No. 13-3124-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIFIED TURBINES, INC., Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, Respondent

and

JOHN NAGLE, Intervenor-Respondent.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

On behalf of Respondent United States Department of Labor ("Department"), and its Administrative Review Board ("ARB" or "Board"), the Secretary of Labor ("Secretary") submits this brief in response to the

brief filed by Petitioner Unified Turbines, Inc. ("Unified").

JURISDICTIONAL STATEMENT

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121, and the regulations implementing those provisions, 29 C.F.R. Part 1979. The Secretary of Labor had jurisdiction over this case based on the complaint filed by Intervenor John Nagle ("Nagle") against Unified under 49 U.S.C. 42121(b)(1) with the Occupational Safety and Health Administration ("OSHA").[1] *See* 29 C.F.R. 1979.103. The Administrative Review Board issued its Final Decision and Order awarding damages and ordering reinstatement on May 31, 2013, and reissued its Order with a corrected caption on June 12,

[1] The Secretary has delegated responsibility for receiving and investigating whistleblower protection complaints under AIR 21 to OSHA. *See* Secretary's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. 1979.103(c).

2013.[2] Unified has timely sought review of that Order. This Court has jurisdiction to review the Order under 49 U.S.C. 42121(b)(4)(A), which provides that any person adversely affected by a final order of the Secretary may obtain review in the court of appeals for the circuit in which the violation occurred, with respect to which the order was issued. *See also* 29 C.F.R. 1979.112(a). Here, the alleged violation occurred in Vermont.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ARB's determinations that Nagle engaged in protected activity and that Unified knew of that protected activity.

2. Whether substantial evidence supports the ARB's determinations that Nagle was discharged, and that his protected activity was a contributing factor in his discharge.

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[2] The Secretary has also delegated authority to the Board to issue final agency decisions under AIR 21 and other whistleblower statutes. *See* Secretary's Order 2-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012); *see also* 29 C.F.R. 1979.110(a).

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings.

This case arises under AIR 21, which protects an employee who provides information to an employer or to the federal government regarding any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. *See* 49 U.S.C. 42121; 29 C.F.R. Part 1979. An employer is prohibited from discharging or discriminating against an employee who engages in such protected activity. *See* 49 U.S.C. 42121(a).

John Nagle filed a complaint with OSHA under 49 U.S.C. 42121(b)(1) and 29 C.F.R. 1979.103 on February 13, 2009. R. 1, A141.[3] In his complaint, Nagle alleged that Unified fired him in violation of AIR 21 after he

[3] References to the Administrative Record are indicated herein as "R.__," while references to the Joint Appendix are identified as "A__."

complained about a co-worker's abuse of prescription narcotics on the job. ALJ Decision and Order on Remand dated Oct. 25, 2012, R. 31, A172. OSHA conducted an investigation in accordance with the statute and the regulations, 49 U.S.C. 42121(b)(2) and 29 C.F.R. 1979.104, determined that there was no reasonable cause to believe that Unified had violated AIR 21 and dismissed Nagle's complaint. *Id*.; R. 1. Nagle filed timely objections and requested a hearing before an administrative law judge. *Id*.; R. 2.

A hearing was held before ALJ Daniel F. Sutton on February 17-18, 2010, in accordance with 29 C.F.R. 1979.107. R. 16, 17. On Sept. 27, 2010, the ALJ found that Nagle had engaged in protected activity, and that the employer knew of his protected activity, but held that Nagle had failed to establish that he was fired under Vermont law. *See* Decision and Order Dismissing the Complaint, R. 21, A166.

Nagle appealed the dismissal of his complaint to the ARB. R. 22. On March 30, 2012, the ARB reversed

and remanded the case for reconsideration of whether Nagle was discharged under ARB precedent. *See* Decision and Order of Remand, R. 39, A166.

On remand, the ALJ found that Nagle had proved that he was discharged as a matter of law under ARB precedent, and that his protected activity was a contributing factor to his discharge. A173-174. Unified appealed the decision to the ARB, which affirmed. *See* ARB Final Decision and Order dated June 12, 2013, R. 49, A195. Unified timely appealed that decision to this Court.

2. Statement of Facts[4]

Unified is a contractor of an air carrier under AIR 21 and repairs, overhauls, and modifies components for various airline manufacturers. It is owned by two partners, Richard Karnes and Karl Deavitt. Unified employed Nagle as a welder beginning in October 2007. A167. In August 2008, Nagle became concerned about one

[4] This Statement of Facts is based on the ALJ's factual findings as adopted by the Board. *See* A167-168; A174-181.

of his co-workers, "M."[5] He began to notice that M seemed to be "high" and that the quality of his work was deteriorating, and learned that M was taking prescription pain medication. *Id*.

Nagle reported his concerns to Deavitt, telling him that the quality of M's work was poor, that he had seen M taking three or four pain pills at a time, and that M seemed high. *Id*.; *see also* A149-150 (citing Tr. 42-48). Deavitt responded that he knew that M was taking prescription medication, but he was unaware of any abuse. *Id*. at A150.

Sometime during the fall of 2008, Nagle observed M opening the tool drawer of an absent co-worker, where he knew the absent co-worker stored prescription pain pills. Nagle grew concerned, and removed the pills, gave them to Karnes or Deavitt, and told them that he believed that M had an interest in the pills and that

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[5] Although the co-worker was identified by name in the transcript and testified at the trial, the administrative decisions refer to him solely as "M," due to "the sensitive nature of some of the testimony." A147, n. 2.

he did not want to be implicated if the pills went missing since he was working at the absent co-worker's bench. A150-151 (citing Tr. 49-57).

On December 16, 2008, Nagle reported to Deavitt that he had seen M selling pills on the street in front of the shop, stating "I've seen him selling his pills now. He's got problems." A151 (citing Tr. 59-60). Deavitt told Nagle that he could not do anything unless he witnessed M doing something wrong. *Id*. That same day, Nagle made a complaint to the Winooski, Vermont Police Department, that he had seen M selling prescription drugs. *Id*. (citing Tr. 58-62). During the hearing, M admitted that he was abusing prescription opiates during the fall of 2008, around the time of Nagle's three complaints, and further admitted that his job performance had deteriorated during this time period. A174.

On the morning of December 24, 2008, a "shoving match" occurred at work between M and Nagle. *Id*. The incident began when M approached Nagle and launched

into a verbal assault, calling him names and saying "I hate you." A178 & n. 7 (citing Tr. 63-64, 374-75). Nagle turned and tried to walk away, but M followed him and continued his verbal attacks. Nagle told him not to talk to him that way, after which M pushed Nagle with two hands, and Nagle responded by pushing M back with one hand. *Id*. Co-worker Dan Hubbert witnessed the altercation and corroborated this version of events. A178-179 (citing Tr. 323-24); JX 3, A5.

