No. 15-3192

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EDWARD E. BLACKORBY,

Plaintiff-Appellee,
v.

BNSF RAILWAY CO.,

Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Missouri, Honorable Stephen R. Bough, Judge, Case No. 04:13-cv-00908-SRB

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellee, Edward E. Blackorby. For the reasons set forth below, the district court correctly concluded that: (1) the contributing-factor standard for showing causation under the whistleblower protection provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109, does not require showing animus; (2) there is no basis to disregard the jury's finding that Blackorby's protected activity of reporting his

work injury was a contributing factor in the disciplinary adverse action taken against him; and (3) Blackorby's testimony constituted sufficient evidence to support the jury's emotional-distress damages award.

STATEMENT OF INTEREST

The Secretary has a strong interest in the interpretation of the whistleblower provision of FRSA, 49 U.S.C. 20109, because he administers and enforces the statute, and adjudicates FRSA whistleblower complaints brought by employees of railroad carriers. *See* 49 U.S.C. 20109(d); *see generally* 29 C.F.R. Part 1982 (providing procedures for the Department of Labor's ("Department") adjudication of FRSA cases). The Secretary also administers and enforces the whistleblower-protection provisions in twelve other federal statutes that use the identical contributing-factor standard of causation and the same standards for assessing compensatory damages and other remedies as FRSA.[1]

The district court decisions in this case were consistent with the Secretary's longstanding administrative interpretations of FRSA and the analogous

[1] *See* National Transit Systems Security Act, 6 U.S.C. 1142; Consumer Financial Protection Act, 12 U.S.C. 5567; Consumer Product Safety Improvement Act, 15 U.S.C. 2087; Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A; FDA Food Safety Modernization Act, 21 U.S.C. 1012; Affordable Care Act, 29 U.S.C. 218c; Energy Reorganization Act, 42 U.S.C. 5851; Seaman's Protection Act, 46 U.S.C. 2114; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. 30171; Surface Transportation Assistance Act, 49 U.S.C. 31105; Wendell H. Ford Aviation Investment & Reform Act for the 21st Century, 49 U.S.C. 42121; Pipeline Safety Improvement Act, 49 U.S.C. 60129.

whistleblower protection statutes. Thus, the Secretary disagrees with the contention of Defendant-Appellant BNSF Railway Company ("BNSF") that the contributing-factor causation standard for a FRSA whistleblower claim requires a showing of "intentional retaliation," which BNSF interprets to mean a showing of animus.

The Secretary also has a significant interest in the emotional-distress damages issue because FRSA allows for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees," 49 U.S.C. 20109(e)(2)(C). The standard that the district court applied was consistent with the standard that the Secretary applies in the adjudication of FRSA and other whistleblower cases when the Secretary awards emotional-distress damages to complainants. BNSF's attack on the jury's award is inconsistent with the law, and, if successful, would undermine the Secretary's authority to award such damages in the future.

STATEMENT OF THE CASE

A. Statutory Background

FRSA prohibits a railroad carrier from, in relevant part, retaliating against an employee if such retaliation "is due, in whole or in part, to the employee's lawful, good faith act" notifying the railroad of a work-related injury. 29 U.S.C. 20109(a)(4).

FRSA incorporates the rules and procedures, as well as the burdens of proof, set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 ("AIR 21"). *See* 49 U.S.C. 20109(d)(2)(A). Under the burdens of proof applicable to retaliation claims under FRSA, the trier of fact "may determine that a violation . . . has occurred only if" the employee demonstrates that protected activity "was *a contributing factor* in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii) (emphasis added). Thus, a FRSA whistleblower plaintiff must demonstrate, by a preponderance of the evidence, that (1) the plaintiff engaged in a protected activity; (2) the railroad employer knew or suspected that the plaintiff engaged in a protected activity; (3) the plaintiff suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *See, e.g.*, *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3d Cir. 2013); *see also Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 344-45 (4th Cir. 2014) (discussing AIR 21's burdens of proof in a whistleblower case under the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. 1514A(b)(2), which also incorporates AIR 21's burdens of proof). Once the plaintiff makes this showing, the burden shifts to the employer to show by clear and convincing evidence that the employer would have taken the same adverse

action absent the protected activity. *See Kuduk*, 768 F.3d at 789; *Araujo*, 708 F.3d at 157-59.

