

**Appeal No. 14-CV-98**

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**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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**NANCY TUCKER, Appellant,**

v.

**THE DISTRICT OF COLUMBIA, Appellee.**

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**ON APPEAL FROM THE SUPERIOR COURT  
OF THE DISTRICT OF COLUMBIA**

Case No. 2010 CA 000459 P (MPA)  
(The Honorable Herbert B. Dixon, Judge)

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**BRIEF OF AMICI CURIAE METROPOLITAN WASHINGTON EMPLOYMENT  
LAWYERS ASSOCIATION AND GOVERNMENT ACCOUNTABILITY PROJECT IN  
SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL**

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## **I. Interests of Amici Curiae**

### **A. Metropolitan Washington Employment Lawyers Association**

Metropolitan Washington Employment Lawyers Association (“MWELA”) is a local affiliate of the National Employment Lawyers Association. MWELA’s members comprise more than 320 attorneys who represent employees in employment and civil rights litigation in the metropolitan Washington, D.C. area. MWELA’s purpose is to bring employment lawyers into close association to promote efficiency in the legal system and fair, equal treatment under the law. MWELA has participated as amicus curiae in many cases before this Court, the U.S. Court of Appeals for the District of Columbia Circuit, and the U.S. District Court for the District of Columbia. MWELA has served as amicus curiae in the following recent cases before this Court: *Bryant v. District of Columbia, et al.*, 102 A.3d 264 (D.C. 2014); *Davis v. District of Columbia*, 70 A.3d 258 (Table) (D.C. 2013); *Cesarano v. Reed Smith LLP*, 990 A.2d 455 (D.C. 2010); *Byrd v. VOCA Corp. of Washington, D.C.*, 962 A.2d 927 (D.C. 2008); *Lively v. Flexible Packaging Ass’n*, 830 A.2d 874 (D.C. 2003) (*en banc*).

MWELA’s member attorneys frequently represent employees in whistleblower and other retaliation cases. Therefore, MWELA has expertise and experience with employment law that likely would be useful to the Court in resolving this case.

And because the outcome will affect the representation of employees, MWELA members have an interest in the issue’s resolution. Jury instructions in D.C. Whistleblower Protection Act (DC WPA) claims have great practical importance to the D.C. government, its employees, and the public interest. Further, the Court’s resolution of the issues presented will likely influence similar anti-retaliation laws throughout the country.

## **B. The Government Accountability Project**

The Government Accountability Project (“GAP”) is a non-partisan, non-profit public interest law firm specializing in legal advocacy for “whistleblowers” - government and corporate employees who use free speech rights to challenge abuses of power that betray the public interest. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or specific dangers to public health and safety, or other institutional misconduct undermining the public interest.

GAP’s efforts are based on the belief that a professional and dedicated civil service is essential to an effective democracy. As the link between the government and the public it serves civil servants are the foundation of a responsible, law-abiding political and corporate system. However, when whistleblowers encounter retaliation or removal for speaking truth to power, that link is severed. It is GAP’s firm belief that, in order to protect both the independence of the civil service and the responsiveness of federal institutions to the citizenry, dedicated members of the federal civil service must not be forced to choose between their jobs and their integrity.

GAP has substantial expertise on protecting government employees’ rights, having assisted more than 5,000 whistleblowers since 1979. GAP attorneys have testified regularly before Congress on the effectiveness of existing statutory protections, filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers, and led legislative campaigns for a broad range of whistleblower protection laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989), the subsequent 1994 amendments, and the DC Whistleblower Protection Act. In addition to their

efforts in connection with these milestone statutes, GAP’s staff attorneys have testified before Congress numerous times concerning the requisites to make statutory retaliation protections effective, as well as the judicial decisions that stand in the way of their effectiveness.

## **II. Argument**

The jury instructions applied to the DC WPA claim in this matter constitute reversible error. First, the trial court erred when it instructed the jury to resolve the employee’s claim by performing a *McDonnell-Douglas* burden-shifting analysis. Second, the trial court erred by requiring the jury to decide whether the plaintiff showed that the employer’s alleged business reasons were pretext. Third, the trial court erred by instructing the jury to weigh the employer’s evidence of its “business judgment” under the “preponderance of the evidence” standard rather than the higher, “clear and convincing” evidence standard. Fourth, the trial court erred when it failed to instruct the jury to weigh the Appellant’s evidence when considering the employer’s same-decision defense. These erroneous instructions constitute harmful error because they state the law inaccurately and set before the jury a confusing and contradictory task.

### **A. Standard of Review**

The fundamental question in reviewing jury instructions is whether the court’s charge, considered as a whole, fairly and accurately states the applicable law. *Campbell-Crane & Assoc. v. Stamenkovic*, 44 A.3d 924, 934-35 (D.C. 2012) (citing *East Capitol View Cnty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1039 (D.C. 2008)). If confusing, contradictory, or incomplete jury instructions may have affected the verdict, reversal is warranted. *Id.* (citing *Ray v. American Nat’l Red Cross*, 696 A.2d 399, 405 (D.C. 1997)). In many cases a fundamentally-flawed jury instruction on a central claim in the case will constitute prejudicial error. *Id.* (citation omitted).

## **B. The Burden-Shifting Instruction was Reversible Error**

The trial court committed reversible error when it instructed the jury to apply the *McDonnell-Douglas* burden-shifting analysis to the DC WPA claim. First, because the *McDonnell-Douglas* analysis is incompatible with the DC WPA’s plain meaning, applying it to a DC WPA claim confronts the jury with a confusing and contradictory task. Second, a consensus of courts has held that the “contributing factor” standard is distinct from the *McDonnell-Douglas* analysis, resulting in the routine reversal of decisions applying the analysis to whistleblower claims. Accordingly, the court’s charge on a central claim was fundamentally flawed.

### **1. The Court’s Instruction Gave the Jury a Confusing, Contradictory Task**

The trial court erred by instructing the jury to undertake the confusing and contradictory task of applying the *McDonnell-Douglas* analysis to the DC WPA claim. It was impossible for the jury in this matter to conclude the Appellant had established the third step of the *McDonnell-Douglas* analysis. And yet, the trial court instructed the jury to consider whether the Appellant made her final showing, as if it were an actual question.

#### **a. The DC WPA Uses a Two-Part Burden Shifting Analysis**

The DC WPA explicitly adopts a two-part burden-shifting analysis that is distinct from the three-part *McDonnell-Douglas* analysis applicable to Title VII claims. The DC WPA states, in relevant part:

[O]nce it has been demonstrated by a preponderance of the evidence that an activity proscribed by [the statute] was a contributing factor in the alleged prohibited personnel action against an employee, the burden of proof shall be on the defendant to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by this section.

DC Code § 1-615.54(b) (emphasis added).

The DC WPA, therefore, prescribes a two-step analysis with different burdens of proof for each.

**b. *McDonnell-Douglas* Uses a Three-Part Burden Shifting Analysis**

Under the three-part *McDonnell-Douglas* analysis, first an employee must establish a *prima facie* case. *Jones v. Bernanke*, 557 F.3d 670, 677, 384 U.S. App. D.C. 443, 450 (D.C. Cir. 2009) (citing *Wiley v. Glassman*, 511 F.3d 151, 155, 379 U.S. App. D.C. 122, 126 (D.C. Cir. 2007)). Second, the employer must offer a legitimate reason for its actions, but it need only produce the reason; the employer never bears the burden of persuasion. *E.g., Texas Dep’t of Cnty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981). At that point, the analysis focuses on the ultimate question: has the employee proven by a “preponderance of the evidence” that the adverse action in question was because of her membership in a protected class? *See, e.g., United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714–16 (1983). In making this final showing, the employee can demonstrate that the employer’s offered legitimate reason is pretext for discrimination, which constitutes the third phase of the traditional *McDonnell-Douglas* burden-shifting analysis. *E.g., Burdine*, 450 U.S. at 255.

**c. The *McDonnell-Douglas* Analysis is Incompatible With the DC WPA**

Applying the *McDonnell-Douglas* analysis alongside the DC WPA’s standards creates a confusing and contradictory task for the jury. In the second phase of the *McDonnell-Douglas* analysis the employer need only argue a legitimate, non-discriminatory reason for its action. In contrast, the DC WPA’s statutory text explicitly mandates that the employer must prove its explanation by “clear and convincing” evidence, a much higher standard than the “preponderance of the evidence.” DC Code § 1-615.54(b). Because of this difference, the standards are fundamentally incompatible.

Consistent with the DC WPA, the trial court first instructed the jury to determine whether the Appellant had established that her protected activity was a “contributing factor” in the adverse action. The trial court then instructed the jury appropriately that it should determine whether the employer had proven its legitimate, non-discriminatory reason by “clear and convincing” evidence.

But rather than stopping there, the trial court went on to instruct the jury:

[T]he burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the employer’s legitimate, non-discriminatory reason was merely a pretext, a plaintiff must prove that a (sic) employer’s explanation is not believable by showing that the employer’s suggested reason is not true, or by showing that the employer’s suggested reason, if even true, did not actually motivate the employer’s decision.

Tr. Transcript at 979-80 ¶¶ 20-3.

This gave the jury a confusing and contradictory task. Before the jury ever reached this third step, it must have already found that the employer had proved its legitimate, non-discriminatory reason by “clear and convincing” evidence. The “clear and convincing” standard is a much higher burden than the “preponderance of the evidence” standard. *See, e.g., Henson v. D.C. Dep’t of Consumer & Regulatory Affairs*, 560 A.2d 543, 545 (D.C. 1989). And so, the jury had to find that the employer produced evidence that “instantly tipped the evidentiary scales” to show it would have taken the same action absent the Appellant’s protected conduct. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

Because the jury found that the employer had met its “clear and convincing” burden, it could not possibly then find that the Appellant made her final showing by a “preponderance of the evidence.” A “preponderance of the evidence” means only such evidence that, when weighed against the evidence opposed to it, indicates that the proposition in question is more likely than not true. *E.g., Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) *aff’d*, 920

F.2d 967, 287 U.S.App.D.C. 173 (D.C. Cir. 1990). In other words, a party need only achieve a “51 percent tilt in the balance of the scales.” *Williams v. First Cash, Inc.*, No. 98 CA 3567, 2000 WL 1205827, \*1 (D.C. Super. July 26, 2000). Once an employer immediately and clearly tips the evidentiary scales in its favor, the employee can no longer possibly achieve a 51-percent tilt in the balance of the scales. Yet this was the task that the trial court gave the jury here. Such a contradictory and confusing task, not rooted in the language of the statute, warrants reversal in this case. See *Campbell-Crane*, 44 A.3d at 934-35.

## **2. The DC WPA Requires a Distinct Analysis**

The trial court misstated the law when it instructed the jury to apply the *McDonnell-Douglas* analysis. Courts and tribunals have reached the consensus that statutes applying the “contributing factor” standard require an analysis distinct from the *McDonnell-Douglas* analysis. Because of this, a consensus of courts have further concluded that applying the *McDonnell-Douglas* analysis to whistleblower retaliation statutes constitutes reversible error. The DC WPA applies the “contributing factor” standard of causation. DC Code § 1-615.54(b). Therefore the instruction misstated the law.

Federal whistleblower statutes offer “contributing factor” burden-shifting requirements analogous to the DC WPA’s. As discussed above, the DC WPA’s burden-shifting standard requires a whistleblower to establish by a “preponderance of the evidence” that her protected disclosure was a “contributing factor” in a personnel action; the government must then prove by “clear and convincing” evidence that it would have taken the same action for independent, legitimate reasons absent the protected disclosures. DC Code § 1-615.54(b). The following federal whistleblower provisions use substantially identical statutory language: the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121; the

Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A(b)(2)(C); the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109; the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105; and the Energy Reorganization Act (ERA), 42 U.S.C. § 5851.

Tribunals interpreting these provisions consistently have found that whistleblower statutes with language comparable to the DC WPA use an “independent burden-shifting standard,” distinct from the *McDonnell-Douglas* pattern applicable to Title VII claims. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) (AIR 21); *see also Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030 (ARB March 20, 2015) (FRSA);<sup>1</sup> *Fordham v. Fannie Mae*, ARB Case No. 12-061, ALJ Case No. 2010-SOX-051, 2014 WL 5511070 (ARB Oct. 9, 2014) (SOX). In analyzing these “contributing factor” burden-shifting statutes, these tribunals have “sought to definitively put to rest reliance upon *McDonnell Douglas* and its progeny.” *Fordham*, 2014 WL 5511070, \*17.

In particular, the text of the DC WPA outlining the scope of a violation runs particularly close to the federal WPA. *Compare* DC Code §§ 1-615.52(a)(6), 1-615.53(a), *with* 5 U.S.C. § 2302(b)(8). The federal and DC whistleblower statutes also share the same standard for causation. *Compare* DC Code § 1-615.54(b), *with* 5 U.S.C. § 1221(e). As such, this Court has often looked to the federal WPA for guidance in construing the DC WPA. *See, e.g., Freeman v. D.C.*, 60 A.3d 1131, 1141 (D.C. 2012). Like other whistleblower retaliation statutes, the federal WPA applies the distinct “contributing factor” burden-shifting analysis.

The Federal Circuit has interpreted the virtually identical whistleblower protection provisions of the federal WPA, including the parties’ respective burdens of proof under the “contributing factor” burden-shifting analysis. *E.g., Marano v. Dep’t of Justice*, 2 F.3d 1137,

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<sup>1</sup> Attached as Appendix 1.

1141 (Fed. Cir. 1993). The *Marano* opinion examined the WPA’s legislative history, which emphasizes an intentional reduction in the whistleblower’s burden of proof as compared to *McDonnell-Douglas* framework, as well as the heightened burden imposed upon the employer for proving any affirmative defense it might have. *Id.* at 1140 (observing that amendments to WPA sent “a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing”); *see also Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013) (observing that “contributing factor” burden-shifting is “much easier for a plaintiff to satisfy than [Title VII’s] *McDonnell Douglas* standard.”); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (“For employers, this is a tough standard, and not by accident.”).

Thus, it is error to apply the Title VII standard to cases arising under statutes that use the “contributing factor” burden-shifting standard. The Department of Labor’s Administrative Review Board, which has administrative jurisdiction over many of the “contributing factor” federal whistleblower protection statutes, uniformly has acknowledged that it is reversible error to apply the *McDonnell-Douglas* analysis to claims arising under those laws. *See, e.g., Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020, 2014 WL 2536888, \*5 (ARB May 13, 2014) (holding “contributing factor” analysis, not *McDonnell-Douglas*, was appropriate standard for STAA retaliation claims); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, 2013 WL 2450037, \*5 (ARB May 31, 2013) (same, for FRSA retaliation claims); *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, 2012 WL 1102507, \*6 (ARB Mar. 28, 2012) (same, for SOX retaliation claims); *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, 2012 WL 423490, \*4-5 (ARB Jan. 31, 2012); (same, for AIR 21 claims); *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-

040, ALJ No. 2011-ERA-006, 2011 WL 6114496, \*3 (ARB Nov. 17, 2011) (same, for ERA retaliation claims).