The ALJ found that "the likely reason" for the confrontation was that M was upset by Nagle's December 16 report to management that he (M) had been selling drugs outside the shop, about which Deavitt and Karnes had informed him on or about that same day. The ALJ discredited M's conflicting testimony on this point, and found that "it is far more likely than not that M verbally and physically assaulted Nagle on the morning of Dec. 24, 2008 because he was upset over Nagle's complaint to Unified Turbines management that he had been seen selling drugs outside the shop." A180.

Following the altercation, M told Deavitt about the incident, complaining that he could not work with Nagle anymore and that Deavitt had to do something about it. Shortly thereafter, Deavitt went out to where Nagle was sitting in his truck on break, and said: "I've already punched you out. Put your [expletive] truck in drive and drive your [expletive] out of here. You've gone too far." A155-156 (citing Tr. at 66-69, 207-08, 229, 307-08, 324-25. Deavitt also told Nagle to take the long holiday weekend to think about whether he still wanted to work at Unified Turbines and, if not, he could leave. However, Deavitt did not expressly tell Nagle that he was fired. *Id.*; A174-175.

Nagle thought he had been fired, went back into the shop to retrieve his welding helmet, and left, as he had been instructed to do. A155-156 (citing Tr. at 67-69, 324), A174-75. M continued to work for the remainder of the day, which ended at noon since it was Christmas Eve. A175.

On Saturday, December 27, Nagle called Hubbert, and told him that he believed he had been fired. A156-157; A180. Hubbert suggested that Nagle go into work the following Monday or at least call Deavitt or Karnes. *Id*. That same day, Nagle followed Hubbert's advice, and placed a call to Deavitt on his personal cell phone, leaving a voicemail message asking for a return call. A180 (citing Tr. 70, 205-06, & JX 11, A144). Unified Turbines paid Nagle for Christmas Eve, Christmas Day, and for the "Boxing Day" holiday on Friday, December 26, 2008. *Id*.

Nagle did not return to work on Monday, December 29, 2008, and Unified Turbines stopped paying him that day. Although "Deavitt admitted that he assumed ... that Nagle wanted to discuss the situation at work," he never returned Nagle's call and never called Nagle back to work. A157, n. 9; A144; A180-181. At some point during that week, Hubbert told Deavitt about his phone conversation with Nagle, and Nagle's belief that Deavitt had fired him, and reported to Deavitt that M

had been the aggressor, not Nagle. A181 (citing Tr. 202-03, 222-23, 333-34). Nevertheless, Deavitt took no action other than to order Nagle removed from the payroll. A180-181. In addition, Deavitt later submitted a sworn affidavit to OSHA falsely stating that Nagle had never called him. A181 & n. 9 (citing JX 4, A138). Nagle never returned to work. *Id.*

3. Initial Administrative Decisions

After considering all the evidence presented during the two-day hearing, the ALJ concluded that Nagle had engaged in protected activity when he provided information to his employer that M was abusing prescription narcotics on the job; that a reasonable person with Nagle's training and experience could believe that M's ongoing abuse of drugs and deteriorating performance was in violation of FAA regulations; and that Unified Turbines was aware of Nagle's protected reports of M's suspected drug use. A160. However, the ALJ applied Vermont state law to the facts surrounding Nagle's failure to return to

work, and held, based on that analysis, that Nagle was not subjected to an adverse personnel action, but instead had voluntarily quit. A162.

On appeal, the ARB reversed and remanded. It held that the ALJ's findings that Nagle had engaged in protected activity and that Nagle reasonably believed that M's ongoing abuse of prescription drugs was in violation of FAA safety regulations were both supported by substantial evidence. A169. It also affirmed the ALJ's findings that Nagle had proved employer knowledge of his protected activity, because it was undisputed that Unified Turbines knew about Nagle's reports of M's drug abuse. *Id*. However, the ARB held that the ALJ had erred by applying Vermont state law to the question of whether Nagle had voluntarily quit. Instead, the ARB remanded for reconsideration of whether an adverse action had occurred based on applicable ARB precedent, in particular *Minne v. Star Air, Inc.,* No. 05-005 (ARB Oct. 31, 2007), and *Klosterman v. E.J. Davies, Inc.*, No. 08-035 (ARB Sept. 30, 2010). The ARB also

suggested that additional findings of fact may be needed to make a final determination on that issue. A170.

On remand, the ALJ found that Nagle had met his burden of proving that he was discharged under ARB precedent, that his protected activity was a contributing factor to his discharge, and that Unified had failed to prove by clear and convincing evidence that it would have fired him in the absence of protected activity. A173-174.

The ALJ also clarified his original finding that Nagle engaged in protected activity on three separate occasions: first, by reporting to his employer that M was abusing prescription drugs on the job, second, by reporting that M seemed to be interested in K's prescription drugs, and third, by informing his employer that he had seen M selling drugs at work and that M had a drug problem on December 16, 2008. A181-182. The ALJ found that Nagle reported M's conduct on December 16 because he believed that it was further

evidence that M had a drug problem that was affecting his work, which made the report protected under AIR 21. *Id*.

The ALJ also made additional findings of fact regarding who initiated the Dec. 24th altercation and why, concluding that M had started it because he was upset over Nagle's complaints, which had been relayed to him by management on or around Dec. 16th. A178-180. He also made additional findings of fact regarding Nagle's and Deavitt's behavior on and after Dec. 27th, finding that Nagle did not quit his job, but instead believed that he had been fired. A180-181. He further found that Nagle made an effort to call Deavitt to talk about what happened on December 27, and left a message on Deavitt's voicemail, but that Deavitt chose to ignore Nagle's call, even after Deavitt found out that Nagle thought he had been fired and knew that Nagle was calling about his job. A182-183. The ALJ further found, based on admissions by Deavitt, that Unified had a "protocol" of contacting its employees if they did

not come to work as planned, and that Unified "departed from its normal protocol of calling an absent employee and decid[ed] instead to interpret Nagle's failure to report for work on December 29th as a voluntary quit in the absence of an actual resignation." A183 (citing Tr. at 224-25). The ALJ therefore found that Unified chose to interpret Nagle's failure to report as having abandoned his job, and that Deavitt misled OSHA by asserting that Nagle had "never called" about his job "in an effort to bolster Unified Turbines' 'voluntary quit' defense." The ALJ concluded that Unified ended the employment relationship by ignoring Nagle's call and deciding instead to treat Nagle as having quit his job. *Id*.

Applying Board precedent as articulated in *Minne v. Star Air* and *Klosterman v. E. J. Davies,* where the Board held that "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee," *Minne*, slip op. at 14, the ALJ concluded that Nagle did not resign.