To pursue a FRSA whistleblower complaint, an employee must file a complaint with OSHA. *See* 29 C.F.R. 1982.103; *see also* 49 U.S.C. 20109(d), *incorporating the rules and procedures in* 49 U.S.C 42121(b). Following an OSHA investigation and determination, either party may object to OSHA's determination and seek a *de novo* hearing before a Department Administrative Law Judge ("ALJ"). *See* 49 U.S.C. 20109(d)(2)(A), *incorporating the procedures in* 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106(a). Either party may seek review of an ALJ decision by the Department's Administrative Review Board ("ARB"), to whom the Secretary has delegated authority to act on his behalf under FRSA in reviewing ALJ decisions and issuing final orders. *See* 29 C.F.R. 1982.110(a); Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012). Thus, the ARB carries out FRSA's directive that the Secretary issue final orders on FRSA complaints. *See* 49 U.S.C. 20109(d)(2), *incorporating the procedures in* 49 U.S.C. 42121(b)(3). Final orders of the Secretary are subject to judicial review only in the U.S. courts of appeals under the standards set forth in the Administrative Procedure Act. *See* 49 U.S.C. 20109(d)(4); 29 C.F.R. 1982.112(a), (b).

In addition, 49 U.S.C. 20109(d)(3), which provided the district court's jurisdiction for Blackorby's FRSA claim, allows an employee to bring his FRSA whistleblower complaint in U.S. district court "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee." *De novo* actions in district court are governed by the same AIR 21 burdens of proof applicable to claims adjudicated by the Department. *See Araujo*, 708 F.3d at 157-59.

B. Factual Background

At the time of the events that form the basis of this litigation, Blackorby worked on a mobile steel gang for BNSF, which required Blackorby to travel to locations along BNSF's line to maintain and repair railroad track. *See Blackorby v. BNSF Ry. Co.*, No. 13-CV-00908, 2015 WL 58601, at *1 (W.D. Mo. Jan. 5, 2015) ("*Blackorby* First Order"). On Wednesday, March 7, 2012, Blackorby was working in Morrison, Oklahoma, on a windy day when something entered his right eye. *See id.* That evening, Blackorby notified his supervising foreman who advised him to get saline from a local store; however, the burning and pain persisted. Transcript ("Tr.") 120. That Saturday Blackorby awoke with his right eye swollen and in pain. Tr. 123. Unable to find a doctor that day, on Sunday Blackorby visited an eye doctor during which time the doctor removed from Blackorby's eye a small piece

of rusted steel. Tr. 123-24. The doctor prescribed medicated drops and scheduled Blackorby for a follow-up appointment on the next day. Tr. 124-25.

Immediately following the initial Sunday, March 11, appointment, Blackorby called his direct supervisor, Roadmaster Douglas Turney, to notify him that he had received medical treatment and that he had a follow-up appointment the next day. Tr. 125-26. He informed Turney that the doctor had removed a piece of steel from his eye that Blackorby believed had entered his eye while he was working on Wednesday. Tr. 125. Before returning home from the follow-up appointment on Monday, Blackorby again called Turney and reiterated that he wanted to report his injury as work related. Tr. 129-30. The next day, Tuesday, Blackorby provided Turney with documentation of his injury and medical treatment, and completed a BNSF Employee Personal Injury/Occupational Illness Report. Tr. 133-34.

Two days later, on Thursday, March 15, BNSF issued Blackorby a notice alleging that he violated BNSF's prompt injury reporting rule because he failed to report his work injury immediately to the proper manager and ordering him to attend a disciplinary investigation. Tr. 134. On June 15, 2012, after a disciplinary hearing, BNSF found Blackorby had failed to make a report of the incident immediately to the proper manager and assessed him discipline of a Level S thirty-day record suspension and a one-year review period during which any rules

violation could result in further disciplinary action as part of BNSF's progressive discipline policy. *See Blackorby* First Order at *2.

C. Procedural Posture and the District Court's Decisions.

On August 20, 2012, Blackorby filed a FRSA complaint with OSHA. Compl. ¶ 2, Sept. 16, 2013, Doc. No. 2. On June 17, 2013, OSHA issued findings that BNSF violated Blackorby's rights under FRSA. *Id.* Both parties sought a *de novo* hearing before an ALJ. *Id.* While the matter was pending before the ALJ, on September 17, 2013, Blackorby exercised his right to file a *de novo* action in district court pursuant to 49 U.S.C. 20109(d)(3) by filing his FRSA complaint in this action.

On January 5, 2015, the district court denied the parties' cross motions for summary judgment. *See Blackorby* First Order at *3. The court outlined the elements that a FRSA plaintiff must establish by a preponderance of the evidence: (1) the employee engaged in protected activity; (2) the railroad employer knew or suspected, actually or constructively, that the employee engaged in protected activity; (3) the employee suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *See id.* The court concluded that Blackorby had established the first three elements, but that the fourth element presented a question of material fact as to whether Blackorby's late reporting of his injury contributed to the decision of BNSF's management to discipline Blackorby.