### C. The Trial Court Erred by Requiring a Showing of Pretext

Similarly, requiring a plaintiff to show pretext under these statutes is clear, reversible error. *See Blackie v. Pierce Transp., Inc.*, ARB No. ARB No. 13-065, ALJ No. 2011-STA-055, 2014 WL 3385883, \*6 (ARB June 17, 2014) (AIR 21 complainant “need not demonstrate the existence of a retaliatory motive . . . [or] that the respondent’s reason for the unfavorable personnel action was pretext” (citations omitted); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, 2012 WL 694502, \*3 (ARB Feb. 29, 2012) (“The ALJ concluded that DeFrancesco failed to show that his protected activity was a “contributing factor” because he did not prove that his employer was motivated by retaliatory animus. This is legal error.”); *Zinn*, 2012 WL 1143309, \*7 (ARB Mar. 28, 2012) (“The ALJ also erred to the extent he required that Zinn show ‘pretext’ to refute [respondent’s] showing of nondiscriminatory reasons for the actions taken against her.”); *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, 2012 WL 759335, \*5 (ARB Feb. 29, 2012) (“Under the 2007 amendment to the STAA burden of proof, an employee is not required to prove that his employer’s reasons for an adverse action were pretext, *e.g.*, that the employer had an alternate, albeit improper, motive for the adverse action, to prevail on a complaint.”); *Klopfenstein v. PCC Flow Tech., Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, 2006 WL 3246904, \*13 (ARB May 31, 2006) (“a complainant is not required to prove pretext”) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

### D. The “Business Judgment” Instruction was Reversible Error

The trial court further misstated the law concerning the employee’s “contributing factor” burden when it issued what it referred to as a “business judgment” instruction. The trial court

told the jury it should consider the government’s evidence of its alleged legitimate reason when it should not have.

As discussed above, the DC WPA applies different burdens of persuasion to the employee’s and employer’s showings. *See* DC Code § 1-615.54(b). A whistleblower’s initial showing is weighed under the “preponderance of the evidence” standard. *See id.* This means necessarily that the employer’s evidence of a legitimate non-retaliatory reason for the employer’s action – which must be proven by the far more burdensome “clear and convincing” standard – should not be weighed against a whistleblower’s initial showing. *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030 (ARB March 20, 2015) (FRSA); *Fordham v. Fannie Mae*, ARB Case No. 12-061, ALJ Case No. 2010-SOX-051, 2014 WL 5511070 (ARB Oct. 9, 2014) (SOX).

As discussed above, the “clear and convincing” burden is much higher than the “preponderance of the evidence” burden. As the decision in *Powers* explains, an employer could avoid its higher standard if it could argue evidence of its legitimate, non-retaliatory reason were considered in evaluating an employee’s “contributing factor” showing. *See Powers*, ARB Case No. 13-034, \*20-24. If an employer can argue its defense during the employee’s initial showing, it can prevail by tipping the evidentiary scales 51 percent in its favor (thereby preventing the employee’s preponderance showing). However, for an employer to avoid liability on such a basis, the DC WPA explicitly requires it to immediately tip the evidentiary scales clearly in its favor. Because the statute mandates distinct evidentiary burdens, an employer’s evidence of its “business judgment” must be confined to an evaluation of the employer’s affirmative defense. *See id.*

Therefore, the court misstated the law when it gave a “business judgment” instruction as part of its instruction on Appellant’s burden to establish causation. Trial Tr., 976-77 ¶¶ 20-6. The instruction stated, “An employer has a right to make subjective personnel decision (sic) for any reason that is not unlawful.” *Id.* at 977 ¶¶ 1-3. The trial court added, without limitation, “In determining the evidence you should consider all the evidence bearing upon that fact regardless of who produced it. A party is entitled to benefit from all evidence that favors him or her or [sic] whether that party produced it or whether it was produced by an adversary.” Trial Tr., 973, ¶¶ 18-20. In focusing the jury on the employer’s alleged lawful reason for the personnel action, and instructing the jury to weigh the employer’s reasons by the lower “preponderance of the evidence” standard, contrary to the language of the statute, the trial court issued an inaccurate statement of the law and confusing instruction.

**E. The Jury Was Not Instructed to Weigh the Appellants Evidence When Considering the Employer’s Same Decision Defense**

The trial court’s instructions were harmful because they likely caused the jury to ignore the employee’s evidence when evaluating the employer’s same-decision defense. *See Whitmore v. U.S. Dep’t of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). In *Whitmore*, the court construed the federal WPA and held that it was error for the adjudicator “to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately.” *Id.* at 1368. The court explained that:

[w]hether evidence is sufficiently clear and convincing to carry this burden of proof cannot be evaluated by looking only at the evidence that supports the conclusion reached. Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from the conclusion.

*Id.* (citations omitted).

Yet, in the case at issue here, when it came to the government’s “clear and convincing” burden, the trial court only instructed the jury to “consider the strength of the employer’s evidence in support.” Transcript at 978-79 ¶¶ 23-3. The instruction incorrectly required the jury to delay its consideration of evidence offered to rebut the government’s alleged legitimate reason for taking a personnel action. That evidence should be considered at the second-stage of the analysis, when the government bears the burden of proving by “clear and convincing” evidence it would have made the same decision absent the protected disclosure. Because the government is the party bearing a much higher burden, a whistleblower’s evidence would have much more impact at this stage. Further, the government gains an unintended advantage in meeting its intentionally-high burden when only its evidence is considered, and not the whistleblower’s evidence. *See Stone & Webster*, 115 F.3d at 1572 (“[f]or employers, this is a tough standard, and not by accident.”)

On the whole, the jury charge regarding the DC WPA claim was fundamentally flawed and likely affected the outcome of the case.

### **III. Proper DC WPA Jury Instructions**

Rather, the standard for causation should simply track the statutory language. *See Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). In *Whitmore*, the court clarified that under the WPA’s standards, an employee must show that her protected disclosure was a “contributing factor” in a personnel decision. *Id.* But the government will still prevail if it can establish by “clear and convincing” evidence that it would have made the same decision for independent, legitimate reasons absent the protected disclosure. Accordingly, this Court should hold that the standard described in *Whitmore* applies to claims under the DC WPA and reverse the verdict in this matter.

Model jury instructions that appropriately track the statutory language have been attached as Appendix 2.

#### **IV. Conclusion**

The trial court's instructions to the jury constitute reversible error because they misstate the law and confront the jury with a confusing and contradictory task. The *McDonnell-Douglas* analysis is inappropriate for DC WPA claims because jury instructions for such claims should simply track the statutory language.

Respectfully submitted:



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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing Brief of Amici Curiae was served by both electronic mail and regular mail on the following persons on this 4th day of June 2015:

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## **APPENDIX 1**



**In the Matter of:**

**ROBERT POWERS,**

**ARB CASE NO. 13-034**

**COMPLAINANT,**

**ALJ CASE NO. 2010-FRS-030**

**v.**

**DATE: MAR 20 2015**

**UNION PACIFIC RAILROAD COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

James Ferguson, Esq. (argued); *Law Office of H. Chris Christy*, North Little Rock, Arkansas; Stephen M. Kohn, Esq. (argued); *Kohn, Kohn & Colapitino*; Washington, District of Columbia

*For the Respondents:*

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**James E. Gauch, Esq.; Jones Day, Washington, District of Columbia; Steven P. Lehotsky, Esq. and Warren Postman, Esq.; U.S. Chamber Litigation Center, Washington, District of Columbia; Prasad Sharma, Esq. and Richard Pianka, Esq.; ATA Litigation Center, Arlington, Virginia**

**Before:** Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. *Chief Judge Igasaki and Judge Corchado dissent.* A summary of the dissent is attached, the full dissenting opinion to follow.

### **DECISION AND ORDER OF REMAND**

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and implemented by 29 C.F.R. Part 1982 (2014), and 29 C.F.R. Part 18, Subpart A (2014). Robert Powers filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 5, 2008, alleging that his employer, Union Pacific Railroad Company (Union Pacific or Company), violated the FRSA by terminating his employment because he reported a work-related injury. After an investigation, OSHA issued a letter on July 22, 2010, finding reasonable cause for a violation. OSHA ordered relief that included reinstatement and backpay.

Union Pacific requested a hearing with the Office of Administrative Law Judges (OALJ). On March 1, 2011, Union Pacific moved the Administrative Law Judge (ALJ) for summary decision arguing that Powers abandoned his FRSA administrative complaint when he grieved the termination under a collective bargaining agreement. On May 17, 2011, the ALJ entered an Order Denying Summary Decision. The ALJ held an evidentiary hearing on the FRSA complaint on July 20-21, 2011. On January 15, 2013, the ALJ issued a Decision and Order Denying Claim and dismissing the complaint (D. & O.).

Powers petitioned the Administrative Review Board (ARB) for review. Following briefing on the petition, the ARB entered an Order setting the case for review en banc, and ordering additional briefing on the effect of the “contributory factor” analysis addressed in *Fordham [v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014)], to the extent that the parties consider it relevant to the resolution of *Powers*.<sup>3</sup> Order Setting En Banc Review at 2 (ARB Oct. 17, 2014). After supplemental briefing by the parties and amici, the ARB held oral argument on January 14, 2014.

## BACKGROUND

### A. Facts

The facts that led to the complaint in this case are set out fully in the ALJ’s decision, and briefly set out below. See D. & O. at 2 (Findings of Fact).

#### 1. *Circumstances involving Powers’ injury and treatment*

Powers began working at Union Pacific in December 1996. On Friday May 18, 2007, he was operating a rail saw, made a cut, and had to loosen a tightening arm. After striking the tightening arm, he hurt his hand. Powers reported the injury to his supervisor, Leroy Sherrah. Sherrah suggested that Powers take care of his hand over the weekend, and that they would fill out an injury report if it still hurt on Monday. D. & O. at 2-3.

On Monday May 21, 2007, Powers reported to Sherrah that he nursed his hand throughout the weekend, but still felt pain. Powers filled out an accident report, and Sherrah told him to date the form for that day, Monday, May 21, 2007. Sherrah also told Powers to indicate on the form that the incident occurred at a milepost in the Eugene Yard, rather than in Springfield, Oregon, where the injury had actually occurred. Powers complied with Sherrah’s requests. Sherrah drove Powers to a hospital for treatment and an x-ray on his hand. The next day, orthopedic specialist Dr. Thomas Wuest examined Powers. Powers reported tenderness and discomfort in part of his left hand, and that he could not extend his thumb. Powers’ x-ray was negative for fracture or dislocation. Dr. Wuest diagnosed a severe contusion (bruise) and tenosynovitis in the right thumb, and immobilized the hand with a cast. Dr. Wuest wrote in his report: “Work restrictions are to avoid any lifting over five to ten pounds; keep the cast clean and dry; no heavy pulling, tugging, lifting, and etcetera.” *Id.* at 3-4 (citing Employer’s Exhibit (E. Ex.) K at 293. Dr. Wuest signed a “Medical Status Report” the same day putting Powers on lifting restrictions of five pounds. *Id.* at 4. Union Pacific accommodated Powers’ medical restrictions and put him on light duty that required him to prepare a truck in the morning, drive during the day, and occasionally lift objects under ten pounds. Further monthly medical examinations and work restrictions prescribed by Dr. Wuest followed. *Id.* at 5

Dr. Wuest again examined Powers on June 5, 2007. Powers reported some pain when extending his thumb. Powers’ x-rays were normal, and showed no signs of arthritis or injury. Dr. Wuest added a diagnosis of mild posttraumatic intersection syndrome; he removed the cast and advised Powers to wear a splint as necessary and released him for driving duties. Powers

continued his light duty assignments. On July 5, 2007, Powers complained to Dr. Wuest of residual inflammation at the wrist and mild swelling. Dr. Wuest prescribed an anti-inflammatory drug, and advised the same work restrictions and use of a splint; Dr. Wuest advised that Powers could continue to drive at work. *Id.*

Dr. Wuest examined Powers on July 19, 2007, and reported that the anti-inflammatory was helpful. Dr. Wuest renewed the prescription, provided Powers a new splint, ordered physical and occupational therapy, and imposed lift restrictions of ten to fifteen pounds. Powers continued his light duty driving at work. On August 23, 2007, Powers indicated to Dr. Wuest that he was still suffering some pain. Powers informed Dr. Wuest that he was undergoing physical and occupational therapy, and that the therapist recommended a steroid injection. Dr. Wuest changed the diagnosis to "recalcitrant tendinitis" and administered a steroid injection to Powers. On September 20, 2007, Dr. Wuest prepared a "Medical Status Report." The Report stated that Powers could continue to work with no pushing, pulling, or lifting over ten to fifteen pounds while wearing a splint as needed. *Id.* at 5-6.

On September 26, 2007, Dr. Wuest examined Powers and stated that he had "dramatically improved with [the steroid injection]." *Id.* at 6, quoting E. Ex. L at 17. Dr. Wuest observed that Powers had some tendinitis, "a little pain" over one joint of the thumb, and "every now and then" the thumb locked up on extension. *Id.* Dr. Wuest imposed a fifty pound lift restriction and "[l]imited repetitive movements or gripping with the left wrist and hand to occasionally or as tolerated." *Id.* Dr. Wuest advised that Powers "[a]void vibratory type or impact tools, and wear the splinter brace when working." *Id.* Dr. Wuest prepared a "Work Status Report" with the same restrictions, and requested a second orthopedic opinion. *Id.* (citing E. Ex. L at 18).

In October 2007, Powers was "force recalled" to a higher paying system welding job. The manager for the job accommodated Powers' medical restrictions, but after two weeks informed Powers that he could no longer accommodate the restrictions. *Id.* at 7. After his dismissal from the welding job, Powers wanted to return to the district driving job, but believed that in doing so he would lose his system welding seniority. Instead, Powers took an unpaid medical leave of absence and consulted with Company Claim Specialist William Loomis to ensure that he would continue to receive his proper benefits. Powers filed for disability benefits with the Company's private disability insurer and the Railroad Retirement Board. *Id.* at 7-8.

On November 15, 2007, Dr. Jason Tavakolian examined Powers for a second orthopedic opinion. Powers reported to Dr. Tavakolian that he had improved, but suffered significant pain if he hyperextended his thumb, which he said happened a few times a month. *Id.* at 8, citing E. Ex. L. at 19-20. Dr. Tavakolian concluded that there were no remaining signs of tenosynovitis following the steroid injection treatment and wrote in his Medical Report the following:

I cannot obtain a more accurate anatomic diagnosis [beyond Dr. Wuest's diagnosis of "thumb pain"]. I suspect that many of Mr. Powers' symptoms will subside with time. I have no further treatment recommendations at this point other than continuing symptomatic treatment.