Instead, it was Unified who decided to terminate Nagle's employment, and it was Unified, rather than Nagle, who ended the employment relationship. A180-181, A183-184. As a matter of law, the ALJ concluded that this discharge constituted an adverse employment action under AIR 21. *Id.*

Finally, the ALJ concluded that Nagle had proved by a preponderance of the evidence that his protected activity contributed to his discharge. The ALJ found that there was close temporal proximity between Nagle's protected activity on Dec. 16th and his discharge on Dec. 29th, and that Nagle's protected activity "tended to affect the outcome which was Unified Turbines' decision not to return Nagle's telephone call and instead interpret his absence from work on December 29, 2008, as a voluntary quit." A185-186. The ALJ described a "chain of causation" starting with Nagle's reports to his employer of M's alleged drug abuse prior to and on December 16, which Unified then relayed to M. As the ALJ explained,

> the proximate and foreseeable effect of Unified Turbines' action in informing M of Nagle's protected complaint was the December 24th altercation for which Nagle was erroneously blamed and which precipitated a series of events which began with Nagle being angrily ordered by Deavitt to leave the premises and concluded with Deavitt's decision to not return Nagle's call and instead let Nagle believe that he'd been fired. Clearly, none of this would have occurred had Nagle not engaged in protected activity and had Unified Turbines not disclosed his protected activity to M.

A185. Thus, the ALJ found that Nagle's protected activity contributed to the adverse action Unified took against him, namely Unified's decision to immediately terminate his employment when he failed to return to work that Monday. *Id*.

Finally, the ALJ also found that Unified failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity, since Unified had never counseled or warned Nagle that his job was in jeopardy or that it was considering terminating him. A186. In addition, the ALJ ordered reinstatement, back pay, and compensatory damages, as well as statutory attorney's

fees and costs. A187-191. He reduced the damages award to $50,000, which he described as "the lower end of the range, in recognition of Nagle's contributory role in his own misfortunes," specifically, "Nagle's failure to do anything to preserve his employment at Unified Turbines other than place a call to Deavitt ...." A191.

4. Board's Final Decision and Order

On appeal, the ARB affirmed all the ALJ's findings of fact as well as his legal conclusions that Unified terminated Nagle's employment and that his protected activity was a contributing factor in that termination, as supported by substantial evidence of record and in accordance with applicable law. A195-196. It agreed with the ALJ that Nagle had engaged in protected activity on three occasions, including on December 16, 2008, by reporting to his employer his suspicions that M was abusing prescription drugs on the job. A196. The ARB found that the ALJ's finding of protected

activity was supported by substantial evidence. A197 (citing Tr. at 47-49, 59-60, 182-84, 189-92).

The ARB also found that the ALJ's findings that Nagle did not resign, but was instead terminated by Unified, were supported by substantial evidence. *Id*. (citing Tr. 224-25). It explained that the ALJ had found, based on Dan Hubbert's "credible and neutral" testimony, that Unified had sent Nagle home on December 24, 2008, instructing him to "take the long weekend to think about what he had done." A197, n.10. When Nagle called Deavitt to talk about what had happened, he left a message on Deavitt's voicemail which Deavitt chose not to return, even after Deavitt found out that Nagle thought he'd been fired and that Nagle was not the one who had started the December 24th altercation. *Id*. Furthermore, Unified "departed from its normal protocol of calling an absent employee and decid[ed] instead to interpret Nagle's failure to report for work on December 29th as a voluntary quit." *Id*. (citing Tr. at 224-25). Based on these facts, the ARB held that the

ALJ had properly applied its precedent as articulated in *Minne v. Star Air* and *Klosterman v. E. J. Davies* to find that Unified had terminated Nagle's employment. *Id*. As in those cases, the ALJ found that "Nagle did not resign," but instead was terminated by the company when it failed to call him back and took no action to reinstate him, but instead simply stopped paying him. The ARB found that there was substantial evidence in the record to support the ALJ's finding that Unified terminated Nagle's employment. *Id*. (citing Tr. 208-10, 224-25, 229).

The Board also upheld the ALJ's conclusion that Nagle proved by a preponderance of the evidence that his protected activity contributed to his discharge. A197-198. It cited the temporal proximity between the protected activity and the termination, and the fact that Nagle's reports of M's suspected drug dealing were "intertwined" with Nagle's reports that M had a drug problem, which Unified passed on to M, which resulted in the scuffle. *Id*. It agreed with the ALJ's findings

that M started the altercation because he was upset that Nagle had reported his suspected drug dealing to management," which led directly to Deavitt telling Nagle to "go home," and which, in turn, led to his termination several days later. *Id*. (*quoting* A182, A185). As the ALJ explained, Nagle's protected activity on December 16 caused Deavitt "to not return Nagle's call and instead let Nagle believe that he'd been fired." A185. Therefore, it "tended to affect the outcome which was Unified Turbines' decision [to] interpret his absence from work on December 29, 2008, as a voluntary quit." A185-186. Thus, the ARB concluded, "there are several identifiable links in the chain of causation from Nagle's protected activity to the adverse action [Unified] took against him, establishing that Nagle's protected activity was a factor in [Unified's] termination of his employment." A198. The ARB therefore concluded that substantial record evidence supported the ALJ's findings of fact regarding causation. *Id*.

The ARB also upheld the ALJ's finding that Unified failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity, as supported by substantial evidence and consistent with applicable law. *Id*. It declined to order a stay of the ALJ's reinstatement order both because Unified did not request a stay or present any supporting evidence before the ALJ, and because it held that it did not have any authority to decide the constitutionality of the statutory reinstatement provisions. A198-199 & n. 13 (citing Secretary's Order 2-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012)).

Finally, the ARB rejected Unified's argument that the back pay award was inappropriate because Nagle failed to mitigate his damages. Instead, the ARB agreed with the ALJ that Nagle was entitled to back pay upon a finding of illegal termination under AIR 21. A199-200. However, it also noted that the ALJ considered Nagle's "contributory" behavior in reducing

his compensatory damages award for non-economic damages to $50,000, citing the ALJ's finding regarding Nagle's actions. A200 (citing A191). As a result, it held that the ALJ had amply supported his award both legally and factually, and affirmed the back pay award of $26,128.75 in addition to the damages award of $50,000. *Id*.

SUMMARY OF ARGUMENT

To prevail on his AIR 21 claim, Nagle was required to show by a preponderance of the evidence that he engaged in activity protected by AIR 21, that his employer knew of his protected activity, that he was subjected to unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action.

After a hearing at which all parties testified, the ALJ analyzed all the evidence, found Nagle's testimony to be credible and made detailed findings of fact, which are supported by substantial evidence. As both the ALJ and the ARB found, the evidence demonstrates

that Nagle reported three times that a co-worker was abusing drugs on the job, which he reasonably believed was in violation of FAA regulations. These actions constituted protected activity under AIR 21, and the court should reject Unified's arguments to the contrary and defer to the ARB's reasonable interpretation of the statutory language.