See id. The court similarly concluded that there were disputed facts as to whether BNSF would have taken the same adverse action in the complete absence of Blackorby's protected activity. *See id.*

A three-day jury trial was held, and, on June 16, 2015, the jury returned a verdict in Blackorby's favor, awarding $58,280 in emotional-distress damages. *See Blackorby v. BNSF Ry. Co.*, No. 13-CV-00908, 2015 WL 5095989, at *1 (W.D. Mo. Aug. 28, 2015) ("*Blackorby* Second Order"). On August 28, 2015, the court denied BNSF's renewed motion for judgment as a matter of law or, in the alternative, for a new trial. *See id.* Relying on the court's decision in the *Blackorby* First Order, the court rejected BNSF's renewed argument that Blackorby did not suffer a cognizable adverse action. *See id.* at *3.

The court also rejected BNSF's arguments that Blackorby failed to present sufficient evidence to establish that reporting his injury was a contributing factor in the adverse action and that BNSF had shown that it would have taken the same action in the absence of Blackorby's injury report. *See Blackorby* Second Order at *4. The court explained that it "d[id] not find the evidence and testimony presented at trial demonstrates a complete absence of probative facts to support the jury's conclusion . . . ." *Id.* (internal quotation marks omitted). Moreover, the court rejected BNSF's related argument that the court should have instructed the jury to

decide whether BNSF "intentionally retaliated" against Blackorby, concluding that such an instruction was not necessary under this Court's precedent. *Id.* at *5.

Lastly, the court rejected BNSF's argument that Blackorby was not entitled to emotional-distress damages, concluding that Blackorby presented competent evidence through his own testimony regarding the stress he suffered and the strain the issue had on his familial relationships. *See Blackorby* Second Order at *6. The court noted that a plaintiff is not required to present "medical or other expert evidence" to prove emotional distress. *Id.* As such, the court found sufficient evidence to sustain the jury's award. *See id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE CONTRIBUTING-FACTOR CAUSATION STANDARD, WHICH DOES NOT REQUIRE A SHOWING OF ANIMUS.

As outlined above, to prevail on a FRSA whistleblower claim, an employee must show, by a preponderance of the evidence, that: (1) he engaged in an activity protected under the statute; (2) the employer knew that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(B); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3d Cir. 2013). After the employee makes this showing, the burden shifts to the employer to show by clear and convincing evidence that

the employer would have taken the same adverse action absent the protected activity. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014); *Araujo*, 708 F.3d at 157-59. BNSF's arguments on appeal address only the fourth of these elements—whether Blackorby's protected activity was a contributing factor in BNSF's adverse action against him.[2]

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.'" *Kuduk*, 768 F.3d at 791 (quoting OSHA's Procedures for the Handling of Retaliation Complaints under the National Transit Systems Security Act and the Federal Railroad Safety Act, 75 Fed. Reg. 53,522, 53,524 (Aug. 31, 2010)). The contributing-factor standard "is broad and forgiving" and "less onerous" than the standard under Title VII, the Age Discrimination in Employment Act of 1967 ("ADEA"), or the Uniformed Services Employment and Reemployment Rights Act. *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136-37 (10th Cir. 2013) (applying the contributing-factor standard of causation in a SOX whistleblower case). In the context of a case under the Energy Reorganization Act ("ERA"), which also uses a contributing-factor standard, the Seventh Circuit noted that Congress intended that the "standard

[2] BNSF has not appealed the conclusions on the first, second, or third elements, i.e., that Blackorby engaged in protected activity, that BNSF knew of the protected activity, or that Blackorby suffered an adverse action. Nor has BNSF appealed the denial of its motion for judgment as a matter of law on whether it proved its affirmative defense.

provide complainants a lower hurdle to clear than the bar set by other employment statutes." *Addis v. Dep't of Labor*, 575 F.3d 688, 690 (7th Cir. 2009). Thus, a contributing factor "is something less than a substantial or motivating one." *Id.* at 691.

Plaintiffs may prove that their protected activity was a contributing factor in the adverse action by direct or circumstantial evidence. *See Araujo,* 708 F.3d at 160 (citing *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003); and *Marano v. Dep't of Justice,* 2 F.3d 1137, 1141 (Fed. Cir. 1993)); *DeFrancesco v. Union R.R. Co.,* ARB No. 10–114, 2012 WL 694502, at *3 (ARB Feb. 29, 2012). Circumstantial evidence may include:

> temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Ray v. Union Pac. R.R. Co., 971 F. Supp. 2d 869, 884-85 (S.D. Iowa 2013) (citing *DeFrancesco,* 2012 WL 694502, at *3) (internal quotation marks omitted); *see Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, 2011 WL 4915751, at *8 (ARB Sept. 30, 2011), *aff'd, Bechtel v. ARB*, 710 F.3d 443 (2d Cir. 2013).

