ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

KENNETH PALMER,	*	
	*	
Complainant,	*	
	*	
v.	*	ARB Case No. 16-035
	*	
CANADIAN NATIONAL RAILWAY/ILLINOIS CENTRAL RAILROAD COMPANY,	*	ALJ Case No. 2014-FRS-154
	*	
Respondent.	*	
	*	

BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 3

A. Statutory and Regulatory Background 3

1. Investigative stage 4

2. ALJ hearing stage 5

B. The *Fordham* and *Powers* Decisions 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. THE CONTRIBUTING FACTOR TEST IS A FORGIVING STANDARD FOR COMPLAINANTS 11

II. ALJS SHOULD WEIGH ALL RELEVANT EVIDENCE TO DETERMINE WHETHER DISCRIMINATION IN VIOLATION OF THE STATUTE HAS OCCURRED 12

A. The Department's Contributing Factor Statutes Establish A Basic Causation Requirement That Must be Satisfied Before an Employer is Required to Prove an Affirmative Defense 12

B. The Implementing Regulations Appropriately Require Complainants to Prove the Contributing Factor Standard by a Preponderance of the Evidence, Which Necessitates Consideration of All Relevant Evidence 16

Page

C. The Legislative Histories of the ERA and the WPA Do Not Reflect That Adoption of the Contributing Factor Standard Was Intended to Prevent Comparative Evaluation of Causation Evidence 19

D. Well-Established Case Law Reflects That ALJs Are Not Precluded From Weighing the Parties' Causation Evidence at the Contributing Factor Stage 24

E. As Demonstrated by this Case, Prohibiting ALJs From Considering an Employer's Reasons for Acting at the Contributing Factor Stage Could Impair the Ability of Some Whistleblowers to Prove a Statutory Violation 26

CONCLUSION 30

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: Page

Addis v. Dep't of Labor,
575 F.3d 688 (7th Cir. 2009) 18, 25

Allen v. Admin. Review Bd.,
514 F.3d 468 (5th Cir. 2008) 18

Almerfedi v. Obama,
654 F.3d 1 (D.C. Cir. 2011) 19

Aquino v. Dep't of Homeland Sec.,
121 M.S.P.R. 35 (MSPB 2014) 24

Araujo v. N.J. Transit Rail Operations, Inc.,
708 F.3d 152 (3d Cir. 2013) 11, 12, 26, 28

Armstrong v. Dep't of Justice,
107 M.S.P.R. 375 (MSPB 2007) 23

Bechtel v. Admin. Review Bd.,
710 F.3d 443 (2d Cir. 2013) 25

Bechtel v. Competitive Techs, Inc.,
ARB No. 09-052, 2011 WL 4889269
(ARB Sept. 30, 2011) 24-25, 26

Bobreski v. J. Givoo Consultants, Inc.,
ARB No. 13-001, 2014 WL 4660840
(ARB Aug. 29, 2014) 12, 14, 19, 24

Brune v. Horizon Air Indus., Inc.,
ARB No. 04-037, 2006 WL 282113 (ARB Jan. 31, 2006) 18, 19

Cases--continued: Page

Clark v. Dep't of Army,
997 F.2d 1466 (Fed. Cir. 1993),
superseded by statute on other grounds,
5 U.S.C. §§ 1221(e)(1)(A), (B) 16, 21, 22

Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust for S. Cal.,
508 U.S. 602 (1993) 18-19

Cont'l Airlines, Inc. v. Admin. Review Bd.,
638 F. App'x 283 (5th Cir. 2016) 11, 25, 26

DeFrancesco v. Union R.R. Co.,
ARB No. 10-114, 2012 WL 759336 (ARB Feb. 29, 2012) 12, 26

Deltek, Inc. v. Dep't of Labor,
No. 14-2415, 2016 WL 2946570 (4th Cir. May 20, 2016) 25, 26

Dorney v. Dep't of Army,
117 M.S.P.R. 480 (MSPB 2012) 23

Dysert v. Fla. Power Corp.,
No. 1993-ERA-021 (Sec'y Dec. Aug. 7, 1995) 18

Dysert v. Sec'y of Labor,
105 F.3d 607 (11th Cir. 1997) 18

Evans v. EPA,
ARB No. 08-059, 2012 WL 3255132 (ARB July 31, 2012) 4

Feldman v. Law Enf't Assocs. Corp.,
752 F.3d 339 (4th Cir. 2014) 26

Finston v. Health Care Fin. Admin.,
83 M.S.P.R. 100 (MSPB 1999) 23

Cases--continued: Page

Fordham v. Fannie Mae,
ARB No. 12-061, 2014 WL 5511070
(ARB Oct. 9, 2014) ..... 1 & *passim*

Franchini v. Argonne Nat'l Lab.,
ARB No. 13-081, 2015 WL 5781072
(ARB Sept. 28, 2015) 7, 13

Goines v. Dep't of Agric.,
113 F. App'x 925 (Fed. Cir. 2004) 23

Hakki v. Dep't of Veterans Affairs,
MSPB No. AT–1221–10–1043–W–3,
2016 WL 1079362 (MSPB Mar. 18, 2016) 22-23

Halliburton, Inc. v. Admin. Review Bd.,
771 F.3d 254 (5th Cir. 2014) 28

Hasan v. U.S. Dep't of Labor,
553 F. App'x 135 (3d Cir. 2014) 25

Keeler v. J.E. Williams Trucking, Inc.,
ARB No. 13-070, 2015 WL 4071575
(ARB June 2, 2015) 7, 13, 15

Kewley v. Dep't of Health & Human Servs.,
153 F.3d 1357 (Fed. Cir. 1998) 23

Klopfenstein v. Admin. Review Bd.,
402 F. App'x 936 (5th Cir. 2010) 25

Lockheed Martin Corp. v. Admin. Review Bd.,
717 F.3d 1121 (10th Cir. 2013) 11

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Majali v. U.S. Dep't of Labor,
294 F. App'x 562 (11th Cir. 2008) 25