The ALJ further found that the employer knew of these reports, and that it terminated Nagle's employment. He found that Nagle did not quit his job, but was ordered to "go home" and think about whether you still want to work here, after being assaulted by the drug-abusing co-worker, who was angry because the employer told him about Nagle's complaints. Finally, the ALJ found that Nagle telephoned his employer to talk about his job, but the employer refused to return his call, lied about it to OSHA, departed from its normal protocol by refusing to call him, and removed him from the payroll without further notice. The ARB affirmed all of these findings as based on substantial

evidence. It further held that the Department's own whistleblower precedent was controlling on the issue of whether these actions constituted a "discharge" under AIR 21. The Court should reject Unified's invitations to substitute state law, Title VII law, or irrelevant Departmental regulations or guidance documents, and instead should defer to the ARB's reasonable interpretation of the statutory term "discharge."

Finally, the ALJ found as a matter of fact that Nagle's protected activity was a contributing factor in his termination, based upon credibility findings and record evidence. He found "a chain of causation" starting with the allegations of drug abuse, which precipitated the shoving match, which caused the employer to send Nagle home and terminate his employment five days later. As such, both the ALJ and the ARB held that Nagle had met his burden of proving that his protected activity was a contributing factor in his termination. They further found, and Unified does not contest, that Unified failed to provide clear

and convincing evidence that it would have taken the same actions in the absence of Nagle's protected complaints. These findings are supported by substantial evidence in the record. Furthermore, the Board correctly identified and applied the legal burdens of proof and required elements for AIR 21 whistleblower claims. Therefore, this Court should uphold the ALJ's finding, as affirmed by the Board, that Nagle was discharged in retaliation for AIR 21-protected whistleblowing.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FACTUAL FINDINGS, AS AFFIRMED BY THE BOARD, THAT NAGLE ENGAGED IN PROTECTED ACTIVITY, THAT UNIFIED KNEW OF THAT PROTECTED ACTIVITY, THAT NAGLE WAS DISCHARGED, AND THAT HIS PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THAT DISCHARGE.

A. Standard of Review.

AIR 21 provides that final decisions of the Secretary of Labor, such as the Board's Final Decision and Order here, are reviewed by the United States Courts of Appeals in accordance with the Administrative Procedure Act, 5 U.S.C. 702 *et seq*. ("APA"). *See* 49

U.S.C. 42121(b)(4)(A). This court must affirm the agency's decisions if it is supported by substantial evidence, and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). "Under this deferential standard of review, '[the court] must assess, among other matters, whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Bechtel v. Administrative Review Board*, 710 F.3d 443, 446 (2d Cir. 2013) (*quoting Judulang v. Holder*, 565 U.S. ---, 132 S.Ct. 476, 484 (2011); *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). This Court may set aside the ARB's decision "only if it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Bechtel, 710 F.3d at 446 (*quoting Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007))(*internal quotation marks omitted*). *See also Gattegno v. ARB*, 353 Fed. Appx. 498, 499, 2009 WL 3789904, at *2 (2d Cir. 2009) (affirming ARB decision as "within the bounds of the agency's expert discretion"). Courts of appeal are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by an ALJ is later overruled by the ARB does not mean the administrative process was arbitrary and capricious. *Bechtel v. ARB*, 710 F.3d at 449, *citing Defenders of Wildlife*, 551 U.S. at 659.

Factual determinations must be upheld "unless they are 'unsupported by substantial evidence' in the record as a whole." *Zurenda v. U.S. Dep't of Labor*, 182 F.3d 902, 1999 WL 459775, at *2 (2d Cir. 1999) (quoting *Brink's, Inc. v. Herman*, 148 F.3d 175, 178 (2d Cir. 1998)). The "substantial evidence" benchmark "is notoriously difficult to overcome on appellate review."

Bath Iron Works Corp. v. U.S. Dep't of Labor, 336 F.3d 51, 56 (1st Cir. 2003). Substantial evidence is "more than a scintilla," but does not require a preponderance of the evidence -- merely "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 45 (2d Cir. 1995)(internal quotation omitted); *Zurenda*, 182 F.3d 902, 1999 WL 459775, at *2. Credibility findings in particular are "entitled to great deference." *Trimmer v. U.S. Dep't of Labor,* 174 F.3d 1098, 1102 (10th Cir. 1999).

The Board's legal determinations are generally reviewed *de novo,* granting deference to its reasonable interpretations of AIR 21. *See Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013), *citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843-44 (1984)(according *Chevron* deference to ARB's permissible interpretation of Sarbanes-Oxley whistleblower provision); *Lockheed Martin Corp. v. Administrative Review Board*, 717 F.3d 1121, 1131 (10th

Cir. 2013) *(same); Welch v. Chao*, 536 F.3d 269, 276 n. 2 (4th Cir. 2008) (*same)*; *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173-74, 1181 (10th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the environmental whistleblower statutes); *Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491 (6th Cir. 2005) (granting *Chevron* deference to ARB's interpretation of the Energy Reorganization Act's whistleblower provision).

B. The Board Applied the Correct Legal Burdens of Proof under AIR 21.

The Board correctly identified and applied the legal burdens of proof for AIR 21 claims. *See* A196. To prevail, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity protected by AIR 21, (2) that unfavorable personnel action[6] was taken against him, and (3) that the

[6] AIR 21 prohibits an employer from discharging or otherwise discriminating against an employee for AIR 21-protected conduct and requires an employee to demonstrate that protected conduct was a contributing factor in the "unfavorable personnel action." See 49 U.S.C. 42121(a) & (b)(2)(B)(ii); (b)(2)(iii). The

protected activity was a contributing factor in the unfavorable personnel action. *Id*. (citing 49 U.S.C. 42121(b)(2)(B)(iii)). *See also* 29 C.F.R. 1979.104(b)(1)(i)-(iv).[7] In *Bechtel*, this court described the relevant burdens of proof slightly differently: "To prevail..., an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Bechtel*, 710 F.3d at 447 (*quoting Harp v.*

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regulations and ARB case law make clear that the terms "discriminate" and "unfavorable personnel action" are interpreted broadly to include actions such as intimidating, threatening, restraining, coercing, or blacklisting an employee. *See* 29 C.F.R. 1979.102(a), (b), 1979.104(b).

[7] After Nagle proved by a preponderance of the evidence that AIR 21-protected activity was a contributing factor in Unified's decision to terminate his employment, Unified could have avoided liability only by proving by clear and convincing evidence that it would have made the same decision to terminate his employment in the absence of his protected activity. *See* 49 U.S.C. 42121(b)(2)(B)(ii); 29 C.F.R. 1979.104(c). However, Unified has waived this issue by failing to appeal it to this court.

Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009) (alterations omitted); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475–76 (5th Cir. 2008); 49 U.S.C. § 42121(b)(2)(B)(iv). The Court further noted that

> it is implicit that before certain conduct can be 'a contributing factor' to an employer's decision, the employer must at least suspect that the employee has engaged in that conduct. We therefore agree with our sister circuits that the same basic four-part framework of the complainant's prima facie case applies ... when an ALJ considers whether the complainant has satisfied his or her evidentiary burden under 49 U.S.C. § 42121(b)(2)(B)(iii).

Bechtel, 710 F.3d at 448, n. 5 (*citing Harp*, 558 F.3d at 723); *Allen*, 514 F.3d at 476. Although the Board here did not expressly state in its findings that Unified knew of Nagle's protected activity, such a finding is undoubtedly implicit in its holding that Nagle reported M's drug use to the employer on December 16, and that this protected activity was a contributing factor to his discharge. A196-197, 198.[8] Therefore, the

[8] The ARB adopted all the ALJ's factual findings, including the fact that Nagle "reported to his employer [on December 16th] that M was abusing prescription

Board applied the correct burdens of proof in reaching its legal conclusions that Nagle engaged in protected activity, that he was discharged, and that his protected activity was a contributing factor to his employment termination.

C. Substantial Evidence Supports the Secretary's Determination That Nagle Engaged in Protected Activity.

Unified admits that Nagle engaged in protected activity by twice complaining to his employers that M was abusing prescription drugs on the job. Petitioner's Brief at 22. However, it asserts that his third complaint, on December 16th, was not protected because it was limited to the alleged "sale of drugs," was based on an objectively unreasonable belief, and did not "definitively and specifically" relate to any

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narcotic medication while on the job." A198 & n. 11. The ALJ also made an express finding that Unified knew of Nagle's protected activity. *See* A160 ("it is undisputed that Unified Turbines was aware of Nagle's protected reports of suspected drug abuse by M.")

action prohibited by AIR 21.[9] Br. at 22-25. Unified is wrong on all counts.

In fact, the ALJ specifically found that Nagle reported M's suspicious conduct to his employer on December 16 *because Nagle believed* that it was further evidence that M had a drug problem that was affecting his work, which therefore made the report protected activity under AIR 21. The ALJ found that Nagle's statement to Deavitt was not limited to the allegation that M was selling drugs, but went on to state that "I've seen him selling his pills now. He's got problems." A151 (citing Tr. 59-60); A182. The ALJ expressly rejected Unified's assertion that the Dec. 16 report was limited to the alleged "sale of drugs" by M, instead finding that Nagle reported suspected drug abuse as well as illegal drug dealing:

> Nagle's report to Unified Turbines on December 16, 2008 was one of three separate, specific

[9] Unified also correctly asserts that the Christmas Eve shoving match between M and Nagle was not protected activity. Nagle never contended that it was, and neither the ALJ nor the ARB made any such finding. *See, e.g.* A185.

> communications to Unified Turbines management regarding M's suspected abuse of prescription medication that were determined to be protected under AIR 21. *I adhere to this conclusion, and I also reject Unified Turbines' argument ...that Nagle's complaint on December 16th was unprotected because it concerned a sale of drugs outside of work and not abuse of drugs on the job.* ... That is, the record shows that Nagle brought M's conduct on December 16th to management's attention because he believed that it was further evidence that M had a "problem" with abusing prescription pain medication that was impacting on his performance.

A182 (citing Tr. at 60 (emphasis added)). The Board affirmed this finding as supported by substantial evidence. A196-197 (citing Tr. at 47-49, 59-60, 182-184, 189-92); A198, n. 11. This court should affirm for the same reason.

Unified also contends that Nagle's December 16 complaint about M's drug problems was not protected because Nagle did not have an objectively reasonable belief that M's actions violated any FAA drug abuse regulation. Br. at 23-24. However, once again, Unified misstates the facts. The ALJ expressly found that M was, in fact, abusing prescription opiates, and that M's work performance was deteriorating, based on

M's own admissions. A174. The ALJ also found that "a reasonable person with Nagle's training and experience could believe that M's ongoing abuse of drugs and deteriorating performance was in violation of FAA regulations." A160, A182.

Finally, Unified argues that Nagle's drug abuse allegations were not protected because they did not "definitively and specifically" relate to air carrier safety. However, Unified misreads the statute. There is no such requirement in AIR 21, and there never has been. The ARB has noted several times that protected activity under AIR 21 must be "specific in relation to a given practice, condition, directive or event." *Yadav v. L-3 Communications, Corp.*, No. 08-090, 2010 WL 348306 (ARB. Jan. 7, 2010); *Simpson v. United Parcel Servs.*, No. 06-065, 2008 WL 921123 (ARB Mar. 14, 2008). However, neither the ARB nor any court has ever applied the heightened "definitive and specific" evidentiary standard proposed by Unified to AIR 21 cases. Courts developed that standard to implement a catch-all

protection in the Energy Reorganization Act ("ERA") that protects employees who, among other things, assist or participate in "a proceeding ... or any other action [designed] to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at *14 (ARB May 25, 2011) (*citing* 42 U.S.C.A. § 5851(a)(1)(F)). The Department recently made clear that it does not regard the "definitive and specific" requirement as applying to provisions other than the catch-all in the ERA. *Id*. at *15 (disavowing "heightened evidentiary standard" as inconsistent with statutory language in Sarbanes-Oxley whistleblower provision). Instead, as the ARB explained in *Sylvester,* the critical focus in such cases should be on "whether the employee reported conduct that he or she reasonably believed constituted a violation of federal law"). *Id*. (emphasis added). The standard for AIR 21 cases articulated in *Yadav* and *Simpson* is consistent with the standard that the ARB and the

courts apply following *Sylvester*, and the ALJ applied the correct standard in this case. *See Villanueva v. U.S. Dep't of Labor*,__ F.3d __, 2014 WL 550817, at *5 (5th Cir. Feb 12, 2014) (agreeing with the Secretary's interpretation of Sarbanes-Oxley whistleblower provision in *Sylvester* and noting that "[a]n employee need not cite a code section he believes was violated in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal") (internal citations omitted).

AIR 21 protects whistleblowers who "provide[]...to the employer ... information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety... ." 49 U.S.C. 42121(a)(1). To the extent that a protected complaint under AIR 21 must be "specific in relation to a given practice, condition, directive or event," the ALJ found that all three of

Nagle's protected complaints, including his statement on December 16 that M "had problems" in context were specific communications to Unified management regarding M's suspected abuse of prescription medication, and that Nagle brought M's conduct to Unified's attention on December 16 because he believed it was further evidence that M had a "problem" with prescription pain medication that was impacting his performance. *See* A182; A158-160 (*citing Simpson*, ARB Case No. 06-065). This finding was based on substantial evidence and should be upheld by this court.