Accordingly, while evidence of animus is one of many ways of demonstrating that protected activity contributed to an adverse action, the contributing-factor standard contains no requirement that the employee show that

the employer took the adverse action based on animus. Indeed, several circuit courts have expressly rejected any such requirement. In a SOX whistleblower case, the Fifth Circuit noted that "[w]e are unaware of any court that has held that, in addition to proving that the employee's protected conduct was a 'contributing factor' in the employer's adverse action, the employee must prove that the employer had a 'wrongful motive' too." *Halliburton, Inc. v. ARB*, 771 F.3d 254, 263 (5th Cir. 2014), *aff'g Menendez v. Halliburton, Inc.*, ARB No. 12-026, 2013 WL 1385561 (ARB Mar. 15, 2013); *see Araujo*, 708 F.3d at 158 ("[A]n employee need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his [protected activity] was a contributing factor to the personnel action.") (internal quotation marks omitted).[3] In a Surface Transportation Assistance Act ("STAA") whistleblower action, which also uses the AIR 21 contributing-factor standard, this Court affirmed the ARB's conclusion that the employee's protected activity

[3] BNSF tries to cast doubt on *Araujo* by misreading a subsequent Third Circuit decision in *Port Authority Trans-Hudson Corp. v. Secretary, U.S. Department of Labor*, 776 F.3d 157 (3d Cir. 2015) ("*PATH*"). BNSF's Br. 33 n.5. *PATH* did not address the issues of retaliatory motive or animus, nor did it question or reconsider any aspect of the court's prior holding in *Araujo* that proof of retaliatory motive is not necessary to satisfy the contributing-factor standard under FRSA. Rather, the issue in *PATH* was whether the provision of FRSA's whistleblower protection that prohibits retaliation against an employee for following a treatment plan of a treating physician, 49 U.S.C. 20109(c)(2), applies to injuries that were incurred outside of work; the court concluded that this provision covers only on-duty injuries. *See* 776 F.3d at 159.

contributed to the adverse action taken against the employee—notably without imposing a separate animus requirement. *See Maverick Transp., LLC v. ARB*, 739 F.3d 1149, 1155-56 (8th Cir. 2014).

The Department's ARB has similarly rejected an animus requirement. The ARB explained in the context of SOX that "[n]othing in [SOX] requires a showing retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002-, 09-003, 2011 WL 4915750, at *20 (ARB Sept. 13, 2011); *see Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, 2013 WL 2450037, at *5 (ARB May 31, 2013) ("Neither motive nor animus is a requisite element of causation as long as protected activity contributed in any way. . . ."); *DeFrancesco,* 2012 WL 694502, at *3. "The protection these whistleblower statutes afford shields employees from both intentional and unintentional adverse conduct due to retaliation for engaging in whistleblower protected activity since, in either case, such conduct creates a 'chilling effect' potentially discouraging employees from protected disclosures." *Hutton*, 2013 WL 2450037, at *5 n.18; *see Menendez*, 2013 WL 1385561, at *8 n.83 (same). Thus, although an unlawful motive may often lurk behind an employer's actions, actual proof of such motive is

not required to show that the protected activity was a contributing factor in the adverse action.[4]

BNSF now tries to undermine the intentionally low burden of the contributing-factor standard by arguing that this Court in *Kuduk* added an additional requirement that a FRSA complainant provide evidence of the employer's animus against the protected activity. BNSF's Br. 30-33. This argument misreads *Kuduk*. In that FRSA whistleblower case, the plaintiff alleged, in relevant part, that he made a safety-related complaint about the weight of a handle used to derail cars. *See* 768 F.3d at 789. Soon thereafter, a supervisor who knew of his handle safety complaint observed Kuduk walking between the rails, an act which is usually a safety violation. *See id.* at 788. The supervisor reported the rule violation and an investigation ensued. *See id.* A higher-level manager reviewed the investigation materials and recommended dismissal; a regional vice president approved the dismissal. *See id.*

[4] The contributing-factor standard under FRSA and other whistleblower statutes that use the same standard is distinct from—and less burdensome than—the causation requirement under statutes such as Title VII's anti-retaliation provision or the ADEA. *Lockheed Martin Corp.*, 717 F.3d at 1137; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) ("Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174, 176 (2009) (to establish an ADEA claim, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision").