Marano v. Dep't of Justice,
2 F.3d 1137 (Fed. Cir. 1993)..... 11, 12, 28

Metro. Stevedore Co. v. Rambo,
521 U.S. 121 (1997) 18

Mizusawa v. Dep't of Labor,
524 F. App'x 443 (10th Cir. 2013) 25

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 20

Nelson v. Energy Nw.,
ARB No. 13-075, 2015 WL 5781071 (ARB Sept. 30, 2015).....7

Nevarez v. Werner Enter.,
ARB No. 14-010, 2015 WL 6778016 (ARB Oct. 30, 2015) 7

Peck v. Safe Air Int'l, Inc.,
ARB No. 02-028, 2004 WL 230770 (ARB Jan. 30, 2004).....25

Powers v. Dep't of Navy,
69 M.S.P.R. 150 (MSPB 1995).....22

Powers v. Union Pac. R.R. Co.,
ARB No. 13-034, 2015 WL 1881001
(ARB Apr. 21, 2015)..... 1-2, 6, 8, 13

Rumsey v. Dep't of Justice,
120 M.S.P.R. 259 (MSPB 2013).....23

Schmittling v. Dep't of Army,
219 F.3d 1332 (Fed. Cir. 2000).....22

Cases--continued: Page

Stewart v. Lockheed Martin Aeronautics Co.,
ARB No. 14-033, 2015 WL 5781075 (ARB Sept. 10, 2015).....7

Trimmer v. Los Alamos Nat'l Lab. and Univ. of Calif.,
ARB No. 96-072, 1997 WL 235807 (ARB May 8, 1997).....25

Trimmer v. U.S. Dep't of Labor,
174 F.3d 1098 (10th Cir. 1999).....14

United States v. C.H. Robinson Co.,
760 F.3d 1376 (Fed. Cir. 2014).....19

United States v. Clum,
492 F. App'x 81 (11th Cir. 2012) 19

Zinn v. Univ. of Mo.,
Nos. 93-ERA-34, 36, 1996 WL 171417
(Sec'y Dec. Jan 18, 1996).....18

Statutes:

Energy Reorganization Act,
42 U.S.C. § 5851 10

Federal Railroad Safety Act,
49 U.S.C. § 20101 *et seq.,*

49 U.S.C. § 20109 3
49 U.S.C. § 20109(a)..... 3, 11, 13, 14
49 U.S.C. § 20109(d) 3
49 U.S.C. § 20109(d)(2).....4

Statutes--continued: Page

Wendell H. Ford Aviation Investment& Reform Act of the 21st Century,
49 U.S.C. § 42121 *et seq.,*

49 U.S.C. § 42121(b) 2, 4
49 U.S.C. § 42121(b)(2)(A) 4, 5, 17
49 U.S.C. § 42121(b)(2)(B)(i).....4
49 U.S.C. § 42121(b)(2)(B)(ii)..... 4, 11
49 U.S.C. § 42121(b)(2)(B)(iii) 5-6, 13, 14, 17
49 U.S.C. § 42121(b)(2)(B)(iv)..... 5, 14, 15

Whistleblower Protection Act,
5 U.S.C. § 1221 10
5 U.S.C. § 1221(e)(1)(A), (B) 16

Code of Federal Regulations:

5 C.F.R. § 1201.4(q) 24

5 C.F.R. § 1209.7(a) 24

29 C.F.R. § 18.57(b) 5

29 C.F.R. Part 1982:

29 C.F.R. § 1982.100(a).....3
29 C.F.R. § 1982.103 3
29 C.F.R. § 1982.104 3
29 C.F.R. § 1982.104(e)(1)-(3) 4
29 C.F.R. § 1982.104(e)(4) 4
29 C.F.R. § 1982.105(a)(1) 4-5
29 C.F.R. § 1982.106 5
29 C.F.R. § 1982.108(a)(1) 1
29 C.F.R. § 1982.109(a)..... 5, 17
29 C.F.R. § 1982.109(b).....5

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55 Fed. Reg. 28,591 (July 12, 1990) 23-24

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138 Cong. Rec. H11,409, H11,444-45 (daily ed. Oct. 5, 1992).....20

S. Rep. No. 103-358 (1994), *reprinted in,*
1994 U.S.C.C.A.N. 3549..... 20, 21, 22

U.S. Dep't of Labor:

OSHA Memorandum, *Clarification of the Investigative Standard for OSHA Whistleblower Investigations* (Apr. 20, 2015), http://www.whistleblowers.gov/InvestigativeStandard20150420.html 17

OSHA Whistleblower Investigation Data, Table of Cases Completed for FY 2013, 2014, and 2015, http://www.whistleblowers.gov/wb_data_FY05-15.pdf 2

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3d Cir. Model Civil Jury Instructions, ¶ 1.10 (2014), http://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions.....19

Other Authorities--continued: Page

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BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

INTRODUCTION

Pursuant to 29 C.F.R. § 1982.108(a)(1) and the June 17, 2016 Order of the Administrative Review Board ("ARB" or "Board"), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae in response to the Board's invitation to address the questions regarding contributing factor causation previously considered by a panel of the Board in *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014), and before the Board en banc in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, 2015 WL 1881001 (ARB Mar. 20, 2015)

(reissued with full dissent Apr. 21, 2015), which was vacated on May 23, 2016. The Board has specifically invited briefs on the following two questions:

> (1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
>
> (2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

These inquiries are relevant in cases in which ALJs must apply the evidence to the statutory burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b), which have been expressly incorporated or are reflected in the whistleblower provisions of numerous statutes administered by the Department of Labor.