E. Ex. L. at 20.

On November 20, 2007, Dr. Wuest completed a Return to Work Status Report on Powers based on the September 26, 2007, examination, and kept Powers on the same work restrictions. D. & O. at 9 (citing E. Ex. L. at 22). On November 28, 2007, Dr. Wuest examined Powers; Powers reported wrist pain and some inflammation. Dr. Wuest informed Powers that the case was ready for closure and that Powers required a “functional capacity evaluation” and may require “some permanent partial restriction to avoid repetitive use of the wrist and/or hand.” *Id.* (citing E. Ex. L at 23).

On November 30, 2007, occupational medicine specialist Dr. Richard Abraham performed a functional capacity evaluation, and ordered an “MRI . . . of his left wrist extending to his proximal thumb to rule out pathology.” *Id.* (citing E. Ex. M at 4). Dr. Abraham adopted the recommendations set out in Dr. Wuest’s Return to Work Status Report advising that Powers refrain from lifting over fifty pounds, and avoid repetitive wrist motion. *Id.* Dr. Abraham examined Powers on December 18, 2007, and reviewed the “MRI report of his left wrist.” E. Ex. M at 10. Dr. Abraham determined the MRI findings were compatible with “mild” tenosynovitis but no tendon tear. D. & O. at 9 (citing E. Ex. M. at 10). The medical report indicated that Powers’ pain was “worse with movement.” E. Ex. M at 10.

After examining Powers on May 13, 2008, Dr. Abraham prepared an Occupational Health Injury Treatment report limiting Powers’ lifting, pushing or pulling to fifty pounds or less. E. Ex. M at 30-32; E. Ex. O. The Injury Treatment report indicated no further limitation to Powers’ work capabilities. Dr. Abraham’s separate Chart Notes dated May 13, 2008, states: “RTW form completed releasing patient to work avoiding repetitive wrist motion. No lifting over 50 pounds.” E. Ex. at 31; E. Ex. O at 2; *see also* D. & O. at 10 n.16. The Notes state: “[Powers] seems to be approaching the point of maximum improvement and medically stationary status.” E. Ex. at 31; E. Ex. O at 2. The Chart Notes state that Dr. Abraham referred Powers to Dr. Wuest “for consideration of another cortisone injection to see if that alleviates his symptoms completely.” *Id.*; *see also* D. & O. at 10 (citing E. Ex. L at 25).

On May 27, 2008, Dr. Abraham examined Powers. Powers reported that the steroid injection Dr. Wuest administered had reduced his pain. D. & O. at 12-13 (citing E. Ex. M at 33-34). Dr. Abraham advised on the Chart Notes that Powers continue on the same fifty pound lift restrictions and limited repetitive movement; Dr. Abraham failed to record the restriction on repetitive movement in the Status Report. On July 8, 2008, Dr. Abraham examined Powers, and Powers reported “minor pain” in the affected area. Dr. Abraham removed the repetitive motion restriction and determined that Powers was “OK for full duty using left thumb brace.” E. Ex. M at 36-37; E. Ex. AA; *see also* D. & O. at 14.

## 2. Surveillance Video of Powers taken in March 2008

Around May 8, 2008, Company Claims Manager Loomis hired Investigator Jonathon Iguchi to secretly record Powers’ activity at his home. Investigator Iguchi recorded Powers’ activity on Saturday May 15, Sunday May 16, and Tuesday May 18, 2008. The parties summarized his three days of activity by the following stipulation:

[Powers] was observed and recorded engaging in various activities, including wrapping a string line, repeatedly lifting 6x6 wood posts, using a shovel, pushing a wheelbarrow, using a hammer, repeatedly lifting a metal trailer ramp, operating a large power drill, pushing and pulling a soil compactor, swinging a sledge hammer and lifting boxes of ammunition.

ALJ Exhibit (ALJ Ex.) 1 at 4 (*see D. & O. at 2, n.1; see also D. & O. at 11-12; Complainant's Exhibit (C. Ex.) 7 (surveillance report)*). On May 28, 2008, the Company's Director of Track Maintenance informed Powers that his fifty-pound lift restriction could not be accommodated. D. & O. at 13. On May 29, Company Manager Michael Gilliam telephoned Powers to determine the level of his work capability. *See Id.; see also C. Ex. 4.* On July 17, 2008, the Company informed Powers it could not accommodate the medical restriction that required use of a thumb brace when needed. E. Ex. V (letter of July 17, 2008).

On July 15, 2008, Claims Manager Loomis gave Company Manager Gilliam the May 2008 surveillance video taken of Powers. D. & O. at 15. After viewing the video, Gilliam determined that Powers had been dishonest about his home activities and failed to adhere to his work restrictions. *Id.*

### ***3. Powers' termination from Union Pacific***

On July 24, the Company issued Powers a Notice of Investigation informing him that the Company would conduct an in-house investigation and hearing to determine whether he violated the dishonesty provision of Rule 1.6 of the General Code of Operating Rules from May 15 to May 18, 2008, by "allegedly fail[ing] to stay within [his] medical restrictions." E. Ex. Y. Hearing Officer Gaylord Poff, who worked for the Company, oversaw a hearing on the allegations on July 31, 2008. Following the hearing, the case was transferred to Reviewing Officer William Meriwether for review of the investigatory record and a determination whether to impose discipline. D. & O. at 17. On September 3, 2008, the Company issued a Notification of Discipline Assessed, notifying Powers that his actions violated Company Rule 1.6, assessing him a Level 5 discipline and terminating his employment. E. Ex. BB; *see also D. & O. at 17-18.*

### ***4. Powers' Union Grievance to the Public Law Board***

The Union grieved Powers' termination on October 22, 2008. D. & O. at 18. Following further proceedings, on August 25, 2009, Public Law Board No. 7258 of the National Mediation Board ruled in Powers' favor and ordered his reinstatement and other relief. *Id.* (citing E. Ex. PP).

The Public Law Board determined that the Company failed to prove that Powers engaged in conduct contrary to his medical restriction in violation of Company Rule 1.6 (dishonesty). E. Ex. PP at 4. The Public Law Board stated: "The first incident that Carrier finds fault with is Claimant wrapping a string onto a spool held with his left hand for a total of 27 repetitions during a twenty-second time period. We do not find this to be repetitive motion as intended by Claimant's work restrictions." *Id.* at 5. The Public Law Board further determined:

Moreover although Claimant was surreptitiously observed hammering and drilling with his right hand, there was no proof that those activities were not within his restrictions. Likewise, Claimant was observed pushing an empty wheel barrow, shoveling, swinging a sledge and guiding a vibrating compactor for a matter of a minute or two or even seconds on each occasion, but Carrier failed to show how that activity constitutes working outside of his medical restrictions. While the Carrier's witness surmised that the activities listed above violated Claimant's repetitive motion restriction, we find it absurd to consider activity lasting less than a minute to fall into the category of repetitive motion as intended by Claimant's physician. While Carrier may disagree with that conclusion, it failed to consult with Claimant's physician to prove that those activities were in violation of the restrictions as intended. The burden here was on the Carrier to prove Claimant's activities violated his work restrictions, a burden it failed to meet.

*Id.* at 5-6. In addition, the Board determined that "concerning load of ammunition boxes, the Carriers' contract investigator testified that he bought and subsequently weighed the Claimant's heaviest ammunition box and found it to weigh 49.4 pounds, less than Claimant's lifting restriction." *Id.* at 6. "Thus Carrier has failed to prove with probative evidence that Claimant exceeded his medical limitations during the gun show." *Id.* The Board ordered that Powers be reinstated to his former position, compensated for all wages and benefits lost since his removal, and that his personnel record be expunged. *Id.* at 1, 6.

#### ***B. ALJ Decision and Order Denying Claim***

On July 20 and 21, 2011, an evidentiary hearing was held before a Department of Labor Administrative Law Judge (ALJ) on Powers' FRSA whistleblower complaint. On January 15, 2013, the ALJ issued a Decision and Order Denying Claim.

The ALJ held that Powers engaged in protected activity when he reported a workplace injury in May 2007, and that Union Pacific discharged Powers on September 3, 2008. The ALJ held, however that "[w]here [Powers'] evidence falls short . . . is on the third element of the *prima facie* case: that the protected activity was a contributing factor in the discharge." D. & O. at 19. The ALJ observed that Powers offered no direct evidence of retaliation, and that the Company's "decision-makers each denied that [Powers'] reporting the May 2007 injury contributed to the discharge." *Id.* The ALJ stated: "I therefore turn to the circumstantial case." *Id.*

The ALJ determined that circumstantial evidence failed to satisfy Powers' burden of proving that protected activity contributed to the adverse action he suffered. D. & O. at 19-26. The ALJ, focusing on Company managers involved in Powers' disciplinary process (Meriwether, Taylor, Gilliam, Poff, and Loomis), determined that Powers' injury report neither personally disadvantaged these managers, nor did Powers' report give them a personal reason to retaliate against him. *Id.* at 21. The ALJ further found that "Loomis' motivation in giving Gilliam the

video is irrelevant . . . because Loomis played no role in the decision to terminate and only gave Gilliam accurate information.” *Id.* at 22.

The ALJ, however, “credit[ed] Gilliam’s testimony that he concluded [Powers] had been less than honest when the two talked on the telephone on May 29, 2008.” D. & O. at 23. The ALJ stated: “I do not suggest that [Powers] utterly misrepresented his activity level. . . . But he did say he would have to stay away from lifting or carrying joint bars because of pain in his thumb and wrist; that lifting or carrying a spoke driver might be too heavy and require a better grip than he had. . . . And of greatest significance to Gilliam, [Powers] said that he had been doing some gardening, but nothing major.” *Id.* The ALJ observed that unlike the “Public Law Board [which] asked whether [Powers] had in fact complied with his medical restrictions; the question I must decide is whether Gilliam recommended discipline, which Meriwether imposed, because he *believed* Complainant had been dishonest or whether he or Meriwether had some other motive, such as retaliation for Complainant’s reporting the injury.” *Id.* The ALJ determined that the activity showed on the video is “more extensive than [Powers] described when answering Gilliam’s questions.” *Id.* at 24. Based on the video, the ALJ determined that “Gilliam could . . . reasonably and fairly have concluded that [Powers] was exceeding his medical restrictions.” *Id.*; *see also id.* at 25 (ALJ stating: “I find no reason to doubt that an ordinary manager in Gilliam’s position . . . could well conclude that the person was engaged in repetitious movement of his wrist, especially given the other repetitive activities.”).

The ALJ further stated, as to Powers lifting the ammunition boxes: “My task is not to determine whether, in fact, [Powers] actually exceeded his restrictions. Rather it is to determine whether I find credible that the Company officials believed that he did and discharged him for that reason, as opposed to asserting as true a rationale they knew to be false because they wished to retaliate against him.” D. & O. at 25. The ALJ concluded that, “even assuming that Company officials took the actual weight of the ammunition boxes into account, they reached their conclusions fairly, honestly, and reasonably. . . . [The video] shows [Powers] doing more than ‘nothing major’ and show him engaged in work requiring what a person could reasonably call repetitive wrist motion.” *Id.*

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the FRSA. 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). The ARB reviews the ALJ’s factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk Southern Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

## DISCUSSION

### *A. The Federal Rail Safety Act's Statutory and Regulatory Framework*

The Federal Rail Safety Act was enacted to “promote safety in every area of railroad operations.” 49 U.S.C.A. § 20101. The statute was amended in 2007 to expand anti-retaliation measures and provide enforcement of those measures within the Department of Labor. 49 U.S.C.A. § 20109. “Prior to the amendment of FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act (45 U.S.C. 151 *et seq.*), which included whistleblower proceedings before the National Railroad Adjustment Board, as well as other dispute resolution procedures.” 75 Fed. Reg. 53,522-53,523 (Aug. 31, 2010). The 2007 statutory amendment “change[d] the procedures for resolution of such complaints and transfer[ed] the authority to implement the whistleblower provisions for railroad carrier employees to the Secretary of Labor.” *Id.*

Under the FRSA, a railroad carrier “may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act” involving one of various statutorily protected activities. 49 U.S.C.A. § 20109(a); 29 C.F.R. § 1982.102(b). The protected activities include “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.” 49 U.S.C.A. § 20109(a)(4); *see also* 29 C.F.R. § 1982.102(b)(1)(iv). The FRSA further provides: “A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for . . . following orders or a treatment plan of a treating physician.” 49 U.S.C.A. § 20109(c). For purposes of subsection (c), “[t]he term ‘discipline’ means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.” *Id.* “An employee who alleges discharge, discipline, or other discrimination in violation of [section 20109](a) or (c) . . . may seek relief . . . with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.” 49 U.S.C.A. § 20109(d)(1); 29 C.F.R. § 1982.103(a).

The FRSA incorporates by reference the legal burden of proof standards governing the employee protection provision of the Wendell H. Ford Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C.A. § 20901(d)(2), referencing 49 U.S.C.A. 42121(b)(2)(B). Under that provision, “[t]he Secretary may determine that a violation . . . has occurred” where the “complainant demonstrates that any behavior” protected by the statute was a “contributing factor in the unfavorable personnel action alleged in the complaint.” 49 U.S.C.A. § 42121(b)(2)(B). The complainant’s showing must be “demonstrated by a “preponderance of the evidence.” 29 C.F.R. § 1982.109(a). Where the complainant meets his or her burden of proof by a preponderance of the evidence, “[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 29 C.F.R. § 1982.109(b).

### B. The FRSA Burden of Proof

As the Third Circuit noted in *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013), the FRSA incorporates AIR 21’s “two-part burden-shifting test.” In order to prevail under AIR-21, and thus under the FRSA, a complainant must prove, by a preponderance of evidence,<sup>1</sup> three specific elements: (1) that complainant engaged in a protected activity, as statutorily defined; (2) that he suffered an unfavorable personnel action; and (3) that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013).<sup>2</sup> Once the complainant makes that showing, “the burden shifts to the employer to demonstrate by ‘clear and convincing evidence’ that the employer would have taken the same unfavorable personnel action in the absence of [the complainant’s protected acts].” *Araujo*, 708 F.3d at 157; *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sept. 18, 2014). The Department promulgated regulations that adopt this burden shifting standard for FRSA complaints. See 29 C.F.R. § 1982.109(a) and (b) (“If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.”).