D. Substantial Evidence Supports the Secretary's Determination That Unified Turbines Knew of Nagle's Protected Activity.

Unified cannot seriously dispute that it had knowledge of Nagle's three complaints. The ALJ made an express finding that Unified knew of Nagle's protected activity. *See* A160 ("it is undisputed that Unified Turbines was aware of Nagle's protected reports of suspected drug abuse by M.") The ARB adopted all the ALJ's factual findings, including the fact that Nagle

"reported to his employer [on December 16th] that M was abusing prescription narcotic medication while on the job." A198. Therefore, it is essentially undisputed that Unified knew of Nagle's protected activity. Indeed, the ALJ also found that "Unified Turbines ... informed M that Nagle was the source of the complaint" about M. *See* A185. The court should affirm this finding of fact as based on substantial record evidence.

E. Substantial Evidence Supports the Secretary's Determination That Unified Terminated Nagle's Employment.

Unified contends that Nagle quit his job voluntarily, directly contradicting the factual findings of the ALJ. Br. at 8-9, 19. Indeed, the crux of Unified's argument on appeal is that Unified did not discharge or terminate Nagle, but instead simply sent him home early on Christmas Eve and then "fail[ed] to prevent him from shooting himself in the foot by not showing up for work" after the four-day Christmas holiday." *Id*. at 18.

However, the ALJ expressly found that Nagle did not quit, noting that "[t]here is no evidence that Nagle actually resigned." A183. Instead, the ALJ found that Deavitt had sent Nagle home on December 24, with instructions to "put [your] F'ing truck in gear... [and] take the long weekend to think about what [you] had done" and about "whether you still want to work here" – and **did not** instruct him to return to work, as Unified falsely asserts in its brief. A197, n. 10 (*quoting* A161 & Tr. at 325) (emphasis added). According to the ALJ, Nagle then called Deavitt and left a message on his voicemail which Deavitt ignored, even after Hubbert told Deavitt that Nagle thought he had been fired and that Nagle did not start the December 24th altercation. A180-A183.

The ALJ refused to credit Deavitt's testimony on this point, finding that Deavitt had "misled OSHA in his affidavit when he stated, in an effort to bolster Unified Turbines' 'voluntary quit' defense, that Nagle had never called" about his job. A183 (citing Tr. at

224-25). The ALJ also found that Unified "departed from its normal protocol of calling an absent employee and decid[ed] instead to interpret Nagle's failure to report for work on December 29th as a voluntary quit." A183. The ARB upheld all these factual findings as supported by substantial evidence. A197 (citing A180, A183; Tr. 224-25). The ARB also found substantial record evidence to support the ALJ's finding that Unified had terminated Nagle's employment. *Id*. (citing Tr. 208-10, 224-25, 229).

As the factfinder, the ALJ was free to believe or disbelieve each of the witnesses, including Nagle, Hubbert, M, and Deavitt, and this court should grant great deference to his credibility findings. *Trimmer*, 174 F.2d 1098, 1102. Even if the inferences that the ALJ drew were not the only possible inferences that could be drawn, "[t]he possibility of drawing different inferences from the administrative record ... is a grossly insufficient basis to disturb an agency's findings on appeal." *Lockheed Martin Corp.*, 717 F.3d

1121, 1138 (citing *Trimmer*, 174 F.3d at 1102). Based on the evidence in the administrative record, a fact finder could reasonably conclude that Nagle and Hubbert were telling the truth and Deavitt was not. This court should not disturb such findings.

On this record, the ARB and the ALJ properly applied ARB whistleblower precedent as articulated in *Minne v. Star Air*, No. 05-005 (ARB Oct. 31, 2007) and *Klosterman v. E. J. Davies*, No. 08-035 (ARB Sept. 30, 2010), to find that Unified had "discharged" Nagle as a matter of law within the meaning of AIR 21.[10] *Id*. at 3. As in those cases, both the ALJ and the ARB concluded that Nagle was "discharged" by the company when Deavitt failed to call him back and took no action to reinstate him, but instead directed Unified to remove him from the payroll effective December 29. *Id*. This legal conclusion should be upheld by the court as consistent with the language of AIR 21 and with controlling ARB

[10] AIR 21 provides that no covered employer "may discharge an employee or otherwise discriminate against an employee ... because [of protected conduct]." 49 U.S.C. 42121(a).

precedent under the whistleblower protection laws enforced by the Department of Labor.

Thus, Unified is wrong in its suggestion that this court should apply Vermont state law, Title VII law, or the Department's Family and Medical Leave Act ("FMLA") regulations, H-2A immigrant guest worker regulations or its Field Assistance Bulletin in deciding whether the agency was reasonable in determining that a discharge occurred under AIR 21. Br. at 14-17. Federal whistleblower law is controlling in this federal whistleblower case, not state law. The Board properly dismissed Unified's argument below that Vermont law should be applied in determining whether Nagel quit or was discharged. As the Board explained in its first Decision:

> ARB precedent arising under the Surface Transportation Assistance Act (STAA), not Vermont law, controls a determination of whether there was adverse action in this case. The statutory scheme established by AIR 21 essentially mirrors the protective provisions of the STAA (as well as other whistleblower statutes) and jurisprudence developed under that statute should be applied to this case. See *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-

> 123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 35 (ARB May 25, 2011) (the Board interprets whistleblower statutes in a parallel manner).

ARB Dec. I at 5, A170. The Board correctly identified the controlling precedent in the Department's whistleblower jurisprudence as *Minne v. Star Air, Inc*., No. 05-005 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies, Inc*., No. 08-035 (ARB Sept. 30, 2010), which are the most recent in a long line of cases taking the same approach to determining whether a whistleblower was discharged. *See Minne*, slip. op. at 14, n.17 and 18. In those cases, which both arose under the very similar provisions of the STAA, the Board interpreted the statutory term "discharge" to include situations like this one, where there was no actual resignation by the employee, but the employment relationship "was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end." *Id*. In the absence of an actual resignation by the employee, "an employer who decides to interpret

an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Minne*, slip op. at 14 (footnotes omitted). Applying this test to Unified's actions, the Board affirmed the ALJ's ultimate legal conclusion upon remand that Nagle was "discharged," and/or suffered an "adverse employment action" or "unfavorable personnel action" within the meaning of AIR 21 and 29 C.F.R. 1979.102(b). A184 (ALJ Decision and Order on Remand); A197 (ARB Final Dec.).

Like the ARB's interpretation of the AIR 21 protected activity provision discussed above, the ARB's reasonable interpretation of AIR 21's "discharge" provision is also due deference under *Chevron,* since the Secretary of Labor has delegated her enforcement authority to it through administrative adjudications. See, e.g., *Chevron*, 467 U.S. at 843, n.11; *Lockheed Martin Corp. v. ARB*, 717 F.3d at 1131-32; *Wiest v. Lynch*, 710 F.3d at 131; *Welch v. Chao*, 536 F.3d at 276 n.2; *Anderson*, 422 F.3d at 1173-74, 1181; *Demski*, 419 F.3d at 491. For the reasons outlined above, the ARB's

interpretation of AIR 21's "discharge" provision is, at minimum, a reasonable construction of the statute, and is entitled to deference.