OSHA implements and enforces the Department's contributing factor statutes, and processes more than 1,000 cases under those statutes annually.[1] The Assistant Secretary thus has a significant interest in the interpretation of those laws. For the reasons discussed below, the Assistant Secretary urges the Board to reaffirm that the contributing factor standard is a forgiving burden for employees who need only demonstrate that protected activity contributed in *any* way to the

[1] *See* OSHA Whistleblower Investigation Data, Table of Cases Completed for FY 2013, 2014, and 2015, http://www.whistleblowers.gov/wb_data_FY05-15.pdf.

adverse action in order to prove a statutory violation. The Assistant Secretary also respectfully requests that the Board clarify that, after trial, ALJs should consider and weigh all relevant causation evidence, which may include evidence offered by an employer that specifically rebuts the employee's causation evidence or that is so compelling that it shows that protected activity did not contribute at all to the employer's actions, in deciding whether impermissible discrimination has occurred.

STATEMENT

A. Statutory and Regulatory Background

The anti-retaliation provisions of the Federal Railroad Safety Act (FRSA or the Act), 49 U.S.C. § 20109, prohibit railroad carriers from discharging or in any other way discriminating against an employee if such discrimination is "due, in whole or in part," to the employee's protected activity under the Act. 49 U.S.C. § 20109(a); *see* 29 C.F.R. § 1982.100(a). An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Secretary of Labor. *See* 49 U.S.C. § 20109(d); 29 C.F.R. § 1982.103.[2] As previously noted, FRSA proceedings are governed by the rules and

[2] The Secretary has delegated responsibility for receiving and investigating FRSA whistleblower complaints to OSHA. *See* Sec'y of Labor's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. § 1982.104.

procedures, as well as the burdens of proof, set forth in AIR 21, 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2).

1. *Investigation stage:* Under AIR 21's procedures, OSHA will commence an investigation if a complaint, supplemented as appropriate by interviews of the complainant, alleges the existence of facts and evidence to make a "prima facie showing" that (1) the employee engaged in protected activity, (2) the employer had knowledge of the protected activity, (3) the employee suffered an adverse action, and (4) the "circumstances were sufficient to raise the inference that the protected activity . . . was a contributing factor in the adverse action." 29 C.F.R. §§ 1982.104(e)(1)-(3); *see* 49 U.S.C. § 42121(b)(2)(B)(i); *Evans v. EPA*, ARB No. 08-059, 2012 WL 3255132, at *5 (ARB July 31, 2012) (describing OSHA's standards for docketing complaints and issuing findings). Even if the complainant makes such a showing, however, OSHA cannot investigate and must dismiss the complaint if the employer establishes by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.104(e)(4).

After investigating, OSHA must issue a determination either dismissing the complaint or finding "reasonable cause to believe that a violation" of FRSA has occurred and ordering appropriate relief. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. §

1982.105(a)(1). The complainant or respondent may file objections to OSHA's decision with an ALJ. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.106.

2. *ALJ hearing stage:* The ALJ may determine that a violation of FRSA has occurred only if the complainant has demonstrated by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.109(a). Even if the complainant satisfies this burden, the ALJ may not order relief if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b).

B. The *Fordham* and *Powers* Decisions

1. On October 9, 2014, a majority panel of the ARB issued a decision in a Sarbanes-Oxley Act (SOX) case addressing AIR 21's burdens of proof and the applicable evidentiary standards discussed above. *See Fordham*, 2014 WL 5511070, at *1. The panel held that an ALJ's determination of whether a complainant has met his or her burden of proving that protected activity contributed to the adverse action must be made solely based on the evidence submitted by the complainant, in disregard of any evidence submitted by the employer in support of its affirmative defense that it would have taken the same

personnel action for legitimate, non-retaliatory reasons. *Id*. The *Fordham* majority concluded that the employer's reasons for taking the adverse action may be considered only at the affirmative defense stage. *Id*.

2. In *Powers*, the Board reviewed en banc the approach to contributing factor causation set forth in *Fordham*. *See Powers*, 2015 WL 1881001. In a 3-2 decision, the Board "fully adopted" *Fordham*'s holding that evidence supporting legitimate, non-retaliatory reasons for an employer's action may not be weighed against a complainant's showing of contributing factor causation. *Powers*, 2015 WL 1881001, at *12, 16. The *Powers* majority did, however, purport to clarify *Fordham* in several ways. *See Powers*, 2015 WL 1881001, at *12, 22. For example, the decision explains that in cases where there is little or no evidence that protected activity has any connection to an adverse action, "objective evidence of employer conduct" may be relevant at the contributing factor stage in showing that protected activity played no role at all in the adverse action. *Id.* at *18. The *Powers* decision was vacated on May 23, 2016.

3. The *Powers* decision is susceptible to multiple interpretations, as illustrated by the divergent views of the decision expressed by members of the

Board in subsequent cases.[3] To the extent that the *Powers* majority was reaffirming the statements in *Fordham* that the employer's reasons for taking the adverse action may be considered only at the affirmative defense stage, OSHA believes that proposition is erroneous for the reasons explained below.

However, the *Powers* decision could instead be read as advising ALJs to be faithful to the broad and forgiving contributing factor standard of causation by recognizing that, because the legal inquiries at the contributing factor and affirmative defense stages are distinct, an employer's evidence regarding its reasons for acting may not always be *relevant* at the contributing factor stage. The *Powers* decision could be construed to hold that "objective evidence of employer conduct" (such as close temporal proximity, statements of animus, differences in the employer's attitude toward the employee before and after the whistleblowing, shifting explanations for the employer's decision, and intervening events not tied to the employee's conduct) should weigh more heavily in the factfinder's consideration of whether protected activity contributed to the employer's action than subjective evidence supporting the employer's explanation for its actions (i.e.,

[3] *See, e.g., Nevarez v. Werner Enters.*, ARB No. 14-010, 2015 WL 6778016 (ARB Oct. 30, 2015); *Nelson v. Energy Nw.*, ARB No. 13-075, 2015 WL 5781071 (ARB Sept. 30, 2015); *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, 2015 WL 5781072 (ARB Sept. 28, 2015); *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-033, 2015 WL 5781075 (ARB Sept. 10, 2015); *Keeler v. J.E. Williams Trucking, Inc.*, ARB No. 13-070, 2015 WL 4071575 (ARB June 2, 2015).

explanations based on the employer's view of the employee's conduct). *See Powers*, 2015 WL 1881001, at *16-21. When the evidence is sufficient for the ALJ to conclude that protected activity more likely than not played a role, however small, in the employer's actions, then evidence supporting the employer's other reasons for its actions is irrelevant at the contributing factor stage and should be considered solely in the context of the employer's affirmative defense. *Id.* at *21 (noting that a 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). This reading of the *Powers* majority opinion is generally consistent with OSHA's view of the statute, the case law, and the legislative history outlined below.