<sup>1</sup> In *Fordham v. Fannie Mae*, the majority took issue with the Eleventh Circuit’s deference in *Dysert v. U.S. Sec’y of Labor*, 105 F.3d 607 (11th Cir. 1997), to the Secretary of Labor’s interpretation of the statutory term “demonstrate” as requiring proof by a preponderance of the evidence of contributing factor causation. ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 27 n.60 (ARB Oct. 9, 2014). While there is merit to the *Fordham* majority’s concern about the Secretary’s interpretive analysis in *Dysert*, nevertheless case authority is clear that in the absence of express congressional imposition of proof requirements, the “preponderance of evidence” standard is considered the default burden of proof standard in civil and administrative proceedings, as well as the one contemplated by the APA, 5 U.S.C. § 556(d). *Jones for Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996) (citing *Steadman v. SEC*, 450 U.S. 91, 101 n.21 (1981) and *Director, Office of Workers’ Comp., Dep’t of Labor v. Greenwich Colleries*, 512 U.S. 267, 277 (1994)). See also *Sea Island Broad. Corp. v. F.C.C.*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. denied 449 U.S. 834 (1980); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 823 (D.C. Cir. 1977); 9 J. Wigmore, *Evidence* § 2498 (3d ed. 1940). Accord *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) (“Title VII’s silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the ‘[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases.’ That rule requires a plaintiff to prove his case ‘by a preponderance of the evidence,’ using ‘direct or circumstantial evidence.’”) (citations omitted).

<sup>2</sup> This test has at times been identified as one requiring proof by the complainant of four elements, i.e., that (1) the complainant engaged in protected activity; (2) the employer knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. See, e.g., *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013); *Harp v. Charter Commc’ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008); *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 18 (ARB Oct. 9, 2014).

A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Araujo*, 708 F.3d at 158; *Hutton*, ARB No. 11-091, slip op. at 8; *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). The “contributing factor” standard was employed to remove any requirement on a whistleblower to prove that protected activity was a “‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.” *Araujo*, 708 F.3d at 158 (quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Consequently, “[a] complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected’ activity.” *Hutton*, ARB No. 11-091, slip op. at 8 (quoting *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007)).

The contributing factor element of a complaint may be proven “by direct evidence or indirectly by circumstantial evidence.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012). It is well established, in the context of various whistleblower statutes, including the FRSA, that in proving contributing factor “an employee need not provide evidence of motive or animus” by the employer. *Araujo*, 508 F.3d at 158 (internal quotations omitted). See also *Peterson v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014); *Hutton*, ARB No. 11-091, slip op. at 7; *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 13-14 (ARB Mar. 15, 2013) (reissued Mar. 20, 2013); *DeFrancesco*, ARB No. 10-114, slip op. at 6. “Regardless of the official’s motives, personnel actions against employees should . . . not be based on protected activities such as whistleblowing.” *Marano*, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). Quite simply, “any weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.” *Marano*, 2 F.3d at 1140.

The court of appeals’ opinion in *Araujo* is instructive in understanding the context for evaluating contributing factor in FRSA cases involving injury reporting. 508 F.3d 152. *Araujo* involved a complaint filed by a railroad employee alleging that his injury report contributed to the discipline he suffered in violation of 49 U.S.C.A. § 20109. The court of appeals, consistent with ARB precedent, expressly rejected Title VII’s evidentiary burden procedure in FRSA cases. The court of appeals observed that under Title VII, where “the employer articulate[s] a legitimate, nondiscriminatory reason for its employment action . . . the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer’s explanation is pretextual.” *Araujo*, 708 F.3d at 158, n.5. This three-part evidentiary burden-shifting framework set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for Title VII plaintiffs, however, was replaced under AIR 21 by the two-part burden-shifting test, *Araujo*, 708 F.3d at 158, n.5, as it has been under other statutes such as the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson Reuters 2012), that use a similar two-part burden-shifting framework. See *Stone & Webster Eng’g v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (“Section 5851 is clear and supplies its own free-standing evidentiary framework.”). The Third Circuit observed, consistent

with *Stone & Webster*, 115 F.3d at 1572, and prior holdings by the ARB, that the AIR 21 burden shifting framework, applicable to the FRSA, is “much easier for a plaintiff to satisfy than [Title VII’s] *McDonnell Douglas* standard.” *Araujo*, 708 F.3d at 159.

The context for the burden of proof standard employed by FRSA is made clear by the Act’s legislative history.<sup>3</sup> The court of appeals in *Stone & Webster* observed that the standard for employers is “‘tough’ because Congress intended for companies in the nuclear industry to face a difficult time defending themselves, due to a history of whistleblower harassment and retaliation in the industry.” 115 F.3d at 1572. “The 2007 FRSA amendments must be similarly construed, due to the history surrounding their enactment.” *Araujo*, 708 F.3d at 159. The court of appeals in *Araujo* noted the following legislative activity surrounding the FRSA:

We note, for example, that the House Committee on Transportation and Infrastructure held a hearing to ‘examine allegations . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting ‘on-the-job-injuries.’ (Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007). As the Majority Staff of the Committee on Transportation and Infrastructure noted to members of the Committee:

The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years. The primary issue identified in many previous government investigations is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have

<sup>3</sup> The 2007 amendment to the FRSA was enacted against a backdrop of findings by Congress of extensive retaliation against injured railway employees, and under-reporting of injuries by the nation’s railroad companies, and these congressional findings have been fully noted in federal court and agency precedent. See, e.g., *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 6, n.20; 7, n.21 (ARB Oct. 26, 2012) (citing Reauthorization of the Federal Rail Safety Program: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Jan. 30, 2007); Fatigue in the Rail Industry: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Feb. 13, 2007); Rail Safety Legislation: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (May 8, 2007); Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007)); *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 8-10 (ARB July 25, 2012) (surveying legislative history of FRSA employee protection provision). See also *Cash v. Norfolk Southern Ry. Co.*, 2015 WL 178065, slip op. at 10 (W.D. Va. Jan. 14, 2015).

frequently complained that harassment of employees who report injuries is a common railroad management practice.

The report noted that one of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration.

*Araujo*, 708 F.3d at 159 (internal footnotes omitted). The court of appeals “note[d] this history to emphasize that, as it did with other statutes that utilize the ‘contributing factor’ and ‘clear and convincing evidence’ burden shifting framework, Congress intended to be protective of plaintiff-employees.” *Id.* at 160.

### **C. The ARB’s Decision in *Fordham v. Fannie Mae***

In *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 20 (ARB Oct. 9, 2014), the ARB addressed the question of what evidence

is appropriately to be considered at the hearing stage in determining whether a complainant has met his or her burden of proving ‘contributing factor’ causation by a preponderance of the evidence test? More specifically: Whether the respondent’s evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant’s causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue?

Following an extensive examination of pertinent federal court and agency precedent, the ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant’s showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham*’s holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant’s proof of causation by advancing specific evidence that could also support the respondent’s statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent’s affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point. With that in mind, we review the relevant legislative history that supports *Fordham*’s holding. In addition, provisions of the Office of Administrative Law Judges’ Rules of Practice and Procedure set out the

necessary framework in which evidence relevant to a complainant's proof of contributing factor may be analyzed in the administrative proceeding.

**1. *The legislative history supporting Congress's adoption of the contributing factor element of proof in whistleblower protection statutes, and the Labor Department's regulatory history, makes a clear evidentiary distinction between complainant's burden of proving causation and respondent's burden of proving the statutory affirmative defense***

The FRSA's whistleblower protection provisions, 49 U.S.C.A. § 20109(d)(2)(A)(i), incorporate the AIR 21 legal burdens of proof, which in turn are modeled after the burden of proof provisions of the 1992 ERA amendments and the Whistleblower Protection Act (WPA) as originally adopted in 1989.<sup>4</sup> The legislative history accompanying the 1992 ERA amendments explains that by adoption of the "contributing factor" and "clear and convincing evidence" burdens of proof, Congress sought to replace the burdens of proof enunciated in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).<sup>5</sup> This ERA expression of intent is identical to that found in the legislative history accompanying the 1989 adoption of the Whistleblower Protection Act, which similarly referred to the intended purpose of supplanting *Mt. Healthy*'s burdens of proof requirements.<sup>6</sup>

Under *Mt. Healthy*, if the trier of fact concludes that the complainant has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action (the "mixed motive" case), the employer, to avoid liability, has the burden of proving by a preponderance of the evidence that it would have reached the same decision or taken the same action in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287; *Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982). The Title VII/*Mt. Healthy* burden of proof requirements are applicable to whistleblower claims under the six environmental whistleblower statutes pursuant to 29 C.F.R. § 24.109(b)(2), which provides:

In cases arising under the six environmental statutes listed in § 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance

<sup>4</sup> As the ARB has observed, the AIR 21 and ERA burden of proof provisions are ultimately modeled after the WPA's burden of proof provisions as originally adopted. See *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 24, n.124 (ARB Sept. 30, 2011); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7, n.15 (ARB Sept. 30, 2003).

<sup>5</sup> 138 Cong. Rec. H11,409; H11,444 (daily ed. Oct. 5, 1992).

<sup>6</sup> 135 Cong. Rec. S2784 (Mar. 16, 1989) ("With respect to the agency's affirmative defense, it is our intention to codify the test set out by the Supreme Court in the case of *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). The only change made by this bill as to that defense is to increase the level of proof which an agency must offer from 'preponderance of the evidence' to 'clear and convincing evidence.'"); see also 234 Cong. Rec. H9321 (Oct. 3, 1988).

of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

The Department of Labor's regulatory history accompanying the foregoing, found at 76 Fed. Reg. 2808, 2811-2812 (Jan. 18, 2011), explains that under the *McDonnell Douglas-Mt. Healthy* Title VII standards embraced by section 24.109(b)(2), "a complainant may prove retaliation either by showing that the respondent took the adverse action because of [“but for”] the complainant’s protected activity or by showing that retaliation was a motivating factor in the adverse action (i.e., a “mixed-motive analysis”). . . . If the complainant proves by a preponderance of the evidence that the respondent acted at least in part for prohibited reasons, the burden shifts to the respondent to prove by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected activity." (internal citations omitted).

The differences (and similarities) between the *McDonnell Douglas-Mt. Healthy* Title VII burdens of proof requirements and the “contributing factor”/“clear and convincing evidence” proof requirements of the FRSA (as well as under AIR 21, the ERA, etc.) are readily apparent when comparing the provisions of 29 C.F.R. § 24.109(b)(2) with the FRSA regulatory provisions regarding burdens of proof found at 29 C.F.R. § 1982.109(a), (b):

- (a) . . . A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.
- (b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.

In explanation of the FRSA burdens of proof provision, the Department's regulatory history found at 75 Fed. Reg. 53,522; 53,524-25 (Aug. 31, 2010) states: "In proving that protected activity was a contributing factor in the adverse action, ‘a complainant need not necessarily prove that the respondent’s articulated reason was a pretext in order to prevail,’ because *a complainant alternatively can prevail by showing that the respondent’s ‘reason, while true, is only one of the reasons for its conduct,’ and that another reason was the complainant’s protected activity*. . . . Once the complainant establishes that the protected activity was a

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See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale.” (internal citations omitted) (emphasis added).<sup>8</sup>

The Whistleblower Protection Act’s burden of proof provisions, as originally adopted in 1989, are strikingly similar to the AIR 21 burden of proof provisions and the foregoing FRSA regulation. The 1989 enactment read in pertinent part, at 5 U.S.C.A. § 1221(e):

- (1) [I]n any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee. . .
- . . .
- (2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

The legislative history pertaining to the foregoing, which accompanied the 1994 amendments to the WPA,<sup>9</sup> explained Congress’s intent in distinguishing a claimant’s initial

<sup>8</sup> The ERA legislative history also makes clear (contrary to the assertion of the dissent in *Fordham*, ARB No. 12-061, slip op. at 45) that a showing of “contributing factor” causation does not, in and of itself, automatically result in a finding of a violation of the whistleblower provisions. The legislative history accompanying the ERA’s 1992 amendments explains Congress’s choice of the word “may” within the statutory provision “[t]he Secretary may determine that a violation . . . has occurred” upon proof that protected activity was a “contributing factor” in the alleged unfavorable personnel action: “At the administrative law judge hearing . . . [o]nce the complainant makes a *prima facie* showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, a violation is established *unless* the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.” 138 Cong. Rec. H-11,409; H-11,444 (daily ed. Oct. 5, 1992) (emphasis added). This expression of Congressional intent is consistent with federal case law holding that choice of the statutory term “may” “has never been held to uniformly mean shall.” *Solenoid Devices, Inc. v. Ledex, Inc.*, 375 F.2d 444 (9th Cir. 1967); *Sani-Top v. North Am. Aviation*, 261 F.2d 342 (9th Cir. 1958). “Where a provision contains both the word ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.” *Perez-Farias v. Global Horizons, Inc.*, 447 Fed. Appx. 843 (9th Cir. 2011).

<sup>9</sup> The 1994 amendment to the WPA merely *clarified* what Congress had intended with the 1989 Act. *Powers v. Navy*, 69 MSPR 150, 155 n.6 (1995) (“The legislative history behind the amended section 1221(e)(1)(A), (B) points out that the added provisions specifying the knowledge/timing test merely express what Congress had intended in enacting the pre-amendment section 1221(e)(1).”).

burden of proving “contributing factor” causation from a respondent’s burden of proving any affirmative defense that it might have:

[T]he Whistleblower Protection Act creates a *clear division* between a whistleblower’s *prima facie* case, which must be proven by a preponderance of the evidence, and an agency’s affirmative defense, which must be proven by clear and convincing evidence. . . . Congress intends for a[n] agency’s evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.

Senate Report No. 103-358, at 6-7 (1994) (emphasis added).<sup>10</sup>

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<sup>10</sup> The dissent in *Fordham*, ARB No. 12-061, slip op. at 46-47, questioned the relevance of the WPA’s legislative history to the interpretation of whistleblower statutes over which the ARB has jurisdiction. However, in at least thirty decisions (in addition to *Fordham*) the ARB has embraced WPA’s legislative history for interpretive guidance through the Board’s citation to and reliance upon the Federal Circuit’s interpretation in *Marano* of the WPA’s “contributing factor” provision, at times quoting the WPA legislative history that *Marano* cites. See, e.g., *Timmons v. CRST Dedicated Servs.*, ARB No. 14-051, ALJ No. 2014-STA-009 (ARB Sept. 29, 2014); *Blackie v. Pierce Transp.*, ARB No. 13-065, ALJ No. 2011-STA-055 (ARB June 17, 2014); *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty*, ARB No. 13-039 (ARB May 13, 2014); *Speegle v. Stone & Webster*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014); *Joyner v. Georgia-Pacific Gypsum*, ARB No. 12-028, ALJ No. 2010-SWD-001 (ARB Apr. 25, 2014); *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013); *Hutton*, ARB No. 11-091 (ARB May 31, 2013); *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015 (ARB Mar. 29, 2013); *Menendez v. Halliburton*, ARB No. 12-026, ALJ No. 2007-SOX-005 (ARB Mar. 20, 2013); *Speegle v. Stone & Webster Constr.*, ARB No. 11-029A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013); *Smith v. Duke Energy Carolinas & Atl. Grp.*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012); *Zinn v. American Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025 (ARB May 28, 2012); *Defrancesco*, ARB No. 10-114 (ARB Feb. 29, 2012); *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033 (ARB Sept. 30, 2011); *Menendez*, ARB No. 09-002 (ARB Sept. 13, 2011); *Furland v. American Airlines*, ARB No. 09-130, ALJ No. 2008-AIR-011 (ARB July 27, 2011); *Bobreski v. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011); *Hoffman v. Netjets Aviation*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB Mar. 24, 2011); *Douglas v. Skywest*, ARB No. 08-070, ALJ No. 2006-AIR-014 (ARB Sept. 30, 2009); *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022 (ARB June 30, 2009); *Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ No. 2006-PSI-001 (ARB June 25, 2009); *Leak v. Dominion Res. Servs.*, ARB No. 07-043, ALJ No. 2006-SOX-012 (ARB May 29, 2009); *Florek v. Eastern Air Cent.*, ARB No. 07-113, ALJ No. 2006-AIR-009 (ARB May 21, 2009); *Clark v. Airborne*, ARB No. 06-082, ALJ No. 2005-AIR-027 (ARB Mar. 31, 2008); *Sievers*, ARB No. 05-109 (ARB Jan. 30, 2008); *Allen v. Steward Enters.*, ARB No. 06-081, ALJ No. 2004-SOX-060 (ARB July 27, 2006); *Henrich v. EcoLab*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB June 28, 2006); *Klopfenstein v. PCC Flow Tech. Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006).