The Court affirmed summary judgment in favor of the railroad because, in relevant part, Kuduk had not shown that the decision-maker who decided to discharge him knew about his protected activity. *See* 768 F.3d at 791. Kuduk had argued that knowledge could be imputed under a broadly applied cat's paw theory because the supervisor who reported Kuduk's rule violation of walking between the rails knew of Kuduk's safety complaint. *See id.* at 790-91. The Court rejected this argument, explaining:

> We agree with the Ninth Circuit [in *Coppinger-Martin v. Solis*, 627 F.3d 745 (9th Cir. 2010)] that, under [FRSA's] contributing factor causation standard, a prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive. . . . But the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.

Id. at 791 (internal quotation marks omitted). The Court then concluded that Kuduk had failed to demonstrate that the person who actually approved the dismissal had knowledge of Kuduk's protected activity or that the supervisor who did know of Kuduk's protected safety complaint communicated that knowledge to the decision-makers in a manner that might have influenced their dismissal decision. *See id.*

The Court's statement regarding "intentional retaliation" was made in the context of determining whether Kuduk had satisfied the *knowledge* element of his case. Thus, the Court referenced intentional retaliation in the sense that the

employee must prove that the decision-makers knew of the protected activity and, with that knowledge, intentionally took an adverse action against the employee. BNSF claims that the "intentional retaliation" language in *Kuduk* means that an employee must show that the employer acted with animus. BNSF's Br. 32-33. Nothing in *Kuduk* supports BNSF's novel attempt to insert an animus showing requirement into the contributing-factor standard.

To read *Kuduk* as requiring such a showing would be inconsistent with the Secretary's administrative decisions interpreting the contributing-factor standard under FRSA and analogous whistleblower statutes and with those courts that have applied the standard. *See, e.g.*, *Halliburton*, 771 F.3d at 263 (affirming ARB's interpretation of SOX); *Maverick Transp.*, 739 F.3d at 1155-56 (affirming ARB's interpretation of STAA); *Araujo*, 708 F.3d at 158 (interpreting FRSA); *Coppinger-Martin*, 627 F.3d at 750 (interpreting SOX); *Hutton*, 2013 WL 2450037, at *5 (interpreting FRSA); *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 11-021, 2012 WL 2588600, at *5 (ARB June 28, 2012) (interpreting STAA).[5] Notably, the

[5] Moreover, the ARB's interpretation that the contributing-factor standard in FRSA and other whistleblower statutes does not require a showing of animus is an interpretation of the broad prohibition against discrimination in these statutes, and therefore is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Cf. Maverick Transp.*, 739 F.3d at 1154 (granting *Chevron* deference to ARB's interpretation of STAA's statute of limitations); *Lockheed Martin*, 717 F.3d at 1131-32 (deferring to ARB's interpretation of SOX); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (same); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (same); *Demski v. U.S. Dep't*

Fifth Circuit in *Halliburton* concluded that requiring a showing of animus "conflicts" with the definition of a contributing factor as "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." 771 F.3d at 263 (internal quotation marks omitted) (emphasis in original).

BNSF's misreading of *Kuduk* would impose an additional evidentiary requirement on employees inconsistent with the statute's contributing-factor standard. *Kuduk* does not, and cannot, stand for the principle that, to satisfy the contributing-factor standard, an employee must show that animus motivated the employer to take the adverse action. Thus, the district court in the instant case correctly rejected BNSF's contention that Blackorby was required to show animus on the part of BNSF's decision-makers when they decided to discipline Blackorby.

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of Labor, 419 F.3d 488, 491 (6th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the ERA). At a minimum, the ARB's interpretation of the contributing-factor standard in these whistleblower statutes is entitled to deference under *Skidmore v. Swift & Co.*, which says that "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944).

II. THERE IS NO BASIS TO DISREGARD THE JURY'S FINDING THAT BLACKORBY'S PROTECTED ACTIVITY OF REPORTING HIS INJURY WAS A CONTRIBUTING FACTOR IN BNSF'S DISCIPLINARY ADVERSE ACTION.

BNSF argues that the jury conflated a factual connection between Blackorby's injury report and BNSF's discipline with the requirement that the protected injury report contributed to the discipline. In so doing, BNSF contends, the district court and the jury imposed an impossibly high standard for employers who take action against an employee based on violation of a workplace rule regarding the time and manner for reporting an injury. BNSF's Br. 33-37. It is true that "[f]or employers, this is a tough standard, and not by accident." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997), *cited in Araujo*, 708 F.3d at 159. In adopting the contributing-factor standard of causation, Congress intended to "facilitate relief for employees who have been retaliated against for" engaging in protected activity. *See* 138 Cong. Rec. H11,409 (daily ed. Oct. 5, 1992) (explaining basis for adopting contributing-factor standard with regard to 1992 amendments to ERA). The court and the jury correctly applied the contributing-factor standard to the facts of this case to conclude that the injury report contributed to the disciplinary action against Blackorby and that BNSF had not shown by clear and convincing evidence that it would have taken the same action in the absence of the injury report.