SUMMARY OF THE ARGUMENT

The contributing factor standard is a forgiving burden of proof for employees who need only demonstrate that *one* of the reasons, no matter how insignificant, that the employer took an adverse action was due to protected activity. If the employee makes this showing, then he or she has proven discrimination in violation of the statute. The employer may be relieved of liability for that violation by showing by clear and convincing evidence that even

though protected activity played a role in the adverse action, the employer would have taken the same action in the absence of the protected activity.

When the employer presents evidence that directly rebuts the employee's causation evidence or that is so compelling that it may show that protected activity did not in any way contribute to the employer's decision to take an adverse action, ALJs should consider and weigh all relevant and admissible evidence on the issue of causation. ALJs must, however, ensure that their weighing of the evidence recognizes the broadly protective nature of the contributing factor standard of causation and does not erroneously impose a burden on the employee to disprove the employer's asserted reasons for taking action against the employee. Such an approach to evaluating causation is fully supported by the statutory text, legislative history, and case law under the Department's contributing factor statutes.

First, the plain language of the Department's contributing factor statutes reflects that a violation only occurs if the employee's protected activity is an actual cause of discrimination (*i.e.*, if protected activity has, in fact, contributed to the adverse action). Allowing ALJs to consider all essential facts in determining whether the contributing factor test has been met regardless of which party offered the evidence ensures that findings of discrimination are made only when protected activity actually contributed to the adverse action in some way.

Second, the implementing regulations for the contributing factor statutes appropriately require complainants to prove the contributing factor test by a preponderance of the evidence, which has consistently been interpreted by federal courts and the ARB as requiring a comparative weighing of all relevant evidence.

Third, while the legislative histories of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, and the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221, clearly reflect that Congress intended the contributing factor burden to be a broadly protective standard for whistleblowers, such legislative histories do not support the conclusion that ALJs are precluded from considering an employer's reasons for its actions under the contributing factor test. Interpreting such history otherwise is in tension with the WPA's regulations and the views advanced by the Merit Systems Protection Board (MSPB) and affirmed by the Federal Circuit.

Fourth, decades of federal and administrative case law interpreting the contributing factor statutes support the conclusion that ALJs should consider all relevant evidence in deciding whether discrimination has occurred.

Finally, as demonstrated by the instant case, an approach to contributing factor causation that strictly prohibits ALJs from considering an employer's reasons for acting could deprive complainants of their well-established opportunity to prove causation by presenting evidence of disparate treatment and pretext.

ARGUMENT

I. THE CONTRIBUTING FACTOR TEST IS A FORGIVING STANDARD FOR COMPLAINANTS

As the ARB and federal courts have consistently recognized, the contributing factor burden of proof is "broad and forgiving." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *see Fordham*, 2014 WL 5511070, at *15. Under this standard, a complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(ii)); *see* 49 U.S.C. § 20109(a). In other words, 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." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks omitted and emphasis added); *see Cont'l Airlines, Inc. v. Admin. Review Bd.*, 638 F. App'x 283, 288 (5th Cir. 2016); *Lockheed Martin Corp.*, 717 F.3d at 1136.

The contributing factor test was "specifically intended to overrule existing case law, which require[d] a whistleblower to prove that his protected conduct 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*,

2 F.3d at 1140); *see Fordham*, 2014 WL 5511070, at *15; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, 2014 WL 4660840, at *9 (ARB Aug. 29, 2014). Where there is no direct evidence that the protected act was a contributing factor, the employee may satisfy his or her burden by offering circumstantial evidence. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 759336, at *3 (ARB Feb. 29, 2012); *see, e.g.*, *Araujo*, 708 F.3d at 160-61.

A whistleblower will thus prevail under the contributing factor test if he or she shows by preponderant evidence that *one* of the reasons that the employer took an adverse action was because of protected activity. If the whistleblower is able to make such a showing, then he or she has proven discrimination in violation of the statute and evidence offered by the employer showing that it had other legitimate, non-retaliatory reasons for acting is not relevant until the judge evaluates relief for the proven violation at the affirmative defense stage.

II. ALJS SHOULD WEIGH ALL RELEVANT EVIDENCE TO DETERMINE WHETHER DISCRIMINATION IN VIOLATION OF THE STATUTE HAS OCCURRED

A. The Department's Contributing Factor Statutes Establish a Basic Causation Requirement That Must be Satisfied Before an Employer is Required to Prove an Affirmative Defense

1. As reflected in the plain text of the contributing factor statutes, a statutory violation is established if the complainant demonstrates that protected activity

contributed to the adverse action. *See, e.g.*, 49 U.S.C. § 42121(b)(2)(B)(iii) ("a *violation* of [the whistleblower provision] *has occurred only* if the complainant demonstrates" that protected activity was a "contributing factor" in the adverse action) (emphasis added).[4] The FRSA whistleblower provision, for example, is violated if discrimination is "*due, in whole or in part,*" to the employee's protected activity. 49 U.S.C. § 20109(a) (emphasis added). Consequently, if an adverse action occurred *solely* due to non-retaliatory reasons, an employer did not violate the law because protected whistleblowing did not contribute to the adverse action.