Consistent with this legislative history, in *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998),<sup>11</sup> a case arising under the WPA, the Federal Circuit held that the ALJ committed reversible error by relying upon the respondent's affirmative defense evidence of legitimate, non-retaliatory reasons for its action in concluding that the claimant failed to prove "contributing factor" causation by a preponderance of the evidence. *Id.* at 1362-1364. Citing WPA's legislative history, the court rejected the respondent's argument that its countervailing evidence of non-retaliatory reasons for why it acted as it did negated the complainant's showing at the "contributing factor" causation stage. The court of appeals held that it was error for the ALJ to weigh the respondent's evidence supporting a non-retaliatory basis for its action against the complainant's causation evidence in determining that the protected activity was not a contributing factor. "Evidence such as responsiveness to the suggestions in a protected disclosure or lack of animus against petitioner may form part of [the respondent's] rebuttal case. Such evidence is not, however, relevant to a [claimant's] *prima facie* case under section 1221(e)(1)(A) and (B)." *Id.* at 1363. "[B]ecause the agency's affirmative defense under section 1221(e)(2) requires a higher burden of proof, we hold that the AJ's causation finding that Ms. Kewley's protected disclosure was not 'a contributing factor' was legally erroneous as contrary to the statutory command as correctly construed." *Id.* at 1364.

The import that evidence relevant to contribution be analyzed in the context of complainant's proof of his/her case is illustrated in *Carey v. Dep't of Veterans Affairs*, 93 MSPR 676, 681 (2003), where the Merit Systems Protection Board states that once the complainant proves contribution through circumstantial evidence, "an ALJ must find that the [complainant] has shown that his whistleblowing was a contributing factor in the personnel action at issue, *even if after a complete analysis of all of the evidence a reasonable factfinder*" would determine that there was evidence that the employer had legitimate business reasons for the adverse action taken. *Id.* at 681-682 (emphasis added); *accord Armstrong v. Dep't of Justice*, 107 MSPR 375, 386 (2007); *Rubendall v. Health & Human Servs.*, 101 M.S.P.R. 599, ¶ 12 (2006); *Gebhardt v. Air Force*, 99 M.S.P.R. 49, 54 (2005).

## **2. The OALJ's Rules of Practice and Procedure set out the framework for complainant to prove to the trier-of-fact the elements of his or her claim**

The Rules of Practice and Procedure for the Department of Labor's Office of Administrative Law Judges (OALJ Rules), 29 C.F.R. Part 18, set out the procedural and evidentiary rules for administering adjudicatory proceedings. Subpart A codifies the General Rules applicable to administrative adjudicatory proceedings held before Department of Labor ALJs, provided the OALJ rules are not inconsistent with "a rule of special application as provided by statute, executive order, or regulation," in which case the latter is controlling. 29 C.F.R. § 18.1(a). Where "any situation [is] not provided for or controlled by [the OALJ Rules], or by any statute, executive order or regulation . . . the Rules of Civil Procedure for the District Court of the United States shall be applied." *Id.* Subpart A further states that in any

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<sup>11</sup> ARB decisions (in addition to *Fordham*) citing *Kewley* for interpretive guidance have included *Tablas*, ARB No. 11-050 (ARB Apr. 25, 2013); *Speegle*, ARB No. 11-029A (ARB Jan. 31, 2013); and *Smith*, ARB No. 11-003 (ARB June 20, 2012).

administrative hearing, the ALJ has “all powers necessary to the conduct of fair and impartial hearings, including, but not limited to” specific powers set out in 29 C.F.R. § 18.29. Unless limited by the ALJ, the “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . .” 29 C.F.R. § 18.14(a). This scope of discovery permits the taking of depositions (29 C.F.R. § 18.22) that can be used at the administrative hearing “by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.” 29 C.F.R. § 18.23(a).

Subpart B of the OALJ Rules prescribes the Rules of Evidence that govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer that is required by, *inter alia*, the Administrative Procedure Act, 5 U.S.C.A. §§ 554, 556 and 557 (West 1996). *See* 29 C.F.R. Subpart B, § 18.101. The purpose of the OALJ Rules of Evidence is to “secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” 29 C.F.R. § 18.102. Under the OALJ Rules, “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401. The Rules provide:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Evidence which is not relevant is not admissible.

29 C.F.R. § 18.402. Relevant evidence may be excluded if, *inter alia*, “its probative value is substantially outweighed by the danger of confusion of issues.” 29 C.F.R. § 18.403. Evidence may be taken in administrative proceedings by competent witness testimony. 29 C.F.R. § 18.601. The ALJ Rules on Evidence authorize the ALJ to exercise reasonable control over the mode and order of interrogation and presentation of evidence, and that authority includes “[m]ak[ing] the interrogation and presentation effective for the ascertainment of the truth.” 29 C.F.R. § 18.611(a)(1). The Rules permit cross-examination of witnesses that is “limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” 18 C.F.R. § 18.611(b).

As shown, the holding in *Fordham*, in which the ARB distinguished the evidence relevant to the determination of whether a complainant meets his/her burden of proving contributing factor causation from an employer’s affirmative defense evidence is consistent with both the OALJ Rules requiring deference to rules “of special application as provided by statute, executive order, or regulation” (29 C.F.R. § 18.1(a)), and the relevance of admissible evidence as prescribed statute or “other rules or regulations prescribed . . . pursuant to statutory authority” (29 C.F.R. § 18.402).

**3. *Fordham, as fully adopted herein, properly requires that in an administrative hearing, an FRSA complainant has the burden of proving solely the elements of his or her claim, and the trier-of-fact bears the responsibility to ensure that specific evidence advanced at hearing to rebut an element of complainant's claim be relevant to that showing***

A FRSA complainant may prove a violation of the Act by demonstrating by a “preponderance of the evidence” the statutorily prescribed elements of (1) protected activity, (2) adverse action, and (3) that the protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint.” 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 29 C.F.R. § 1982.109(a). The parties, the Assistant Secretary, and amici appear to agree that all of the evidence admitted at the hearing is available to the ALJ in assessing whether the complainant meets his or her burden of proving the requisite elements that the FRSA requires. *See, e.g.*, Assistant Secretary’s Brief at 18-19 and n.9 (citing Model Jury Instructions and stating that “when applying the preponderance of the evidence standard in civil cases, juries must consider all relevant evidence regardless of which party presented it.”). This principle may also be drawn from a general reading of the Administrative Procedure Act, 5 U.S.C.A. § 556(e), which states: “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . .” “A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts” 5 U.S.C.A. § 556(d). The ALJ, however, has authority to exclude evidence that is “irrelevant, immaterial” (5 U.S.C.A. § 556(d)), and where “its probative value is substantially outweighed by the danger of confusion of issues.” 29 C.F.R. § 18.403.

While the entire record, including witness testimony (direct and cross examination) and the admitted documentary evidence, constitutes the administrative record for purposes of decision (5 U.S.C.A. § 556(e)), it does not mean that just any item of evidence can be utilized for purposes of determining whether the complainant has met his or her burden of proof under the Act. For purposes of assessing whether the complainant has met his or her burden of proof, the evidence must be *relevant* to the element that is sought to be proven. *See, e.g.*, 5 Am. Jur. Trials 505 (Order of Proof at Trial Stage, Sec. 12. Plaintiff’s case) (“In meeting this burden, the outline of the factual proof must necessarily be coordinated with the outline of the legal requirements . . . . [The legal factors] in the plaintiff’s case must be proved by admissible evidence.”). Under the OALJ Rules, “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401. In the context of assessing whether a complainant has met his or her burden of proof, the trier of fact must assess the evidence in the context of the legal elements that complainant is required to prove, *e.g.*, protected activity, adverse action, and contribution. Conversely, where a respondent seeks to rebut the complainant’s showing, any evidence advanced by respondent (on cross examination of witnesses or utilization of direct testimony and documentary evidence) must be relevant to the three elements that complainant is legally required to prove and, at the same time, subject to proof by a preponderance of the evidence. This reasoning does not undermine the preponderance of evidence standard that ALJs employ for determining whether a complainant

has met his or her showing. It does, however, put in context how items of evidence are to be used in assessing whether a complainant has proven his or her case to the trier of fact.

Contrary to the dissent's assertion in *Fordham* that the majority's holding in that case precluded consideration by an ALJ of all relevant evidence in deciding the question of contributing factor causation (see *Fordham*, slip op. at 37), the majority in *Fordham* only addressed the question of what evidence could properly be weighed under the "preponderance of the evidence" standard in analyzing complainant's proof of contributing factor causation. *Fordham* specifically addressed the question as to evidence that may be weighed to demonstrate the contributing factor element under the preponderance of evidence standard. The majority decision in *Fordham* stated that its ruling "does not preclude an ALJ's consideration, under the preponderance of the evidence test, of respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower in order to prevail,"<sup>12</sup> explaining that "[i]t is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn." *Fordham*, ARB No. 12-061, slip op. at 35, n.84. The distinction should not, however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. It merely recognizes that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence. Certainly, analyzing specific evidence in the context of the AIR 21 burden shifting framework "requires a 'fact-intensive' analysis." *Franchini v. Argonne Nat'l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014), slip op. at 10 (ARB Sept. 26, 2012).

While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*. 29 C.F.R. § 18.401. Thus, the *Fordham* majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence." *Fordham*, slip op. at 23.

A number of ARB decisions have recognized this *relevancy* distinction without having expressly articulated its reasoning. To be sure, where there is little or no evidence that the protected activity has any connection to the adverse action, objective evidence of employer conduct may be relevant for showing that protected activity played no role whatsoever in the adverse action. For example, in *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012), the ARB affirmed an ALJ's ruling that complainant failed to prove that protected activity contributed to his termination. In this case, complainant had

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<sup>12</sup> The three elements referred to in the cited passage from *Fordham* include: whether the complainant engaged in protected activity, whether the employer knew that complainant engaged in the protected activity, and whether the complainant suffered an unfavorable personnel action. *Fordham*, slip op. at 35, n.84.

engaged in several acts protected by AIR 21. The Company, however, “strictly prohibited” “[t]he use of profanity or abusive language.” *Zurcher*, ARB No. 11-002, slip op. at 3 (quoting RX7 at 112-113). The Company Handbook stated that the “use of profanity and abusive language . . . [was] strictly prohibited and will subject the individual involved to immediate disciplinary action up to and including termination.” *Id.* at 3, 5 (quoting RX 7 at 112-113). In *Zurcher*, complainant had frequently used profane language in the workplace and had been warned to modify his behavior but failed to do so. *Id.* at 2-3; see also *Zurcher*, ALJ No. 2009-AIR-007, slip op. at 15 (Sept. 29. 2010) (citing RX 22 at 163 (“Zurcher did not modify his behavior as he promised Cline; in fact his behavior became more offensive.”)). Zurcher’s employment was terminated after he used profanity directed at a secretary in a conversation that had no connection to his protected acts. *Zurcher*, ARB No. 11-002, slip op. at 3, 6. In this case, Zurcher’s circumstantial evidence of contribution rested solely on the temporal proximity of his protected activity to the adverse action. There was no evidence that the individual responsible for terminating Zurcher’s employment knew of the protected activity or that individuals in the Company aware of the protected activity influenced the termination decision. *Id.* at 6. Thus, while temporal proximity *alone* may at times be sufficient to satisfy the contributing factor element,<sup>13</sup> the ruling in *Zurcher* is consistent with ARB precedent that has declined to find “contributing factor” based on temporal proximity *alone* where relevant, objective evidence disproves that element of complainant’s case.<sup>14</sup>

A more difficult case is where the adverse action is closely intertwined with the protected activity, where evidence advanced by the complainant to support the contributing factor element of his or her claim may prove more persuasive against rebuttal evidence advanced by respondent to disprove contribution. For example, *Tablas*, ARB No. 11-050 (ARB Apr. 25, 2013), involved a truck driver whose employment was terminated after he complained about faulty air lines on his vehicle and failed to complete a driving assignment because of inclement weather conditions. The ALJ determined that complainant failed to prove either protected activity under the Surface Transportation Assistance Act (STAA) of 1982, as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2012) , or that protected activity contributed to the adverse action he suffered. In determining that complainant failed to prove contributing factor causation, the ALJ stated: “[C]ompany officials who testified at the hearing ‘uniformly stated that there were no adverse consequences to the Complainant’s complaints on this issue; to the contrary, they stated, they were appreciative of his actions . . . [but that] Tablas was “terminated from employment chiefly, if not solely, because he refused to complete the Bellingham run.” *Tablas*, ARB No. 11-050, slip op. at 4; see also *Tablas*, ALJ No. 2010-STA-024, slip op. at 27.

On petition for review, the ARB reversed and remanded. The ARB determined that the ALJ erred in holding that the complainant’s report to his Dispatcher that his truck’s air lines were

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<sup>13</sup> *Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009). *Accord Clemons v. Ameristar Airways*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

<sup>14</sup> See, e.g., *Spelson v. United Express*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3, n.3 (ARB Feb. 23, 2011); *Robinson v. Northwest Airlines*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

not operating properly was not protected activity under STAA. *Tablas*, ARB No. 11-050, slip op. at 6-8. Based on that error, the ARB held that the ALJ also erred in determining that the complainant failed to prove that protected activity contributed to his termination. *Id.* at 8-9. While the record in this case contained testimony by a Company manager that Tablas was fired because he refused to drive in bad weather (*id.* at 9), that witness testimony was insufficient to rebut evidence (witness testimony by Tablas and the Dispatcher, and documentary evidence of the Driver Vehicle Report) supporting complainant's proof of the elements of his STAA claim. The ARB stated that Tablas's refusal to drive, "which stemmed in part from his concerns about the weather, was also 'inextricably intertwined' with his [protected] activity (reporting the faulty air lines)." *Id.* Given that the employer's evidence for its action (employer witness testimony that Tablas "failed to complete the Bellingham run") was inextricably intertwined with the complainant's evidence of contribution, such that the competing evidence could not be separated, the ARB held that Tablas's protected activity was a contributing factor in the decision to terminate his employment. *Id.* See also *Marano*, 2 F.3d at 1143; *Pogue v. Dep't of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991); *Smith*, ARB No. 11-003 slip op. at 8 (ARB June 20, 2012); *Abdur-Rahman v. Dekalb Cnty.*, ARB No. 08-003; ALJ No. 2006-WPC-002, slip op. at 12, 15 (ARB May 18, 2010). Where the trier of fact determines that the protected acts are closely intertwined with the adverse action taken, the respondent "bears the risk that the influence of legal and illegal motives cannot be separated." *Abdur-Rahman*, ARB No. 08-003, slip op. at 12. *Accord Pogue*, 940 F.2d at 1291 ("It is well-settled that '[i]n dual motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated.'").