As an initial matter, the district court did not treat Blackorby's injury report as a *per se* contributing factor in BNSF's disciplinary adverse action. Rather, it explicitly concluded that "questions of material fact remain[ed] as to the fourth element of plaintiff's *prima facie* case. . . . [A] jury can choose whether to believe that [plaintiff] was disciplined solely because of the late reporting of the injury." *Blackorby* First Order at *3. Indeed, the jury heard the evidence, as the district court noted, *see Blackorby* Second Order at *4, and concluded that BNSF imposed the discipline, at least in part, because of Blackorby's reporting the injury.

BNSF argues that the jury was not entitled to make this determination unless Blackorby demonstrated that the BNSF managers who made the disciplinary decision harbored animus towards the injury report. As explained above, however, the contributing-factor standard does not require such a showing. The jury's finding is consistent with the case law, the Secretary's administrative interpretations under FRSA, and the legislative history.

Several courts have concluded, based on facts similar to those present here, that railroad employees' injury reports contributed to adverse actions taken against them for having violated a rule requiring prompt reporting of injuries (or could have if disputed facts were found in the employee's favor). In *Smith-Bunge v. Wis. Cent., Ltd.*, No. 13-cv-2736, 2014 WL 5023471, at *7 (D. Minn. Oct. 8, 2014), the court concluded that a railroad worker's injury report was a contributing factor in

the railroad's decision to suspend the worker for violating the railroad's prompt injury reporting rule. Similarly, in *Ray*, a railroad worker was fired for failure to timely report an injury, and the court found that there were issues of material fact as to whether the worker's injury report was a contributing factor in his termination because "if Plaintiff had not reported the alleged work-related injury, Defendant would not have undertaken an investigation into either the honesty of Plaintiff's statement to [his supervisor] . . . or the timeline of Plaintiff's injury report, and Plaintiff would not have been terminated." 971 F. Supp. 2d at 888; *see Armstrong v. BNSF Ry. Co.*, --- F. Supp. 3d ---, No. 12 C 7962, 2015 WL 5180589, at *11 (N.D. Ill. Sept. 4, 2015) (plaintiff "cleared the low causation hurdle" in showing "a genuine issue of fact whether Defendant would have initiated the investigation that led to Plaintiff's termination had Plaintiff not reported any injury"); *Mosby v. Kansas City S. Ry. Co.*, --- F. Supp. 3d ---, No. CIV-14-472-RAW, 2015 WL 4408406, at *2-6 (E.D. Okla. July 20, 2015) (question of fact whether employee's injury report was a contributing factor in railroad's adverse action for having violated a timely injury reporting rule); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, 2012 WL 5391422, at *6-9 (ARB Oct. 6, 2012) (adverse action was "inextricably intertwined" with protected activity because the disciplinary

investigation into whether the injury was timely reported and whether he worked safely to avoid injury arose directly from the protected injury report).[6]

Courts have recognized that FRSA's legislative history supports the conclusion that an employee's injury report can be a contributing factor in an adverse action. In 2007 Congress amended FRSA to include reporting an injury as a protected activity. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, sec. 1521, § 20109(a)(4), 121 Stat 266, 444-448 (Aug. 3, 2007) (codified at 49 U.S.C. 20109(a)(4)). The Third Circuit in *Araujo* noted congressional testimony that railroads "sometimes either subtly or overtly intimidate[d] employees from reporting on-the-job injuries." 708 F.3d at 159 (citation omitted); *see Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, 2012 WL 3164360, at *8 (ARB July 25, 2012) (citing FRSA's 2007

[6] The burdens of proof in a contributing-factor case demonstrate that employers can, in fact, rebut an employee's showing that his protected activity was a contributing factor in the adverse action taken against him. An employer can avoid liability by showing that it would have taken the same adverse action absent the protected activity. *Cf. Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 393 (7th Cir. 2010) (affirming the ARB's decision under STAA, which concluded that the employee was fired not because of his safety complaint, but because he crossed the line of acceptability in his insubordinate and disruptive manner of voicing those concerns); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 14-027, 2015 WL 1005047, at *6 (ARB Feb. 25, 2015) (concluding that employers had shown by clear and convincing evidence that they would have fired the employee for not promptly reporting the falsification of safety information absent his protected activity), *appeal docketed Smith v. Dep't of Labor*, No. 15-1713 (4th Cir. June 26, 2015). Thus, even in cases where the protected activity and the basis for the adverse action are intertwined, employers can overcome the high burden to prove that they would have taken the same action absent the protected activity.