2. The determination of whether protected whistleblowing contributed to an adverse action (and thus a statutory violation has occurred) necessarily requires consideration of all relevant evidence, regardless of which party presented it. To hold otherwise could preclude consideration of an employer's reasons for its action even in situations in which the employer's evidence is so compelling that it shows that protected activity did not contribute at all to the employer's decision. Such an

[4] The *Powers* majority stated 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." 2015 WL 1881001, at *13 n.8. The majority thus apparently would require employees both to prove the contributing factor test *and* to defeat the employer's affirmative defense. Such an interpretation is inconsistent with the plain text of the contributing factor statutes, which expressly prohibit employers from discriminating, even in part, due to protected activity. *See* 49 U.S.C. § 20109(a); *Franchini*, 2015 WL 5781072, at *14 n.98 (Corchado, J., concurring and dissenting); *Keeler*, 2015 WL 4071575, at *7 (Igasaki, J., concurring).

interpretation would be inconsistent with the basic causation requirement imposed by the statute because it would deem an employer to have violated the law, when in fact protected whistleblowing did not contribute to the employer's actions. *See* 49 U.S.C. § 20109(a).[5]

3. This reading of the statute does not render an employer's affirmative defense meaningless nor does it allow an employer to prevail under a lesser burden than Congress intended. AIR 21's plain language requires complainants to prove discrimination *before* the employer is required to prove by clear and convincing evidence that, notwithstanding that protected activity contributed to its decision, it would have taken the same action in the absence of protected whistleblowing. *See* 49 U.S.C. §§ 42121(b)(2)(B)(iii), (iv); *see, e.g.*, *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999); *Bobreski*, 2014 WL 4660840, at *10; 76

[5] For example, consider a case in which an employee files a safety complaint with his or her supervisor on Monday. On Tuesday, a tornado strikes the train yard where the employee works and destroys all of the buildings. On Wednesday, the railroad determines that its facilities are damaged beyond repair and terminates all 100 workers stationed at that train yard. Based on *Fordham*, an ALJ would likely conclude that FRSA was violated because the employee engaged in protected activity and was terminated only two days later; the ALJ could not consider the evidence of the tornado or the fact that all of the employee's co-workers were also fired. The railroad would likely avoid liability for damages by later proving its affirmative defense but would not be able to negate the finding that it violated the law (even though the record as a whole clearly would not support such finding).

Fed. Reg. 2808, 2812 (Jan. 18, 2011) (under the ERA, if the complainant fails to prove a statutory violation, "the burden never shifts to the employer").

Proof of the employer's affirmative defense does not negate the finding of discrimination; indeed, the affirmative defense only becomes relevant if discrimination has already been established. The affirmative defense merely allows an employer to escape liability for a proven violation in a mixed-motive case in which the employer's evidence supporting its reasons for taking an adverse action clearly and convincingly show that it would have taken the same action even if the protected activity had not occurred. 49 U.S.C. § 42121(b)(2)(B)(iv) ("*Relief may not be ordered*" if the employer demonstrates its affirmative defense) (emphasis added); *see Keeler*, 2015 WL 4071575, at *7 (Igasaki, J., concurring) (the purpose of the affirmative defense "is only to determine whether, *after finding discrimination*, relief will be denied due to factors that would've justified the adverse action in the absence of protected activity") (emphasis added). The contributing factor stage is thus the only opportunity for an employer to show that it acted *solely* for non-retaliatory reasons, i.e., that protected activity did not contribute in any way to the adverse action; at the affirmative defense stage, a violation has already been established.

B. The Implementing Regulations Appropriately Require Complainants to Prove the Contributing Factor Standard by a Preponderance of the Evidence, Which Necessitates Consideration of All Relevant Evidence

In *Fordham*, the majority asserted that, by adopting the contributing factor test, Congress intended to eliminate the weighing of the parties' respective causation evidence. *See* 2014 WL 5511070, at *16. However, such an interpretation improperly conflates the contributing factor burden of proof with the preponderance of the evidence standard, which has been consistently interpreted to require that a court consider the entire record.

1. The contributing factor burden and the preponderance of the evidence standard "are entirely different concepts . . . . The first concept describes how thin the 'causation link' can be between protected activity and the unfavorable employment action; the second pertains to the weight of the evidence presented for and against the very existence of a causal link." *Fordham*, 2014 WL 5511070, at *24 n.110 (Corchado, J., concurring in part and dissenting in part); *see Clark v. Dep't of Army*, 997 F.2d 1466, 1473 (Fed. Cir. 1993), *superseded by statute on other grounds*, 5 U.S.C. §§ 1221(e)(1)(A), (B) (rejecting the argument that an employer's evidence of its reasons for the adverse action cannot be considered under the preponderance of the evidence standard in evaluating the contributing

factor test because such an argument "confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue").

2. The Department's contributing factor statutes require complainants to demonstrate that whistleblowing activity contributed to the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii). Because the statutes do not define the term "demonstrate," the Assistant Secretary has promulgated regulations requiring that, at the ALJ evidentiary stage, a plaintiff must demonstrate "by a preponderance of the evidence" that protected activity contributed to the adverse action. 29 C.F.R. § 1982.109(a).[6] The preponderance of the evidence standard has

[6] The statutory term "demonstrate" establishes that a higher burden of proof applies to a complainant's case after an ALJ hearing than it does at the OSHA investigation stage. As noted above, the standard applicable to OSHA whistleblower investigations is whether OSHA has "reasonable cause" to believe that a violation has occurred. 49 U.S.C. § 42121(b)(2)(A); *see* OSHA Memorandum, *Clarification of the Investigative Standard for OSHA Whistleblower Investigations* (April 20, 2015), http://www.whistleblowers.gov/InvestigativeStandard20150420.html ("Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing."). Significantly, however, even under the "reasonable cause" standard, OSHA considers and weighs all record evidence relevant to causation. *Id.* ("The threshold OSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and *consideration of the evidence provided by both sides during the investigation*, but does not generally require as much evidence as would be required at trial. Thus, *after evaluating all of the evidence provided by the employer and the complainant*, OSHA must believe that a reasonable judge could rule in favor of the complainant.") (emphasis added).

been consistently applied to the complainant's burden of proof under the Department's contributing factor statutes since 1995. *See Dysert v. Fla. Power Corp.*, No. 1993-ERA-021 (Sec'y Dec. Aug. 7, 1995).

