accordingly, if the employer can show that after-acquired evidence of wrongdoing would have led to the complainant's termination on legitimate grounds had the employer known about it, then an award of back pay is cut off as of the date the employer discovered the new evidence.

In *Clemmons*, the Administrative Law Judge ("ALJ") found in favor of the complainant on the merits and awarded back pay from the date of termination until the date of the hearing.[1] *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Feb. 20, 2008). The ARB affirmed the ALJ's decision on the merits and on the remedies. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010). The employer appealed that decision to the United States Court of Appeals.

The Fifth Circuit affirmed the ARB's decision on the merits and on its award of back pay but remanded the case for a determination of the proper amount of the award. *Ameristar Airways, Inc. v. A.R.B.*, 650 F.3d 562, 570 (5th Cir. 2011). Specifically, citing *McKennon*, the Fifth Circuit concluded that both the ALJ and ARB failed to address whether the period of the back pay award should have ended when the employer discovered an insubordinate and offensive email sent by the complainant.

On remand, the ARB explicitly held that, based upon the similarities between AIR 21 and other employee protection statutes, the Supreme Court's decision in *McKennon* applies to actions brought under the whistleblower provisions of AIR 21. Thus, a complainant's recovery of back pay is cut off on the date that the employer discovers new evidence of wrongdoing and where such evidence is so severe that it would have led to termination of the complainant on those grounds alone.[2]

The *Clemmons* decision is a small victory for employers. Although, the ARB explicitly limited its holding to cases brought under AIR 21, it also has opened the door for employers to use the after-acquired evidence doctrine to limit awards of back pay in cases brought under other whistleblower statutes, such as the Sarbanes-Oxley Act of 2002 and Section 11(c)

of the Occupational Safety and Health Act.

[1] The ALJ initially erred in awarding back pay only until the date of the hearing because back pay generally runs from the date of the unlawful termination until the date the employer makes a bona fide offer of reinstatement. The complainant, however, did not want reinstatement and did not argue the amount of the award on appeal.

[2] The ARB did not address the employer's burden of proof on the issue of after-acquired evidence and left it to the ALJ to do so. The ARB, however, strongly indicated that the employer must prove the issue of after-acquired evidence by "clear and convincing evidence" rather than by a "preponderance of the evidence."

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