The inherent tension of resolving the contributing factor element is clear in FRSA cases where a complainant alleges a violation based on reporting a work injury (49 U.S.C.A. § 20109(a)(4)), or "following orders or a treatment plan of a treating physician" (49 U.S.C.A. § 20109(c)). Certainly, in these cases, injured workers may be unable to return to work at full capacity for days, months, or in more extreme cases even years due to ongoing medical concerns that stem from the workplace injury. However, that tension is not for the administrative agency to resolve by departing from the elements of proof that Congress requires, and that the Department of Labor administers, under the FRSA employee protection statute. By adopting the AIR 21 standards in the FRSA, 49 U.S.C.A. § 20109(d)(2), Congress appropriated the well-established "contributing factor" standard that requires that railroad workers show no more than that the protected activity was "any factor, which alone or in combination with other factors, tends to affect in *any way* the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Allen*, 514 F.3d at 476, n.3 (emphasis added), and *Marano*, 2 F.3d at 1140)). See also *Cash*, 2015 WL 178065, slip op. at 10. The standard for FRSA complainants is underscored by congressional findings of worker abuse in the railroad industry, including "a history of retaliation against injured railway employees and the under-reporting of injuries by the nation's railroad companies." *Cash*, 2015 WL 178065, slip op. at 9-10 (citing *Araujo*, 708 F.3d at 159). The FRSA legislative changes were intended to "enhance the oversight measures that improve transparency and accountability of the railroad carriers" with "[t]he intent of [the employment protection provision] being to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Rep. No. 110-259 at 348 (2007), Conf. Rep., 2007 U.S.C.C.A.N. 119, 181; see also *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 12-14 (ARB July 25, 2012).

Finally, in assessing the persuasiveness of a complainant's evidentiary showing, it is clear that specific documentary and testimonial evidence can serve more than one purpose. For example, in *Speegle*, ARB No. 11-029A (ARB Jan. 31, 2013), testimony by complainant that he used profanity to complain about safety and directed that profanity at Company managers at a staff meeting was relevant evidence that substantiated complainant's proof of contribution. On remand, however, the same testimonial evidence (witness testimony at the hearing that complainant's profane language accompanied complainant's safety complaints), along with testimony by managers was advanced by respondent to prove an affirmative defense for the adverse action taken.

*Speegle* involved a complaint by a nuclear plant worker alleging that his termination violated the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson Reuters 2012). Complainant Speegle testified at the evidentiary hearing that he used profanity at a staff meeting in the context of complaining about safety. *Speegle*, ARB No. 11-029A, slip op. at 16 (quoting Hearing Transcript at 164-165 (testimony of James Speegle)). The ALJ determined that this evidence, and other witness testimony of Company managers, rebutted complainant's showing of contribution which was based on the temporal proximity of the protected acts (the staff meeting on May 22, 2008) and the adverse action (complainant's termination on May 24, 2008). *Id.* at 37-38 (ALJ holding that Speegle's "comment at the May 22 meeting was an intervening event of significant weight. Respondent reasonably could have terminated Speegle for the legitimate reason of insubordination arising out of this comment."). On further administrative review, the ARB reversed the ALJ's determination on contributing factor, and held that "there is no evidence of unprofessional conduct or insubordinate conduct by Speegle that is unrelated to his protected activity." *Speegle*, ARB No. 11-029-A, slip op. at 10-11. The ARB remanded the case to the ALJ to determine whether respondent could show by clear and convincing evidence that it would have taken the same adverse action absent complainant's protected acts. The ALJ subsequently determined, based in part on the same testimony proffered by Speegle at the hearing and additional testimony of company managers, that respondent proved by clear and convincing evidence that the same adverse action would have been taken absent any protected acts. *Speegle*, ALJ No. 2005-ERA-006, slip op. at 5-6 (July 9, 2014). The ARB affirmed that determination, stating: "Though not the strongest case for clear and convincing evidence, the ALJ provided sufficient rationale for dismissing this case after considering the three factors in determining whether S & W proved by 'clear and convincing evidence' that it 'would have' taken the same adverse action in the absence of" Speegle's protected activity." *Speegle v. Stone & Webster Const., Inc.*, ARB No. 14-079, ALJ No. 2005-ERA-006, slip op. at 6 (Dec. 15, 2014).<sup>15</sup>

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<sup>15</sup> *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012), is another example in which an employer's evidence may serve more than one purpose. Indeed, *Abbs* demonstrates how close the relationship can be as to evidence demonstrating the contributing factor element at the preponderance of evidence showing, and that can alternatively support an employer's affirmative defense at the clear and convincing evidentiary showing. In *Abbs*, the ALJ ruled on summary decision that complainant failed to prove the contributing factor element of his claim based on undisputed evidence that he falsified log books – a work task unrelated to his claim of protected activity – and undisputed evidence that he was terminated because he knowingly entered false information on his driving log and pay sheet. *Abbs*, ARB No. 12-016, slip op. at 4, 6. Complainant did not dispute that he falsified his log book and payroll record. *Id.* at 6. In *Abbs*, the

**4. Since complainant's burden of proof does not require a showing of retaliatory motive by the employer, evidence that employer lacked a retaliatory motive for the adverse action taken does not rebut complainant's evidence supporting contributing factor**

It is well established that to prove contributing factor under the FRSA and whistleblower statutes that adopt the AIR 21 standard of proof, “complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action.” *Timmons*, ARB No. 14-051, slip op. at 6 (ARB Sept. 29, 2014) (citing *Araujo*, 708 F.3d at 158; *Marano*, 2 F.3d at 1141). *See also DeFrancesco*, ARB No. 10-114, slip op. at 6; *Hutton*, ARB No. 11-091, slip op. at 7, n.18. Congress has indeed made clear in the context of whistleblowing legislation that “[r]egardless of the official’s motives, personnel actions against employees should . . . not be based on protected activities such as whistleblowing.” *Marano*, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). Since proof of contributing factor does not require evidence of retaliatory motive, long understood to be a very difficult element of proof for complainants generally,<sup>16</sup> it stands to reason that complainant has no obligation to *disprove* evidence of a subjective non-retaliatory motive in the context of advancing evidence supporting a showing of contributing factor. *See generally Kewley*, 153 F.3d at 1363 (“Evidence such as . . . lack of animus against petitioner may form part of such a rebuttal case. Such evidence is not, however, relevant to a petitioner’s *prima facie* case.”). For example, in *DeFrancesco*, ARB No. 10-114, slip op. at 6, n.17, the ALJ dismissed the FRSA complaint because there was “insufficient evidence to establish that the

intervening event upon which the employer relied in terminating the complainant’s employment was held to be sufficiently compelling to break any inference of causation due to temporal proximity. At the same time, the ARB noted that the employer’s evidence would also constitute “clear and convincing evidence that [the employer] would have taken the same adverse action in the absence of the protected activity.” *Id.* at 6, n.5.

<sup>16</sup> *See generally* Kohn, “Proving Motive In Whistleblower Cases,” 38-MAR JTLA TRIAL 18 (Mar. 2, 2002) (“Proof of intent is usually the most difficult aspect of a case. Testimony that contains a direct admission of retaliatory motive rarely exists. Lawyers who represent whistleblowers must carefully review both the direct and circumstantial factual evidence of motive.”); Estlund, C., “Wrongful Discharge Protections In An At-Will World,” 74 TEX. L. REV. 1655, 1670 (June 1996) (“Although the law protects imperfect as well as perfect employees from discrimination and retaliation, the burden of proving the bad motive may be overwhelming for the former. The problems of proof are further magnified to the extent that employers and their supervisors are reasonably well-educated about the employment laws, reasonably cautious in avoiding statements evidencing bad motives, and reasonably diligent in documenting employee shortcomings.”). *See also Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1072-1073 (9th Cir. 2003) (“[A]n employer’s true motive in an employment decision is rarely easy to discern. As we have previously noted, ‘[w]ithout a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations. . . .’” (internal citation omitted); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 442 (7th Cir. 2010) (“Plaintiffs often have great difficulty in gathering information and can present only circumstantial evidence of discriminatory motives.”).

decision to commence disciplinary charges against Complainant was motivated by Complainant's reporting of his injury." The ARB reversed, and held:

[Complainant] is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to Union's adverse action. Rather, [complainant] must prove that the reporting of his injury was a *contributing factor* to the suspension. By focusing on the motivation of [Company managers], the ALJ imposed on [complainant] an incorrect burden of proof, thus requiring remand.

*DeFrancesco*, ARB No. 10-114, slip op. at 6.

The holding in *DeFrancesco*, drawing from precedent and the statutory text of AIR 21, makes clear that imposing on complainant a heightened obligation to proffer evidence that directly contradicts evidence of non-retaliatory motive can entail, for example, rebutting evidence of self-serving witness testimony at hearing by Company managers that they were not motivated by retaliation when they took the adverse action in dispute. See, e.g., *Powers*, D. & O. at 23 (finding lack of contributing factor based on testimony by Company Managers of a subjective belief that Powers violated his medical restrictions). Just as a complainant's burden of proof does not require a showing of employer motivation, non-retaliatory motive cannot rebut complainant's evidence of contribution when that rebuttal evidence is comprised of the self-serving testimony of Company managers. Instead, this evidence is more properly evaluated when the burden shifts to the respondent to prove "by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of [the protected acts]." 49 U.S.C.A. § 42121(b)(2)(B)(iv). This evidence is more relevant to respondent's affirmative defense to "show that the truth of its factual contentions is highly probable." *Timmons*, ARB No. 14-051, slip op. at 6 (quoting *Araujo*, 708 F.3d at 159 (internal quotations omitted)).

#### **D. Applying *Fordham*, the ALJ in *Powers* Erred in Determining that Complainant Failed to Prove that his Protected Activity Was a Contributing Factor in the Adverse Action he Suffered**

Applying the principles enunciated in *Fordham*, as clarified herein, the ALJ erred in determining that complainant failed to prove the contributing factor element of his case.

##### **1. The ALJ erred in ruling that Powers failed to prove contributing factor based on the testimony of Company Managers pertaining to their subjective nondiscriminatory motive for the adverse action taken**

The two-stage analysis mandated by FRSA's incorporation of the AIR 21 employee protection statute distinguishes the elements of proof required of each party and their respective burdens of proof. See *Fordham*, ARB No. 12-061, slip op. at 9-10. Under the facts of this case, the ALJ erred in ruling that Powers failed to prove the contributing factor element of his claim, because that ruling is based on the subjective testimony of Company managers regarding their alleged legitimate business reasons for Powers' termination—evidence that is of highly

questionable relevance to contribution. *See supra* at 25-26. For example, the ALJ stated: “I must determine whether it is more likely than not that Gilliam subjectively concluded that Complainant had been dishonest . . . .” D. & O. at 23; *see also id.* at 21 (“I therefore turn to the managers involved.”); *id.* at 23 (“focus on the managers’ thinking”); *id.* at 23 (“the question I must decide is whether Gilliam recommended discipline, which Meriwether imposed, because he *believed* Complainant had been dishonest.”). In relying on that subjective testimony by Company managers to rebut Powers’ evidence of contribution, the ALJ improperly applied the preponderance of evidence standard to evidence of non-retaliatory motive. Moreover, the relevancy of subjective witness statements for purposes of analyzing complainant’s showing of contributing factor, as a general matter, is highly questionable because “subjective criteria can be a ready vehicle for [discrimination].” *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005); *see also Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (“subjective evaluations . . . provide a ready mechanism for . . . discrimination.”). Subjective standards are difficult for courts to evaluate and difficult for plaintiffs to rebut, and their use in employment decisions should be viewed with suspicion. *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 808-09 (11th Cir. 1989). To be sure, “[t]he Supreme Court has consistently recognized that disparate treatment potentially results from an employer’s practice of committing employment decisions to the subjective discretion of its supervisors.” *Anderson v. WBMG-42*, 253 F.3d 561, 564 n.1 (11th Cir. 2001) (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (“[W]e have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review [employment] decision[s] that were based on the exercise of personal judgment or the application of inherently subjective criteria.”)).

Since Powers “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action” to prove contributing factor (*supra* at 19), he has no obligation under the Act to rebut evidence of nondiscriminatory motive by Company managers to satisfy his showing for proving an FRSA violation. *See supra* at 19-20; *see also* 29 C.F.R. § 18.401. And certainly, even if such evidence were relevant, it should be excluded because “its probative value is substantially outweighed by the danger of confusion of the issues” since, again, subjective employer motivation is not a required subset of complainant’s showing of contribution. 29 C.F.R. § 18.403.

## ***2. The ALJ’s ruling on contributing factor is not supported by substantial evidence***

Next, even absent the ALJ’s error in weighing the testimony of Company managers to rebut Powers’ evidence of contribution under the preponderance of the evidence standard, the ALJ’s ruling, for various reasons, is not supported by the substantial evidence.

First, the ALJ erred by basing the contributing factor determination on evidence that Company managers subjectively *believed* that Powers was dishonest in violation of Company Rule 1.6. E. Ex. BB (termination letter stating that Powers was in “violation of Rule 1.6 (Conduct”).). The undisputed evidence of the Public Law Board determination establishes that Powers, in fact, was complying with his doctor’s treatment plan and that his actions were within his medical restrictions; that his conduct at home, which conformed to the “treatment plan of a treating physician” certainly is within the scope of acts protected by the FRSA. 49 U.S.C.A. §

20109(c). See E. Ex. PP, Public Law Board Decision (dated July 8, 2009). The Public Law Board determined that the surveillance video showed no act Powers engaged in that violated the medical restrictions in effect as of May 16, 2007, when the video was conducted. *Id.* The undisputed evidence further shows that Claims Manager Loomis made no effort to contact Dr. Abraham, Powers or Powers' attorneys to clarify the disparity between Dr. Abraham's May 13, 2008 Chart Notes (that imposed a repetitive motion restriction) and the Injury Report (that contained no such limitation). Hearing Transcript (Tr.) at 155-156, 161 (Loomis). Furthermore, Powers testified on direct examination that the surveillance tape of his activities in May 2008 shows that he complied with the medical restrictions Dr. Abraham imposed. Powers testified that Dr. Abraham

wanted me to do things. His idea of repetition and the reason he put that on there was because I had told him that we do physical work all day long. And he didn't want to see me out there swinging a sledge hammer all day long or wasn't doing repetitive motions for hours on end. It wasn't meant to be a one or two-minute deal.