3. The Department's application of the preponderance of the evidence standard to the complainant's contributing factor burden was affirmed as reasonable by the Eleventh Circuit in *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997) and subsequently adopted and consistently applied by federal courts and the ARB itself for nearly twenty years. *See, e.g.*, *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, 2006 WL 282113, at *8 (ARB Jan. 31, 2006); *Zinn v. Univ. of Mo.*, Nos. 93-ERA-34, 36, 1996 WL 171417, at *3 (Sec'y Dec. Jan. 18, 1996).

4. The Supreme Court has explained that the preponderance of the evidence standard "goes to how convincing the evidence in favor of a fact must be *in comparison with the evidence against it* before that fact may be found." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (emphasis added). This "most common standard in the civil law" requires a party to prove "that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622

(1993) (internal quotation marks omitted). Federal courts have therefore interpreted the preponderant evidence standard to require a comparative weighing of all relevant and competent evidence. *See, e.g.*, *United States v. C.H. Robinson Co.*, 760 F.3d 1376, 1383 (Fed. Cir. 2014); *United States v. Clum*, 492 F. App'x 81, 85 (11th Cir. 2012); *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011).[7] Indeed, the ARB itself has consistently interpreted the preponderance of the evidence standard as requiring evaluation of all relevant evidence. *See, e.g.*, *Bobreski*, 2014 WL 4660840, at *10; *Brune*, 2006 WL 282113, at *8.

C. The Legislative Histories of the ERA and the WPA Do Not Reflect That Adoption of the Contributing Factor Standard Was Intended to Prevent Comparative Evaluation of Causation Evidence

In support of its conclusion that adoption of the contributing factor test was intended to strictly preclude judicial consideration of an employer's explanation

[7] The Eighth Circuit has proposed model jury instructions for FRSA explaining that a plaintiff's claim must be proven by the "greater weight of the evidence." Eighth Cir. Proposed Ch. 18, Federal Railway Safety Act, Civil Jury Instructions, ¶¶ 18.00, 18.20 (2016), http://www.juryinstructions.ca8.uscourts.gov/Proposed_Chapter_18_Employment--Federal_Railway_Saftey_Act.pdf. Model jury instructions promulgated by several other federal appellate courts also explicitly state that, when applying the preponderance of the evidence standard in civil cases, juries must consider all relevant evidence regardless of which party presented it. *See, e.g.*, Third Cir. Model Civil Jury Instructions, ¶ 1.10 (2015), http://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions; Ninth Cir. Manual of Model Civil Jury Instructions, ¶ 1.3 (2007), http://www3.ce9.uscourts.gov/jury-instructions/model-civil; Eleventh Cir. Pattern Jury Instructions (Civil), ¶ 1.1 (2013), http://www.ca11.uscourts.gov/pattern-jury-instructions.

for an adverse action in deciding whether a violation occurred, the *Fordham* majority relied heavily on the legislative history of the ERA and the WPA. *See* 2014 WL 5511070, at *19-23. Although the *Fordham* majority's decision finds some support in the Senate report for the 1994 WPA amendments, *see* S. Rep. No. 103-358, at 6-7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3555-56, subsequent case law interpreting that history and relevant regulations counter such a view.

1. With regard to the ERA, *Fordham* relied on the statements of two of the statute's principal sponsors in which they explained the ERA's 1992 amendments adopting the respective "contributing factor" and "clear and convincing evidence" burdens of proof. *See* 2014 WL 5511070, at *19. That legislative history is most fairly read as reflecting Congress's intent to replace the "motivating factor" burden set forth in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) with the more forgiving "contributing factor" standard to "facilitate relief" for whistleblowers. 138 Cong. Rec. H11,409, H11,444-45 (daily ed. Oct. 5, 1992). The legislative history does not address what type of evidence may be considered under that standard.

2. With respect to the WPA's legislative history, the *Fordham* majority accurately observed that, in 1994, Congress amended the WPA to clarify that a complainant may satisfy the contributing factor standard solely by establishing that

the employer knew of the complainant's protected activity and that there was temporal proximity between such activity and the adverse action. *See Fordham*, 2014 WL 5511070, at *20-22. These 1994 amendments were enacted, in part, in response to the Federal Circuit's 1993 decision in *Clark*, 997 F.2d at 1472. *See* S. Rep. No. 103-358, at 7-8. In *Clark*, the Federal Circuit held that circumstantial evidence of knowledge and timing alone was insufficient to prove the contributing factor test per se. *See* 997 F.2d at 1471-72.

However, in *Clark*, the Federal Circuit also ruled upon the precise question at issue in *Fordham*: "when the agency offers evidence to prove that the disclosure was not a contributing factor (an issue evaluated under the preponderant evidence standard), and this evidence is also relevant to the agency's affirmative defense that the same action would have been taken absent the disclosure, must the agency meet the higher 'clear and convincing' evidence standard reserved for its affirmative defense?" *Clark*, 997 F.2d at 1470. In response to that issue, the Federal Circuit held that, at the contributing factor stage, the employer "may introduce any relevant and competent evidence to counter [the whistleblower's] evidence, including the reason it acted." *Id.* at 1473. The court further concluded that, at this stage, the ALJ must decide "on the basis of all the evidence whether [the whistleblower] proved her claim by a preponderance of evidence." *Id.*

With the 1994 WPA amendments, Congress intended to overrule the Federal Circuit's holding in *Clark* that evidence of knowledge and timing alone could not prove the contributing factor test. *See* S. Rep. No. 103-358, at 7-8. However, the MSPB, the tribunal charged with adjudicating the WPA, has expressly concluded that the 1994 amendments did not overrule *Clark*'s holding that an employer's causation evidence may be considered at the contributing factor stage. *See Powers v. Dep't of Navy*, 69 M.S.P.R. 150, 155-57 (MSPB 1995). As the MSPB explained, "Congress has not disturbed the other holdings in *Clark*, such as that *any and all relevant evidence, including 'the reason for the agency's action,' may be considered in determining the contributing factor issue*." *Powers*, 69 M.S.P.R. at 156 n.7 (quoting *Clark*, 997 F.2d at 1472-73) (emphasis added).[8]

Accordingly, the MSPB has consistently held that if a whistleblower cannot satisfy the knowledge and timing elements of the WPA's contributing factor test, the court must consider all relevant evidence such as that pertaining to "the strength or weakness of the agency's reasons for taking the personnel action" in determining whether protected activity contributed to the adverse action. *Hakki v. Dep't of Veterans Affairs*, MSPB No. AT–1221–10–1043–W–3, 2016 WL

[8] *See also Schmittling v. Dep't of Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (recognizing that congressional abrogation of *Clark* was limited in scope). Significantly, the MSPB cases relied upon in *Fordham*, *see* 2014 WL 5511070, at *20 n.74, were issued prior to the MSPB's *Powers* decision.