Furthermore, contrary to Unified's assertions, the ARB and the ALJ's approach to this case is consistent with the approach that courts in this circuit and elsewhere have taken in determining whether an employee has been discharged under other employment laws. In those contexts, whether an employee is "discharged" depends not on whether the employer ever used formal words of firing but on the reasonable perceptions of the employee. *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir. 1996)(allowing plaintiff to pursue claim that she was actually discharged in Title VII case based on numerous cases under National Labor Relations Act("NLRA")); *see also Berman v. Tyco Internat'l Co.*, 492 Fed. Appx. 152, 156, 2012 WL 2877366 (2d Cir. 2012) (reversing district court's grant of summary judgment in ERISA and state law discharge case because a reasonable jury could find

employee was terminated based on directors' rejections of his efforts to have an ongoing role as employee); *Thomas v. Dillard Department Store*, 116 F.3d 1432, 1434 (11th Cir. 1997) (holding in ADEA case that discharge could occur despite vague offer of alternative position and citing pregnancy discrimination and Title VII cases holding the same); *Kaynard v. Palby Lingiere, Inc.*, 625 F.2d 1047, 1052-53 (2d Cir. 1980) (finding statement "If you don't like the work, why stay here. I'm not going to fire you" effectuated a discharge in NLRA case). A discharge occurs when the employer's language and conduct "would logically lead a prudent person to believe his tenure has been terminated." *Chertkova*, 92 F.3d at 88; *see also Poly-America, Inc. v. NLRB*, 260 F.3d 465, 477-78 (5th Cir. 2001)(upholding ALJ's determination that strikers were terminated based employer's conduct). Under this rubric, "the NLRB has frequently held that firms have some affirmative obligation to contact employees who may think that they have been fired." *N. Am. Dismantling Corp. v. NLRB, 35*

*Fed. Appx. 132, 2002 WL 554496, at *4 (*6th Cir. Apr. 12, 2002*)* (*citing Hale Mfg. Co.*, 228 NLRB 10, *order enforced NLRB v. Hale Mfg. Co.*, 570 F.2d 705, 708 (8th Cir. 1978) and *Ridgeway Trucking Co.*, 243 NLRB 1048, *order enforced NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir. 1980). Thus, the ALJ and the ARB's holdings that Nagle was terminated when Unified interpreted his failure to return to work as a resignation and failed to correct his misimpression that he was fired are not out of step with the approach taken in other areas of employment law, as Unified suggests.

Unified also errs in its suggestion that this court should apply the Title VII "adverse employment action" standard set forth in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006), to determine whether Nagle was discharged in this AIR 21 whistleblower case. Br. at 14-16. As the Board explained in its decision, the issue here is whether Nagle was "discharged" in violation of AIR 21, which

prohibits “discharge or other discrimination.” 49 U.S.C. 42121. The “adverse employment action” standard in *Burlington Northern* is aimed at determining not what constitutes a discharge -- which the decision itself recognizes unquestionably would be an adverse action -- but what sorts of actions short of a discharge or other tangible employment action are sufficiently materially adverse to be actionable as retaliation under Title VII. *Burlington Northern*, 548 U.S. at 64 (noting that the anti-retaliation provision, unlike the substantive provision, of Title VII is not limited to violations that involve a “tangible employment action” such as a discharge). While the *Burlington Northern* standard may be relevant by analogy for determining what actions constitute other discrimination under AIR 21, it has no place in the analysis of whether a whistleblower was discharged. See *Williams v. American Airlines, Inc.,* ARB No. 09-018, 2010 WL 5535815, at *6-8 (ARB Dec. 29, 2010)(noting that the *Burlington Northern* standard is instructive but not dispositive for determining what

conduct constitutes "other discrimination" under AIR 21); see also *Menendez,* Nos. 09-002, 09-003, 2011 WL 4439090 at *10-13 (ARB Sept. 13, 2011) (holding the same under SOX), *petition for review filed sub nom. Halliburton, Inc. v. Administrative Review Board, U.S. Dep't of Labor*, No. 13-60323 (5th Cir. 2013).

For similar reasons, the Court should reject Unified's invitation to apply the FMLA regulations, the H-2A regulations, the Vermont Parental and Family Leave Act or other laws or guidance to the facts of this case. Each of the cited provisions construe different statutes with different terms, different purposes, different enforcement provisions and different legislative and/or regulatory histories. Instead, the Court should hold that the ALJ and ARB reasonably applied AIR 21 and the governing case law under the whistleblower statutes which the Labor Department is charged with enforcing, and under which it has developed a considerable body of expertise over the

years. The Court should therefore affirm the decisions of the ALJ and the ARB that Nagle was discharged.

F. Substantial Evidence Supports the Determination That Nagle's Protected Activity Was a Contributing Factor to His Employment Termination.

Finally, the ALJ's finding, as affirmed by the Board, that Nagle's protected activity was a contributing factor in his employment termination is also supported by substantial evidence in the record as a whole. As the ALJ correctly stated, a "contributing factor" under AIR 21 is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." A184 (*citing Allen v. Stewart Enter., Inc*., No. 06-081, 2006 WL 6583250, at *14 (ARB Jul. 27, 2006), *aff'd sub nom*. *Allen v. Admin. Review Bd*., 514 F.3d 468 (5th Cir. 2008)). The ALJ also correctly held that Nagle need not prove that his protected activity was a significant, motivating, substantial, or predominant factor in his termination, nor did he need to prove "retaliatory motive" on the part of the employer. A185 (*citing Menendez v.*

Halliburton, Inc., Nos. 09-002, 09-003, 2011 WL 4915750 (ARB Sept. 13, 2011)).[11] All that the employee must show is that the protected conduct was a factor which influenced the outcome. *See Allen*, 514 F.3d at 476 n.3. The protected conduct need not be the sole or even the primary reason for the action, as long as it played a role in the employer's decision to take action against the employee. *See Marano v. U.S. Department of Justice*, 2 F.3d 1137, 1140, 1143 (Fed. Cir. 1993)(finding retaliation based on the "uncontested sequence of events" where whistleblower's disclosure led agency to reorganize office and led to whistleblower's reassignment).