legislative hearings as a signal of "increasing public and Congressional concern with rail safety, including chronic under-reporting of rail injuries, widespread harassment of employees reporting work-related injuries, and interference with medical treatment of injured employees") (citations omitted). The ARB in *Santiago* specifically noted congressional testimony identifying "numerous management policies that deterred employees from reporting on-the-job injuries . . . ." *Id.* (citations omitted). Thus, as the Third Circuit explained in *Araujo*, the history surrounding the amendments to FRSA warrant construing the statute in a manner that sets a low burden of proof for an employee to prove his case. *See* 708 F.3d at 159.

In its administration and enforcement of FRSA, OSHA has observed that, although employers have a legitimate interest in establishing procedures for receiving and responding to injury reports, employer policies regarding the time and manner for reporting injuries are sometimes applied as a pretext to retaliate against an employee for making an injury report. *See* Memorandum on Employer Safety Incentive and Disincentive Policies and Practices by Richard E. Fairfax, Deputy Assistant Secretary for Occupational Safety and Health, U.S. Dep't of Labor, for Regional Administrators, Whistleblower Program Managers (Mar. 12, 2012) ("Fairfax Memorandum"), *available at* https://www.osha.gov/as/opa/whistleblowermemo.html.

OSHA has noted that there is "a clear potential" for violating FRSA where "the act of reporting the injury directly results in discipline . . . ." Fairfax Memorandum. The fact that employers' policies may discourage reporting injuries even though their motive may not be animus highlights why there is no requirement to show animus to establish a FRSA violation. *See Araujo*, 708 F.3d at 161 n.7 (noting motive could sometimes be difficult to prove under FRSA because some supervisors in the railroad industry were motivated by financial incentives to keep injury numbers down rather than by animus). Thus, cases in which employees who report injuries are disciplined for violating an employer rule about the time or manner for reporting injuries "deserve careful scrutiny." Fairfax Memorandum.

Here, BNSF penalized Blackorby for not realizing immediately that he sustained a reportable injury. While at work on a windy March day, Blackorby experienced what appeared to be a fairly common problem of getting something in his eye. He promptly told his supervising foreman of his eye pain, and the foreman told him to use saline. When his eye became painful and swollen a few days later, he went to a doctor and learned that, in fact, a rusted piece of steel had lodged in his eye, at which point he promptly reported the work-related injury to BNSF management. Two days after he submitted the documentation of the injury, BNSF brought charges against Blackorby alleging that he violated the railway's prompt reporting rule. Although BNSF may have a legitimate interest in requiring

employees to promptly report injuries, the prompt reporting rule as applied in this case has the problematic effect that OSHA identified of discouraging the protected activity of reporting injuries. *See* Fairfax Memorandum.

Moreover, as in *Smith-Bunge*, *Mosby,* and *Ray*, Blackorby's injury report led directly to the disciplinary adverse action taken against him. Blackorby's injury report triggered the investigation and determination that he had violated BNSF's prompt injury reporting rule, upon which the disciplinary adverse action was based. The two were inextricably intertwined. In such situation, it was reasonable for the jury to have concluded that Blackorby's injury report was a contributing factor in the disciplinary adverse action taken against him for violating BNSF's prompt injury reporting rule, and the district court was correct in its decision not to set aside the jury verdict or order a new trial. As this case illustrates, the unlawful retaliation under FRSA is the imposition of an adverse action that was prompted, at least in part, by an employee's protected injury report, regardless of whether the employer was motivated by animus.

III. BLACKORBY PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT AS TO DAMAGES FOR EMOTIONAL DISTRESS.

Blackorby presented sufficient evidence, through his own testimony, of the emotional distress he suffered as a result of BNSF's retaliation to support the jury's

emotional-distress damage award.[7] In refusing to reverse the jury's award of emotional-distress damages, the district court applied standards that are consistent with this Court's precedent and with the standards that the Secretary applies in his adjudication of cases under FRSA and other whistleblower statutes. The Court recognizes that "[a] compensatory damage award for emotional distress may be based on a plaintiff's own testimony." *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552 (8th Cir. 2013) (citing *Forshee v. Waterloo Indus. Inc.*, 178 F.3d 527, 531 (8th Cir. 1999)). The plaintiff must present "competent evidence of genuine injury," but need not put forth medical or expert evidence. *Bennett*, 721 F.3d at 552 (citing *Forshee*, 178 F.3d at 531; and *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997)); *see Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 357–58 (8th Cir. 1997) (court lowered amount but still awarded $50,000 in emotional-distress damages in Title VII suit based on testimony of plaintiff and his wife).