1079362, ¶ 37 (MSPB Mar. 18, 2016); *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259, 273 (MSPB 2013); *Dorney v. Dep't of Army*, 117 M.S.P.R. 480, 486 (MSPB 2012); *Armstrong v. Dep't of Justice*, 107 M.S.P.R. 375, 386 (MSPB 2007) (explaining that "the Board may consider any relevant evidence on the contributing factor question, including the strength or weakness of the agency's reasons for taking the personnel action"). Moreover, the MSPB permits ALJs to consider the employer's evidence on knowledge and timing. *See, e.g.*, *Finston v. Health Care Fin. Admin.*, 83 M.S.P.R. 100, 102 (MSPB 1999).[9]

Moreover, and significantly, the WPA's regulations have applied a preponderance of the evidence standard to the complainant's contributing factor burden since 1990 and that evidentiary standard expressly requires a comparative weighing of all the relevant record evidence. *See* 55 Fed. Reg. 28,591, 28,592-94

[9] The *Fordham* majority relied on the Federal Circuit's decision in *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998) for its conclusion that an employer's causation evidence may not be weighed against the complainant's contributing factor causation evidence. *See Fordham*, 2014 WL 5511070, at *20-21. The *Kewley* decision provides that if an employee proves the knowledge and timing elements by preponderant evidence, a prima facie case has been established per se under the WPA's unique statutory language and the burden then shifts to the employer to prove its affirmative defense. *See* 153 F.3d at 1362-63. That decision does <u>not</u> preclude consideration of an employer's evidence on temporal proximity nor does it prohibit consideration of an employer's causation evidence under the contributing factor test should the complainant fail to prove timing. *See, e.g.*, *Goines v. Dep't of Agric.*, 113 F. App'x 925, 929 (Fed. Cir. 2004) (affirming MSPB's consideration of agency's reasons for adverse action at the contributing factor stage where temporal proximity was not established).

(July 12, 1990); 5 C.F.R. §§ 1209.7(a) (applying preponderance of the evidence standard to the WPA's contributing factor test), 1201.4(q) (defining "[p]reponderance of the evidence" as the "degree of relevant evidence that a reasonable person, *considering the record as a whole*, would accept as sufficient to find that a contested fact is more likely to be true than untrue") (emphasis added); *see, e.g.*, *Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, 42 (MSPB 2014). Notably, the MSPB did not amend its 1990 regulations to adopt a different evidentiary standard or prohibit judicial consideration of an employer's causation evidence under the contributing factor test after the 1994 WPA amendments.

D. Well-Established Case Law Reflects That ALJs Are Not Precluded From Weighing the Parties' Causation Evidence at the Contributing Factor Stage

Prior decisions of the ARB and federal courts under the Department's contributing factor statutes have consistently considered the totality of the evidence in determining whether a complainant has met the contributing factor standard. Indeed, courts have expressly considered – and rejected – the precise argument regarding the employer's causation evidence advanced in *Fordham*.

1. For nearly two decades, the ARB has considered employers' causation evidence in determining whether complainants have proved by preponderant evidence that protected activity contributed to the adverse action at issue. *See, e.g.*, *Bobreski*, 2014 WL 4660840; *Bechtel v. Competitive Techs, Inc.*, ARB No. 09-052,

2011 WL 4889269 (ARB Sept. 30, 2011); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, 2004 WL 230770 (ARB Jan. 30, 2004); *Trimmer v. Los Alamos Nat'l Lab. and Univ. of Calif.*, ARB No. 96-072, 1997 WL 235807 (ARB May 8, 1997).

2. Federal courts have consistently affirmed the consideration of an employer's evidence by ALJs and the ARB in determining whether protected activity contributed to the adverse action. *See, e.g.*, *Deltek, Inc. v. Dep't of Labor*, No. 14-2415, 2016 WL 2946570 (4th Cir. May 20, 2016); *Cont'l Airlines, Inc.*, 638 F. App'x at 288-89; *Hasan v. U.S. Dep't of Labor,* 553 F. App'x 135 (3d Cir. 2014); *Mizusawa v. Dep't of Labor*, 524 F. App'x 443 (10th Cir. 2013); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443 (2d Cir. 2013); *Klopfenstein v. Admin. Review Bd.,* 402 F. App'x 936 (5th Cir. 2010); *Addis*, 575 F.3d 688. In fact, the Eleventh Circuit expressly considered and rejected the argument subsequently advanced by the *Fordham* majority that, under AIR 21, the burden is always on the employer to show clear and convincing evidence that it would have taken the same action in the absence of whistleblowing activity. *See Majali v. U.S. Dep't of Labor*, 294 F. App'x 562, 567 (11th Cir. 2008).[10] Moreover, the Fourth Circuit recently held in a

[10] The Eleventh Circuit rejected the argument that the ALJ and ARB erred by considering the employer's evidence in determining that protected whistleblowing did not contribute to the adverse action. *See Majali*, 294 F. App'x at 567 (stating that "in accepting [the employer's] non-retaliatory explanation for firing petitioner, the ALJ and Board found that petitioner had not proved that his protected activity

SOX case that the contributing factor test would "simply be toothless" if the court did not consider all of the relevant evidence, including evidence of intervening events that caused the employer to view the plaintiff as insubordinate. *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014).