Tr. at 71.<sup>17</sup> Furthermore, Dr. Abraham testified that the repetitive motion limitation reflected on the May 13, 2008 Chart Notes permitted Powers to engage in movement that is "intermittent in nature." Tr. at 380. Dr. Abraham testified on cross-examination that "intermittent" means "less than, usually 33 percent of the time that you are doing an activity." Tr. at 385. Moreover, Dr. Abraham testified that he may not have been precise in describing to Powers at his appointment the scope of activity medically permitted. Dr. Abraham testified: "I don't think that I specifically went over those exact -- that exact criteria with Mr. Powers, either, to be honest with you." Tr. at 386. Dr. Abraham testified that he never directed Powers to cease all activity with the left hand, and that he encouraged Powers to use his hand and try to rehabilitate it. Tr. at 387. Powers testified that he used his right hand in the videotape, not the left hand that had suffered the workplace injury. See Tr. at 68-69.

For these reasons, the ALJ's determination that Powers failed to prove the contributory factor element of his claim is not supported by substantial evidence and contrary to law. Based on the record evidence, Powers proved that he engaged in protected activity when he reported a workplace injury in May 2007 (49 U.S.C.A. § 20109(a)(4)), prepared and subsequently filed a complaint under the Federal Employee Liability Act (FELA), 45 U.S.C.A. § 51 et seq. (see, e.g., *Ledure v. BNSF Ry Co.*, ALJ No. 2012-FRS-020 (Feb. 21, 2013)), and properly followed Dr. Abraham's treatment plan (49 U.S.C.A. § 20109(c)). Powers suffered an adverse action when Respondent terminated his employment in September 2008 based on an erroneous belief by Company managers that he failed to adhere to Dr. Abraham's treatment plan after telling his manager that he was following his doctor's orders, in violation of Company Rule 1.6

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<sup>17</sup> Even in evaluating whether the surveillance tape rebuts Powers' evidence of contribution, Powers effectively testified on direct examination at the evidentiary hearing that his actions comported with his medical restrictions. Tr. at 68-69, 84. However, as we have determined on review, the ALJ's determination that complainant failed to prove contributing factor is not supported by substantial evidence and contrary to law.

(dishonesty). The record reflects that Powers' acts comported with Dr. Abraham's treatment plan, and that his termination violated the Act.

Second, absent the ALJ's erroneous determination, *supra* at 26-28, the ALJ's findings, which are based on undisputed evidence, show that Powers satisfied his burden of proving that his protected activity contributed to his termination. Specifically, undisputed evidence shows that Powers' May 2007 injury at the railroad tracks and his subsequent attempts to comply with his doctor's treatment plan contributed to the disciplinary proceeding and termination.

Powers was injured in May 2007 and filed a medical injury report days later after his supervisor, Leroy Sherrah, discouraged him from filing a report immediately. See D. & O. at 2-3. The record reflects that during that year, Sherrah was "under disciplinary scrutiny because too many employees who reported to him were getting injured." *Id.* at 3, n.4. The record reflects that during 2007, Sherrah was reprimanded, suspended with pay, put on a personal development review plan, and later discharged. *Id.* at 5, n.6. A reason for Sherrah's termination was "that there were four personal injuries on Sherrah's watch." *Id.*

Powers filed his medical injury report in May 2007, and the Company accommodated his injury by placing him on light (driving) duty that comported with his medical restrictions. D. & O. at 4. When the Company determined in October 2007 that Powers could no longer be accommodated, Powers stopped working based on his belief that he could not return to a position at the local level without losing his seniority. D. & O. at 6-8; Tr. at 59-60 (Powers). In November 2007, Powers began preparing to file a personal injury claim under the FELA. D. & O. at 7-8. n.13.<sup>18</sup> Claims Manager Loomis testified that he was aware of Powers' intent to file a FELA claim, an act that has been found to be protected activity under AIR 21 (*see, e.g., Ledure, ALJ No. 2012-FRS-020, slip op. at 10*), and arranged for Powers to be offered vocational rehabilitation through the Company's Director of Disability Management. D. & O. at 8; *see also* Tr. at 173. The ALJ stated, based on Claims Manager Loomis's testimony, that "the Company's exposure would be reduced if Complainant returned to work." D. & O. at 10 (citing Tr. at 180-81). Claims Manager Loomis remained concerned about the pace of Powers' recovery and on May 2, 2008, again offered him vocational rehabilitation. D. & O. at 11 (citing Tr. at 174-175; E. Ex. S). On May 6, Claims Manager Loomis directed Investigator Jonathan Iguchi to secretly videotape Powers. Iguchi videotaped Powers over a three-day period, during May 15, 16, and 18, 2008. D. & O. at 11 (citing C. Ex. 7; E. Ex. T (video recording)).

On May 27, 2008, Dr. Abraham ordered that Powers continue the fifty-pound lifting and repetitive movement restriction. D. & O. at 12-13 (citing Tr. at 347-348). On May 28, a system level manager informed Powers that the fifty-pound lift restriction could not be accommodated. E. Ex. U. On May 29, 2008, Company Manager Gilliam interviewed Powers about his work capabilities given his doctors' medical restrictions. D. & O. at 13; C. Ex. 4; *see also* Tr. at 327-333. During this interview, Powers answered various questions Gilliam asked about his physical

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<sup>18</sup> The administrative record reflects that Powers filed the FELA complaint in state court on March 11, in the year 2009 or 2010. *See D. & O. at 7-8 ("Complainant also retained a law firm and ultimately brought the present case as well as a later claim under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.*, apparently initiated on March 11, 2009. ALJ Ex. 1 at 8 (*see fn. 1*); but see E. Ex. QQ suggesting a possible 2010 filing date)." See also D. & O. at 8; nn.12,13.*

ability to complete certain tasks. C. Ex. 4. Gilliam's questions included: "Have you been living up to your restrictions while you've been off?" C. Ex. 4; *see also* D. & O. at 13. Powers responded: "Off 6 months. Have had pain. Have been within restrictions. Wearing brace a little bit; trying to wean off brace." *Id.* Claims Manager Loomis gave Company Manager Gilliam the surveillance video on July 15, 2015. Tr. at 341 (Gilliam). Loomis testified that he gave Gilliam the videotape to help get Powers back to work. D. & O. at 15 (citing Tr. at 157 (Loomis)). However, Gilliam reviewed the videotape and concluded that Powers was being dishonest in the interview about his home activities in violation of Company Policy 1.6. D. & O. at 15; *see also* Tr. at 313-315, 332, 356-357. Gilliam sought a disciplinary charge against Powers based on a belief that Powers was not adhering to Company policy. Tr. at 347-349. Hearing Officer Poff conducted a disciplinary hearing, and the record of the hearing constituted testimony of Powers, Gilliam, documentary exhibits (including the surveillance video), and argument by the parties. D. & O. at 16-17; *see also* Tr. at 218-219. Following the disciplinary hearing, Review Officer Meriwether "reviewed the disciplinary hearing transcript . . . [and] talked to Hearing Officer Poff and to Company Manager Gilliam both before and after the hearing." D. & O. at 17; Tr. at 251. Meriwether, however, did not confer with Powers, the union representative; nor review the surveillance video directly. Tr. at 250-252; *see also* D. & O. at 17. On this information, Reviewing Officer Meriwether opted to terminate Powers' employment. D. & O. at 17-18.

Finally, Powers' activity documented in the surveillance videotape fails to objectively establish that Powers was dishonest. The record evidence establishes that the ammunitions boxes weighed less than fifty pounds, in accordance with Powers' lift restrictions at the time. There is also no objective evidence that Powers acted beyond the repetitive movement restrictions. *See supra* at 6-7 (citing E. Ex. PP).

Based on this undisputed evidence, it is clear that Powers' injury report, as well as evidence (based on testimony by Dr. Abraham and Powers) that Powers complied with his doctor's treatment plan, contributed to his termination. Given these undisputed facts, Powers has proven by a preponderance of evidence presented at the evidentiary hearing that protected activity contributed to his employment termination in violation of the FRSA.

#### **E. The ALJ on Remand Must Determine Whether the Company Can Show by Clear and Convincing Evidence that it Would Have Taken the Same Action Absent Powers' Protected Acts**

In light of this ruling on contributing factor (49 U.S.C.A. § 42121(b)(2)(B)(i)), we remand so that the ALJ can determine if Respondent can "demonstrate[], by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of that behavior" (49 U.S.C.A. § 42121(b)(2)(B)(ii). *See also* 29 C.F.R. § 1982.109(b). In *Speegle*, ARB No. 13-074, slip op. at 11-12, the ARB explained:

this statutory mandate requires adjudicators of whistleblower cases to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2)

the evidence that proves or disproves whether the employer “would have” taken the same adverse action; and (3) the facts that would change in the “absence of” the protected activity.

Should the ALJ determine on remand that Respondent failed to prove its affirmative defense by clear and convincing evidence, the ALJ should find Respondent liable under the Act and determine the appropriate relief. 49 U.S.C.A. § 20109(e); *see also* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

#### CONCLUSION

The ALJ’s Decision and Order Denying Claim is **REVERSED**, and the case is **REMANDED** for proceedings consistent with this Decision and Order of Remand.\*

**SO ORDERED**



LISA WILSON EDWARDS  
Administrative Appeals Judge



E. COOPER BROWN  
Deputy Chief Administrative Appeals Judge



JOANNE ROYCE  
Administrative Appeals Judge

*Chief Judge Igasaki and Judge Corchado dissent. Due to the exigencies of one Judge's departure from the Board, only a summary of the dissent is attached. The full dissent will follow.*

*Judge Corchado dissenting, with Chief Judge Igasaki joining.*

Due to the imminent departure of one of our Board members, I am providing only a snapshot of my dissent and will follow with a more complete dissent as soon as possible. Significantly, I note that the Board majority in this case makes two important rulings that have unanimous support. First, while it professes to “fully adopt” *Fordham* (a securities case) by reference in this railway injury case, the Board majority in fact rejects the clear-cut evidentiary rule created by the 2-judge majority in that case. The *Fordham* majority asserts or implies more than two dozen times that an employer cannot use its reasons for its own employment action to dissuade the ALJ from finding contributory factor.<sup>1</sup> Contrary to *Fordham*, the majority in this case states that “there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor *as long as the evidence is relevant to that element of proof.*”<sup>2</sup> D. & O. 21 (italics in original). Further, the majority cites several cases in which the employer’s reasons were relevant in deciding the question of “contributing factor.”<sup>3</sup> The rejection of *Fordham*’s clear-cut evidentiary rule has unanimous support.

Second, the Board majority reaffirms the duty that 29 C.F.R. Part 18 imposes on the ALJs to decide relevance questions. This ruling also has unanimous support. It is beyond question that the Board must accept an ALJ’s evidence rulings unless the ALJ abused his or her discretion. The ALJ’s discretion to decide relevance issues limits the Board’s substantial evidence review of the ALJ’s ruling on causation by restricting the Board’s ability to disregard evidence considered by the ALJ. In the end, while it is difficult to understand the majority’s patchwork discussions of the 2-judge majority decision in *Fordham* and this case, it is clear that the en banc decision here unifies the

<sup>1</sup> The *Fordham* majority expressly ruled, “It would seem self-evident from this statutory delineation that the respondent’s evidence in support of its affirmative defense as to why it took the action in question is not to be considered at the initial ‘contributing factor’ causation stage where proof is subject to the ‘preponderance of the evidence’ test.” *Fordham*, ARB No. 12-061, slip op. at 22. Another ten times, the *Fordham* majority stated one way or another that respondent’s evidence should not be “considered” in deciding “contributing factor.” See, pp. 3, 24, 26 (including n.52), 28-29, 30, 33, 35 at n.84, 37. The *Fordham* majority also said that the contributing factor should be decided in “disregard” of the respondent’s reasons for its actions (p. 3). Then using the terms “disregard,” “examined,” “presented,” “weigh,” and other terms, the *Fordham* majority reaffirmed more than a dozen times that the respondent’s reasons for its employment actions cannot dissuade the ALJ from finding that protected activity was a contributing factor in the employment action. See pp. 2, 3, 16, 17, 21, 22-23, 23, 24, 25, 26, 31, 31-32, 32 at n.74, 35, and 35 at n.84. These statements show that, among other misunderstandings, the majority confuses the ARB’s rulings that pretext is not a *mandatory* part of a complainant’s contributing factor case, as saying that the employer’s reasons for its employment action are not relevant.

<sup>2</sup> This sentence, among others, and the majority’s reliance on evidence rules reject the idea that the AIR 21 burdens of proof create a clear-cut division between “contributing factor” and “clear and convincing” evidence.

<sup>3</sup> See discussion p. 35, *infra*.

Board on the age-old rule that relevance governs the way that evidence is used on a case-by-case basis in FRSA and AIR 21 whistleblower cases, and ALJs have discretion to decide relevance. In this case, a combination of many misunderstandings and errors of law, including confusion over the Public Law Board's ruling, led the majority to conclude wrongly that certain critical factual issues were undisputed and some material evidence should be excluded to find contributing factor in this case.

To be further explained in a more complete dissent, I will introduce some of the many reasons for dissenting in the remand order. First, contrary to the majority's decision, I find that substantial evidence supports the ALJ's finding on causation: that protected activity did not contribute to Union Pacific's termination of Powers' employment. The ALJ sufficiently explained why he rejected protected activity as a contributing factor and also provided a useful recap of some of these reasons, including (1) the many months separating Powers' report of injury (May 2007) and his termination in late 2008, (2) the accommodations that Union Pacific provided and (3) that central decision-makers were not in Powers' chain of command in May 2007. D. & O. at 26. In addition, in deciding what did influence Union Pacific's actions, the ALJ properly considered Union Pacific's stated reasons for terminating Powers' employment and the ALJ explained why he believed these reasons as the true reasons instead of protected activity as Powers believes. The ALJ is the trier of fact that must be persuaded by the competing evidence the parties present. Where a genuine dispute of material facts exists, the ALJ decides whether protected activity, non-retaliatory reasons, or a mixture of both contributed to an unfavorable employment action.