The Secretary, in adjudicating FRSA and other whistleblower cases, similarly recognizes that an award of emotional-distress damages may be

[7] BNSF disputes the sufficiency of Blackorby's evidence; it does not dispute that compensatory damage awards under FRSA can include emotional-distress damages. *See* 49 U.S.C. 20109(e)(2)(C) (allowing for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."); *see also Barati v. Metro-North R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 150-52 (D. Conn. 2013) (FRSA's statutory construction, similar to that of AIR 21, indicates Congress intended the "compensatory damages" provision to reflect the generally accepted definition, thus allowing for recovery for emotional distress).

appropriate, even in the absence of medical evidence, based on a plaintiff's credible and unrefuted testimony. *See Hood v. R&M Pro Transp., LLC*, ARB No. 15-010, 2015 WL 9426021, at *5 (ARB Dec. 4, 2015) (STAA plaintiff's "testimony 'that he suffered from anxiety, depression, and trouble sleeping,' due to Respondents' actions is sufficient to support the ALJ's award"); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, 2011 WL 3882480, at *5 (ARB Aug. 31, 2011) (explaining availability of emotional-distress damages under STAA based solely on employee's testimony); *Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, 1998 WL 686646, at *18 (ARB Sept. 29, 1998) ("Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. . . . All that is required is that the complainant show that he experienced mental and emotional distress and that the [adverse action] caused the mental and emotional distress." (internal citations omitted)); *Petersen v. Union Pac. R.R. Co.*, ALJ Case No. 2011-FRS-017, slip op. at 30 (ALJ Aug. 7, 2013) (unpublished) (attached as Addendum A) (awarding emotional-distress damages under FRSA based on plaintiff's testimony), *aff'd* ARB No. 13-090, 2014 WL 6850019 (ARB Nov. 20, 2014).

Blackorby testified to suffering increased on-the-job stress due to the discipline imposed by BNSF, which was essentially a one-year probation. Expressing his response to receiving the disciplinary letter, Blackorby testified that

it "was pretty upsetting because you know you can't mess up. I mean, when that's on your record, something major could actually end your career, and you ain't going to go out and get another railroad job. It ain't going to happen." Tr. 137:15-19. Blackorby also provided testimony that BNSF's initiation of discipline caused stress in his marriage and placed a strain on his relationship with his mother. Tr. 138-39.

While Blackorby's testimony alone is sufficient to justify emotional-distress damages, the nature of the adverse action at issue here—a one-year probation—also supports emotional-distress damages because Blackorby was forced to work under the heightened pressures of a year-long probation. *See also Vernace v. Port Auth. Trans-Hudson Corp.*, ALJ No. 2010-FRS-00018, slip op. at 26 (ALJ Sept. 23, 2011) (unpublished) (attached as Addendum B) ("[T]hose charges are the first step in a disciplinary process that has the potential to culminate in a warning, suspension, or termination. Once charges have been sustained and discipline meted out, the employee is then susceptible to a higher degree of punishment if he or she commits a subsequent offense."), *aff'd,* ARB No. 12-003, 2012 WL 6849446 (ARB Dec. 21, 2012). Thus, the circumstances of this particular case, i.e., being on probation for a year, which could result in heightened discipline for any future rule violation, further support the jury's finding.

BNSF argues that Blackorby presented no evidence of the physical manifestation of his emotional distress, no evidence that he sought medical help or that he suffered economic loss, and no testimony from corroborating witnesses. BNSF's Br. 44. BNSF does not, however, cite any authority for requiring such evidence. Indeed, the cases cited above make clear that such evidence is not necessary. BNSF also attempts to dismiss any emotional distress Blackorby suffered as a result of the litigation as "not sufficiently connected" to the discrimination he suffered. BNSF's Br. 44-45. Yet BNSF does not point to any evidence that conclusively demonstrates that the jury could not reasonably find that Blackorby suffered emotional distress as a result of BNSF's adverse action. Thus, there is no reason to set aside the jury's emotion distress damage award.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)
AND EIGHTH CIRCUIT RULE 28A(h)

Pursuant to Federal Rule of Appellate Procedure 32(a) the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. The brief contains 6,795 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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3. I certify that this brief complies with Eighth Cir. R. 28A(h) because the brief has been scanned for viruses and is virus-free.

Dated: February 12, 2016

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