E. As Demonstrated by this Case, Prohibiting ALJs From Considering an Employer's Reasons for Acting at the Contributing Factor Stage Could Impair the Ability of Some Whistleblowers to Prove a Statutory Violation

1. The ARB has consistently held, and federal appellate courts have affirmed, that employees may satisfy their contributing factor burden by offering circumstantial evidence such as "indications of pretext," "inconsistent application of an employer's policies," "an employer's shifting explanations for its actions," and "the falsity of an employer's explanation for the adverse action taken." *DeFrancesco*, 2012 WL 759336, at *3; *see, e.g.*, *Bechtel*, 2011 WL 4889269, at *7; *Deltek*, 2016 WL 2946570, at *8 ("In this case, application of the 'contributing factor' standard turns critically on one key finding by the ALJ, affirmed by the Board: that the explanation proffered by Deltek for [the whistleblower's] termination was pretextual—or, more colloquially, not true."); *Cont'l Airlines, Inc.*, 638 F. App'x at 288-89; *Araujo*, 708 F.3d at 160-61.

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was a 'contributing factor' to the decision to fire him. We agree. . . . Accordingly, [the employer] was under no obligation to prove that it would have taken the same personnel action regardless of petitioner's protected activities.").

These types of circumstantial evidence that a whistleblower may offer to prove causation necessitate evaluation of an employer's proffered reasons for taking an adverse action. Strictly prohibiting ALJs from considering and weighing an employer's stated reasons for acting may therefore prevent whistleblowers from being able to satisfy the contributing factor test.

2. The instant case exemplifies that judicial consideration of evidence regarding an employer's proffered explanation for taking an adverse action may be important to the success of a whistleblower's claim. *See Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ALJ No. 2014-FRS-154 (ALJ Jan. 19, 2016). In this case, Palmer committed an admitted rule violation involving the operation of railroad equipment (the "run-through switching" incident). *See Palmer*, slip op. at 3, 10. Shortly before the disciplinary hearing for that incident, Palmer reported an injury. *Id*. at 3. The employer then terminated Palmer a few weeks later purportedly because of his rule violation and history of other similar violations. *Id.* at 4, 20, 36.[11] In attempting to prove that his protected activity contributed to the adverse actions, Palmer argued, inter alia, that he had been disparately treated for the run-through switching incident because no other employee had ever been terminated

[11] The ALJ determined that Palmer suffered adverse actions when he was terminated as well as when his employer refused to offer or honor a waiver agreement for his admitted rule violation. *See Palmer*, slip op. at 38.

for such misconduct and other employees with similar histories were offered waiver agreements in lieu of dismissal. *Id.* at 35.

The ALJ found that Palmer had shown by preponderant evidence that his protected activity contributed to the adverse actions. *See Palmer*, slip op. at 41. In relevant part, the ALJ observed that Palmer had presented evidence "showing the inconsistent application of and change in Respondent's policies regarding the holding of formal hearings of run-throughs that were applied only to Palmer" and "the inconsistent application of Employer policies in granting waivers to [another employee] who had 14 switching mistakes or run-throughs but was granted a waiver in each case and allowed to retire." *Id.*[12] The ALJ viewed the employer's evidence that Palmer had committed a rule violation as relevant at the contributing factor stage because otherwise he would have been unable to evaluate Palmer's

[12] The ALJ also found that Palmer presented evidence showing that management had expressed "hostility" when he reported his injury. *See Palmer*, slip op. at 41. Importantly, a complainant is not required to show direct evidence of retaliatory animus or motive under the contributing factor test. *See Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014); *Araujo*, 708 F.3d at 161; *Marano*, 2 F.3d at 1141. However, if an employee, like Palmer, presents evidence of retaliatory animus or "hostility" to prove causation, the ALJ should also weigh the employer's evidence rebutting that claim. In this case, the ALJ interpreted *Powers* to preclude the consideration of such rebuttal evidence at the contributing factor stage. *See Palmer*, slip op. at 42-43. Nonetheless, it appears that the judge did in fact appropriately evaluate and ultimately reject the employer's evidence of non-retaliatory motive (e.g., supervisor testimony that the decision to discharge Palmer was based solely on his rule violation) at the contributing factor stage.

claim that the employer had inconsistently applied its disciplinary policies to the rule violation and thus that his employer's proffered reason for terminating him was pretext for discrimination. The ALJ thus appropriately weighed evidence regarding the employer's reasons for acting and ultimately concluded that Palmer had satisfied the contributing factor test.[13]

3. Finally, the approach to contributing factor causation advanced in *Fordham* would require ALJs for the first time to determine, as a threshold matter, what types of testimonial and documentary evidence qualify as an employer's affirmative defense evidence but it does not offer specific guidance for judges in making such a determination. This silence is particularly problematic in cases such as the instant matter where evidence regarding the employer's reasons for acting is relevant for both the contributing factor test and the employer's affirmative defense. Are ALJs precluded from evaluating any causation evidence *submitted* by the employer? Or are they prohibited from evaluating any causation evidence that is *favorable* to the employer, regardless of which side presented it? Or are they precluded from considering all evidence that is *relevant* to the employer's reasons

[13] After making this determination, the ALJ concluded that the employer had failed to prove its affirmative defense by clear and convincing evidence. *See Palmer*, slip op. at 42-45. Although the Assistant Secretary has not had the opportunity to review the full record in this matter, it appears from the decision and the parties' briefs that substantial evidence supports the ALJ's decision in favor of Palmer even under the traditional, pre-*Fordham* approach to causation.

for taking the adverse action? Such questions reflect the practical difficulties that may result from a balkanized approach to causation evidence.

CONCLUSION

The Assistant Secretary respectfully requests the Board to hold that the contributing factor standard only requires complainants to demonstrate that protected activity contributed to the adverse action in order to prove discrimination in violation of the statute and that all relevant evidence should be considered and weighed by ALJs in deciding whether that standard has been met.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae have been served this 3rd day of August, 2016, by express mail, postage prepaid, upon the following:

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