Unified does not challenge the ALJ's or the ARB's summary of the relevant case law, but attacks the ALJ's and ARB's findings of fact and legal conclusions regarding causation as a "Rube Goldberg Construct." It

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[11] *See also Araujo v. New Jersey Transit*, 708 F.3d 152, 159 (3d Cir. 2013); *Marano*, 2 F.3d at 1140 (*quoting* 135 Cong. Rec. 5033 (1989)); *Hoffman v. Netjets Aviation, Inc.*, No. 09-021, 2011 WL 1247208, n.96 (ARB Mar. 24, 2011), *aff'd sub nom.*

misstates the facts in the record as well as the ALJ's findings, falsely asserts that Nagle's December 16 drug abuse report was not protected activity, then claims that Nagle's September and October drug abuse reports were "too removed in time" from the December 29 termination to be a contributing factor "as a matter of law." However, Unified cites no law for this proposition, nor could it, since there is none. Instead, the ALJ expressly found that there was close temporal proximity between the December 16 drug abuse report and Nagle's discharge on December 29, and found that Nagle's protected activity "tended to affect the outcome which was Unified Turbines' decision not to return Nagle's telephone call and instead interpret his absence from work on December 29, 2008, as a voluntary quit." A185-186.

Unified also falsely claims that "uncontroverted direct evidence" exonerates M, choosing to ignore the ALJ's express finding that M was the one who started the shoving match, based on testimony by Hubbert and

others. Br. at 20. The record belies Unified's contention, as the ALJ clearly stated. *See, e.g.,* A178-180 (citing testimony by Nagle, Hubbert, Kinsell and M); A5 (Hubbert affidavit).[12] Finally, Unified continues to argue that Nagle voluntarily quit his job, despite the ALJ's express finding that he did not quit but instead was ordered to "go home" on December 24th and was formally discharged on December 29th. A155-156, A161-162 (*citing* Tr. at 66-67, 69, 207-08, 307-08, 324-325); A174; A197, n. 10. The Board affirmed these

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[12] Oddly, Unified claims that a "party admission" by Nagle somehow prohibits the ALJ from making this factual finding based on all the evidence. Br. at 27. To the contrary, the ALJ credited Nagle's testimony that M said "I hate you" and called him names, including "stupid mother fucker," "asshole," and credited Hubbert's testimony that M started the fight, which corroborated Nagle's version of events. *See e.g.* A178-79 (citing Tr. at 63-64, 374-75). The ALJ also noted that M admitted certain key facts at the hearing, including that Deavitt told him about Nagle's complaints on or about December 16, that M was upset by Nagle's complaints, and that he "was under the influence of opiates at the time and admitted that his opiate addiction ... made him more argumentative with his girlfriend." A179 (citing testimony by Nagle, Hubbert, M and Deavitt).

findings as based on substantial record evidence. A197.

The ALJ engaged in a detailed analysis and discussion of the hearing testimony and other record evidence in this case, made credibility findings based on the testimony, and drew appropriate inferences from the evidence. He concluded that the record supported a "chain of causation," starting with Nagle's three reports to his employer of M's alleged drug abuse, which Unified then revealed to M on or about December 16, which disclosure had "the proximate and foreseeable effect of" making M angry, which in turn caused the December 24th altercation for which Nagle was erroneously blamed and eventually terminated five days later. A185. As the ALJ found, the altercation between M and Nagle was started by M, and

> precipitated a series of events which began with Nagle being angrily ordered by Deavitt to leave the premises and concluded with Deavitt's decision to not return Nagle's call and instead let Nagle believe that he'd been fired. Clearly, none of this would have occurred had Nagle not engaged in protected activity and had

> Unified Turbines not disclosed his protected activity to M.

Id. at A185. Each and every event in this chain of causation is well-supported by direct evidence in the record, including the testimony of Nagle, Hubbert, Deavitt and M himself. See, e.g. A154-A157, A161-A162 (citing Tr. at 66-67, 69, 207-208, 307-308, 324-25, JX 3); A174-A181, A184-A186 (citing Tr. at 63-64, 66-67, 69, 207-08, 307-08, 324-325, 374-75).

The ALJ properly credited Nagle and Hubbert to establish what happened, including the fact that Unified breached Nagle's confidentiality by "outing" him to M on or around December 16, and that M attacked Nagle in retaliation on December 24, which led in turn to Deavitt sending Nagle home, ignoring his telephone call, and then removing him from the payroll just five days later. *See* A178-A181 (citing Tr. at 70, 144, 147-148, 158, 205-06, 323-24, JX 3, JX 11). Substantial record evidence supports the ALJ's findings in this regard.

In addition, the ALJ was entitled to draw the inferences that M was the aggressor in the December 24th shoving match, that he started the fight because Unified had informed him of Nagle's third report of drug abuse on or about Dec. 16th, and that Unified's disclosure of Nagle's protected activity contributed to the ultimate outcome of Deavitt ordering Nagle to "go home" and then discharging him. *See Lockheed v. Martin*, 717 F.3d at 1138 (affirming ALJ's inferences as drawn from the factual record); *Gattegno v. ARB*, 353 Fed. Appx. 498, 500, 2009 WL 3789904, at *2 (2d Cir. 2009) (affirming ARB decision as "within the bounds of the agency's expert discretion"). Here, Nagle presented both direct and circumstantial evidence, including temporal proximity and a "chain of causation," showing that his protected activity was a contributing factor in Unified's decision to terminate his employment. A reasonable factfinder could therefore conclude that he had proved his case. *Id.* *See also Araujo*, 708 F.3d at 160 (noting that temporal

proximity between a protected complaint and the adverse action, or shifting explanations for the employer's decision, can support a finding of contributing factor, even without evidence of retaliatory motive); *Bechtel*, 710 F.3d at 446 (court should affirm where the agency decision was based on a consideration of the relevant factors and no clear error of judgment occurred); *Ameristar Airways v. Administrative Review Board*, 650 F.3d 562, 569-570 (5th Cir. 2011) (termination within two weeks of protected activity, coupled with employer's untrue and shifting defenses, was sufficient to find liability).[13] The ARB found that substantial evidence in the record supports the ALJ's findings of fact regarding causation. A198. Because the ARB's opinion is in agreement with and based on part on the ALJ's credibility determinations, it is entitled to

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[13] A whistleblower "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 disclosure was a contributing factor to the personnel action." *Marano v. U.S. Department of Justice*, 2 F.3d at 1140.

"great deference." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999).

The agency's decision was based on substantial evidence in the record as a whole and on consideration of the relevant factors, as required by 5 U.S.C. § 706. Therefore, the Court should affirm the ALJ and the ARB's determinations that Nagle's protected activity contributed to his discharge, and that Unified violated AIR 21. This Court should also affirm the Board's decision in its entirety, including its orders for back pay, reinstatement and attorney fees.

CONCLUSION

For the foregoing reasons, this Court should deny Unified's Petition for Review and affirm the Board's Final Decision and Order upholding Nagle's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief:

(1) was prepared in a monospaced typeface, namely Courier New 14-point font containing no more than 10.5 characters per inch, using Microsoft Office Word 2010, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains less than 14,000 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ SARAH J. STARRETT
SARAH J. STARRETT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor was served this 24th day of March, 2014, via the Court's CM-ECF system, on each of the following:

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