Second, the majority usurps the ALJ's role and reverses his dismissal of this case. To begin with, the majority fails to perform a proper substantial evidence review of the ALJ's contributing factor ruling<sup>4</sup> and/or a proper abuse-of-discretion review of evidentiary issues the majority discussed. Then, the majority (1) disregards record evidence without finding an abuse of discretion or reversible evidentiary error, (2) reassesses the credibility and weight of witness testimony, (3) ignores substantial evidence in the record, (4) weighs the record evidence as if it were a trier of fact and (5) finds that the ALJ erred in finding no causal link between Powers' protected activity and the termination of his employment. Next, rather than remand, the majority engages in more prohibited fact-finding to conclude that Powers proved that protected activity contributed to Union Pacific's decision to terminate his employment.<sup>5</sup> The Board cannot

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<sup>4</sup> See *Bobreski v. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB Aug. 29, 2014).

<sup>5</sup> See *Stone & Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133-1134 (11th Cir. 2012) ("[a]lthough the ARB acknowledged that it was bound by the substantial evidence standard, the ARB showed little deference to the ALJ's findings with which it disagreed, and it disregarded the ALJ's conclusions supported by substantial evidence in the record;" "[t]he question for the ARB, however, was not whether the ARB could support alternative factual findings with substantial evidence, but whether the ALJ could support its original findings with substantial evidence;" "[t]herefore, we conclude that the ARB erred . . . by refusing to accept the ALJ's findings which were based on substantial evidence); *Dalton*

make factual findings; it can make findings as a matter of law that the undisputed facts establish that there was overwhelming evidence of causation<sup>6</sup> or perhaps that protected activity was inextricably intertwined with the unfavorable employment action. Neither situation exists here.

While the majority recognizes that the AIR 21 burden shifting framework “requires a ‘fact-intensive’ analysis,” it fails to apply the Board precedent in *Bobreski* to determine whether substantial evidence review supports the ALJ’s ruling on contributing factor. In *Bobreski*, the Board did not change the mandatory “substantial evidence review” standard, it merely fleshed out a standard that the law has required for years, which is to determine: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact-findings; (2) whether such record evidence logically supports the material fact-findings; and, if so (3) whether the record as a whole overwhelms that fact finding or contains factual disputes that expose that fact finding as unresolved.<sup>7</sup> Missing this point, the majority and Powers instead focus on whether there is “substantial evidence to support a prima facie case under the FRSA.” Powers’ Brief at 1. But the question is not whether evidence supports an alternate conclusion; it is whether evidence supports the ALJ’s conclusion.<sup>8</sup> As stated above, I find that the record contains substantial evidence supporting the ALJ’s finding on causation (rejecting “contributing factor”) and his finding that a reasonable mistake led to firing Powers. It is true there is some confusing language in the ALJ’s decision, but the ALJ’s overall opinion suggests to me that the ALJ understood Union Pacific to argue an all-or-nothing approach (its reasons to the exclusion of protected activity), and Union Pacific persuaded the ALJ that a reasonable mistake was the sole cause.

Setting off to see if the record supports an alternative view, the majority misunderstands the fundamental difference between the Public Law Board hearing and this case and, therefore, asserts incorrectly that the Public Law Board case created undisputed fact findings for this case. But the burdens of proof are flipped in the two hearings and the causation questions are materially different questions. The Public Law Board case placed the burden of proof on Union Pacific to prove that there was sufficient cause to fire Powers and that his alleged dishonesty justified termination as a discipline. In this whistleblower case, Powers has the burden of proof and must prove that protected activity contributed to the termination of his employment. It is true that he does not have to prove that Union Pacific’s reasons were pretext. But if Powers chooses not to

<sup>6</sup>. U.S. Dept. of Labor, 58 F. Appx. 442, 2003 WL 356780, slip op. at 9 (10th Cir. 2003) (unpub.) (“substantial evidence supported the ALJ’s findings . . . [and] under its own regulations, the Board was required to adopt those findings . . . [so] its failure to do so was reversible error”).

<sup>7</sup> See *Bobreski*, ARB No. 13-001, slip op. at 15-30.

<sup>8</sup> *Id.* at 13-14. The concurring judge in *Bobreski* raised no objection to the three-step analysis.

<sup>8</sup> See n.4, *supra*.

challenge Union Pacific's reasons, he runs the risk of permitting the ALJ to accept Union Pacific's reasons as the sole cause to the exclusion of protected activity as a factor, a choice that the trier of fact may make.

Contrary to *Fordham*, the majority in this case relies on *Abbs* and *Zurcher* to demonstrate that, in deciding the question of contributing factor, an ALJ can choose to accept the employer's reasons for its employment action and reject the employee's assertion that protected activity contributed. Most notably in *Abbs*, the Board affirmed a summary decision where the ALJ believed the employer's competing reasons for a termination where the protected activity and termination were only three days apart. The Board in *Abbs* expressly relied on the "contributing factor" standard and affirmed the ALJ's decision to discount the significance of a temporal proximity of three days.<sup>9</sup> Similarly, in *Zurcher*, the Board affirmed the ALJ's reliance on the employer's explanations of its employment action to rule that there was no "contributing factor." Again, temporal proximity was very close in the *Zurcher* case, where Zurcher's protected activity occurred in February 2008, and he was fired in March 2008. Like the *Powers* case, some of the employer's reasons involved subjective belief (Zurcher had been "rude"). Zurcher's employer based part of its subjective opinion on its observations of the reactions of a co-worker who was on the phone with Zurcher, not quite as vivid as watching a video of the complainant like Union Pacific in this case. The Board affirmed the dismissal of these cases without requiring that the ALJ consider the employer's reasons under the "clear and convincing" standard.<sup>10</sup>

Given these cases and the majority's reliance on the evidence rules, its attempt to incorporate *Fordham* into *Powers* and its discussion of the WPA to fundamentally change ARB law is confusing at best and even self-contradictory. The majority also makes some surprising and novel statements. For example, the majority in this case may be the first to have said that proving that protected activity was a "contributing factor" in an unfavorable employment action is not necessarily a violation of the whistleblower law.

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<sup>9</sup> I do not understand how the ALJ could resolve the issue of contributing factor on summary decision in this particular case, but the decisions stands as a contradiction to the clear-cut rule asserted in *Fordham*.

<sup>10</sup> *Abbs* and *Zurcher* are not the only ARB precedents that the Board fails to overrule where "contributing factor" was rejected due to the employer's explanations of its employment actions and without requiring application of the "clear and convincing" standard. See *Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022, slip op at 2, n.3 (ARB Feb. 27, 2013) (the Board affirmed an ALJ's rejection of causation based on the employer's reasons for firing the employee and expressly ruled that it did not need to review the issue of clear and convincing); *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013). The majority in this case also ignores precedent in some of its analysis. The Secretary's delegation of authority requires the Board "to adhere to the rules of decision and precedent . . . until and unless the Board or other authority explicitly reverses." Acting outside of delegated authority is a void act and, at minimum, voidable by the Secretary. See *supra* at 8.

This is a troubling statement and I wholeheartedly disagree. See D. & O. 16, n.8. The *Powers* majority also suggests that citing *Marano* thirty times on one finite point of law means that the Board can or perhaps must rely on the WPA and fundamentally change the whistleblower laws under the Board's jurisdiction. More importantly, before the *Fordham* decision, the Board has never cited the *Kewley* case for the clear-cut rule announced in *Fordham* (*Kewley*).<sup>11</sup> I reserve the remainder of my dissent. But I reiterate the significance of the consensus reached on two points in this case. First, there is no "inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor." Second, the ALJs must exercise their discretion to determine what evidence is relevant.

**LUIS A. CORCHADO**  
Administrative Appeals Judge

**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge

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<sup>11</sup> Before *Fordham*, the Board cited *Kewley* a mere three times. See *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 8 (ARB Apr. 25, 2013); *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 10, n.69 (ARB Jan. 31, 2013) (Corchado, J., concurring); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 6-7 (ARB June 20, 2012).

**ADMINISTRATIVE REVIEW BOARD**  
**CERTIFICATE OF SERVICE**

**CASE NAME :** Robert Power v. *Union Pacific Railroad Company*

**ARB CASE NO.:** 13-034

**ALJ CASE NO.:** 2010-FRS-030

**DOCUMENT :** ORDER

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## **APPENDIX 2**

## **I. Jury Instruction No. 1 - Plaintiff's Burden of Proof**

**PLAINTIFF has brought this action under the District of Columbia Whistleblower Protection Act ("WPA"). This law protects current and former employees of the District of Columbia Government [as well as employees of independent and subordinate agencies]<sup>1</sup> who report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal.**

**To prevail on his/her whistleblower claim, PLAINTIFF must prove, by a preponderance of the evidence, that**

- 1. PLAINTIFF made a protected disclosure,**
- 2. A supervisor took or threatened to take a prohibited personnel action against PLAINTIFF, and**
- 3. PLAINTIFF'S protected disclosure(s) was (were) a contributing factor in the prohibited personnel action(s).**

Source: D.C. Code §§ 1-615.51, 1-615.53 and 1-615.54(b); *Johnson v. District of Columbia*, 935 A.2d 1113, 1118 (D.C. 2007); *Crawford v. District of Columbia*, 891 A.2d 216, 219 (D.C. 2006).

## **II. Jury Instruction No. 2 - Definition of Whistleblower**

**"Whistleblower" means an employee who makes or is perceived to have made a protected disclosure.**

Source: D.C. Code § 1-615.52(9).

## **III. Jury Instruction No. 3 - Prohibitions**

**A supervisor shall not threaten to take or take a prohibited personnel action or otherwise**

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<sup>1</sup> Bracketed text should be used only where applicable.

**retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.**

Source: D.C. Code §1-615.53.

**IV. Jury Instruction No. 4 - Definition of Protected Disclosure**

**Under the WPA, a "protected disclosure" is defined as any disclosure of information, not specifically prohibited by statute, by an employee to a supervisor or a public body that the employee reasonably believes evidences:**

**[Use only applicable portions of the following:]**

- 1. Gross mismanagement;**
- 2. Gross misuse or waste of public resources or funds;**
- 3. Abuse of authority in connection with the administration of a public program or the execution of a public contract;**
- 4. A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or**
- 5. A substantial and specific danger to the public health and safety.**

**The law protects a disclosure without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant for employment.**

**An employee's communication does not have to be an original disclosure to qualify for protection under the WPA.**

**A disclosure may be protected even if it is made in the ordinary course of an employee's duties.**

Source: D.C. Code §1-615.52(a)(6).

**V. Jury Instruction No. 5 - Definition of Supervisor**

"Supervisor" means:

**an individual employed by the District government who has the authority to effectively recommend or take remedial or corrective action for the violation of a law, rule, regulation or contract term, or the misuse of government resources that an employee may allege or report pursuant to this section, including without limitation an agency head, department director, or manager.**

"Supervisor" also means:

**a District of Columbia employee who has authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The definition of supervisor shall also include an incumbent of a position which is classified at a level higher than it would have been had the incumbent not performed some or all of the above duties.**

Source: D.C. Code § 1-615.52 (8); D.C. Code § 5 1-617.01(d).

**VI. Jury Instruction No. 6 - Individual Liability**

**Any District employee, supervisor, or official can be held personally liable for relief and damages under the WPA if he/she was personally involved in the prohibited personnel action.**

Source: D.C. Code § 1-615.54(a)(1) (as amended by 57 D.C. Reg. 139697 § 2(c)(1)).

**VII. Jury Instruction No. 7 - Definition of Public Body**

A “Public body” means:

- (A) The United States Congress, the Council, any state legislature, the District of Columbia Office of the Inspector General, the Office of the District of Columbia Auditor, the District of Columbia Financial Responsibility and Management Assistance Authority, or any member or employee of one of these bodies;
- (B) The federal, the District of Columbia, or any state or local judiciary, any member or employee of these judicial branches, or any grand or petit jury;
- (C) Any federal, District of Columbia, state, or local regulatory, administrative, or public agency or authority or instrumentality of one of these agencies or authorities;
- (D) Any federal, District of Columbia, state, or local law enforcement agency, prosecutorial office, or police or peace officer;
- (E) Any federal, District of Columbia, state, or local department of an executive branch of government; or
- (F) Any division, board, bureau, office, committee, commission or independent agency of any of the public bodies described in subparagraphs (A) through (E) of this paragraph.

Source: D.C. Code §1-615.52(a)(7).

**VIII. Jury Instruction No. 8 - Definition of Reasonable Belief**

To determine whether PLAINTIFF’s belief was reasonable, and therefore protected under the WPA, the jury should decide the following question:

**Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the facts he discloses are true and that actions of the government evidence: [use only applicable] gross mismanagement, gross misuse of public resources, abuse of authority, a violation of law, or a substantial and specific danger to the public health or safety?**

Source: D.C. Code § 1-615.52(a)(6); *Zirkle v. District of Columbia*, 830 A.2d 1250, 1259-60 (D.C. 2003).

**IX. Jury Instruction No. 9 - Definition of Illegal Order**

**An illegal order is a directive to violate or to assist in violating a federal, state, or local law, rule, or regulation.**

Source: D.C. Code § 1-615.52 (4); D.C. Code § 2-223.01(4)

**X. Jury Instruction No. 10 - Prohibited Personnel Action**

**“Prohibited personnel action” includes, but is not limited to: recommended, threatened, or actual termination, demotion, suspension, or reprimand; involuntary transfer, reassignment, or detail; referral for psychiatric or psychological counseling; failure to promote or hire or take other favorable personnel action; or retaliating in any other manner against an employee because that employee makes a protected disclosure or refuses to comply with an illegal order.**

**“Retaliating” includes conducting or causing to be conducted an investigation of an employee or applicant for employment because of a protected disclosure made by the employee or applicant who is a whistleblower.**

**The definition of “investigation” includes an examination of fitness for duty.**

**The definition of “investigation” excludes any ministerial or nondiscretionary fact-finding activity necessary to perform the agency’s mission.**

Source: D.C. Code § 1-615.52(a)(5).

**XI. Jury Instruction No. 11 - Contributing Factor**

**“Contributing factor” means any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision.**

Source: D.C. Code §1-615.52(a)(2).

**XII. Jury Instruction No. 12 - Burden of Proof Shifting**

**Once the employee has demonstrated by a preponderance of the evidence that the protected disclosure was a contributing factor in the alleged prohibited personnel action against him/her, the burden of proof shall be on DEFENDANT to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activity.**

**If DEFENDANT fails to meet this burden, you must find for PLAINTIFF.**

Source: D.C. Code §1-615.54(b).

**XIII. Jury Instruction No. 13 - Clear and Convincing Evidence**

**The standard of clear and convincing evidence requires a degree of persuasion much higher than mere preponderance of evidence but still somewhat less than beyond a reasonable doubt. Clear and convincing evidence is evidence that should produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.**

Source: *Bums v. U.S.*, 880 A.2d 258, 261 fn. 2 (D.C. 2005); *Brown v. The George Washington Univ.*, 802 A.2d 382, 386 n. 6 (D.C. 2002) (describing the standard in a failure-to-promote case); *Henson v. District of Columbia Dept. of Consumer and Regulatory Affairs*, 560 A.2d 543, 545 (D.C. 1989).