No. 14-60061

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERISTAR AIRWAYS, INCORPORATED,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

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

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BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Respondent Secretary of Labor does not believe that oral argument is necessary in this case because the issue presented may be resolved based on the briefs submitted. The Secretary, however, would be pleased to participate in oral argument if this Court decides that oral argument would be helpful.

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BRIEF FOR THE SECRETARY OF LABOR

JURISDICTIONAL STATEMENT

The Secretary of Labor ("Secretary") had subject matter jurisdiction over this case pursuant to the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. 42121. *See also* 29 C.F.R. Part 1979. The Secretary's jurisdiction is based on the complaint filed with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") by Thomas E. Clemmons against his employer Ameristar Airways, Inc., and Ameristar Jet Charter,

Inc. ("Ameristar"), pursuant to 49 U.S.C. 42121(b)(1).[1] This Court has jurisdiction to review the final order of the Secretary under AIR 21, 49 U.S.C. 42121(b)(4)(A). The Department of Labor's Administrative Review Board ("ARB") issued a Final Decision and Order on November 25, 2013.[2] Ameristar filed a timely petition for review with this Court on January 24, 2014. This Court has jurisdiction to review the ARB's Final Decision and Order under 49 U.S.C. 42121(b)(4)(A), because the violation, with respect to which the order was issued, occurred in Texas.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ARB's Final Decision and Order, affirming the Administrative Law Judge's ("ALJ") Decision, that Ameristar failed to prove by clear and convincing evidence that Clemmons' January 13, 2003 e-mail, discovered two months after his discharge, was of such severity that it would have terminated Clemmons on those grounds alone, thereby requiring modification of the back pay award.

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[1] Congress has granted the Secretary the authority to administer AIR 21 through adjudication. The Secretary, in turn, has delegated the authority and assigned the responsibility to OSHA to investigate whistleblower complaints under AIR 21. *See* Secretary's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. 1979.103-.105.

[2] The Secretary has delegated the authority to issue final agency decisions in cases arising under AIR 21 to the ARB. *See* Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1979.110(a).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

AIR 21 protects airline employees who provide information to an employer or the federal government about any violation of federal law relating to air carrier safety. *See* 49 U.S.C. 42121(a); 29 C.F.R. Part 1979. Under AIR 21, employers are prohibited from discharging or discriminating against an employee who engages in such protected activity. *See* 49 U.S.C. 42121(a).

On April 14, 2003, Clemmons filed a complaint with OSHA, alleging that Ameristar terminated him in violation of the whistleblower protections of AIR 21 after he reported violations of Federal Aviation Administration ("FAA") regulations governing aircraft maintenance and pilot safety to both the FAA and Ameristar supervisors. *See* CX 67.[3] OSHA conducted an investigation and issued findings on January 20, 2004 that Ameristar had violated AIR 21. R. 1 (OSHA's Findings & Prelim. Order). OSHA ordered Ameristar to pay back wages to Clemmons; Clemmons did not seek reinstatement. *Id.*

[3] Clemmons's Trial Exhibits are noted as "CX" Followed by a number. References to the documents of record on the certified list filed with this Court by the ARB on March 24, 2014 are indicated by the abbreviation "R." followed by the document number. "Tr." refers to the transcript of the proceedings before the ALJ. References to the petitioner's brief are noted as "Pet. Br."

On February 9, 2004, Ameristar appealed OSHA's findings and requested a hearing before an ALJ. R. 2. ALJ Clement J. Kennington held a hearing in Dallas, Texas on July 27-30 and September 21-22, 2004. R. 30 (ALJ's Initial Decision and Order, *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-00011 (ALJ Jan. 14, 2005)). The ALJ found Ameristar liable for retaliation and ordered Ameristar to pay back pay totaling $56,746.23, plus interest, costs, and attorneys' fees. R. 30 at 74.

Ameristar filed a timely Petition for Review with the ARB. R. 43. On June 29, 2007, the ARB issued a Decision and Order of Remand, vacating and remanding because of legal error. R. 49 (ARB Decision and Order of Remand, *Clemmons v. Ameristar Airways, Inc.,* No. 05-04805-096, 2007 WL 1935557 (ARB June 29, 2007)). On February 20, 2008, the ALJ issued a Decision and Order on Remand, again finding Ameristar liable and reinstating the damages award. *See* R. 51 *(*ALJ Decision and Order on Remand, *Clemmons v. Ameristar Airways, Inc.,* ALJ No. 2004-AIR-00011 (ALJ Feb. 20, 2008)). Ameristar filed a timely Petition for Review with the ARB. R. 52. The ARB issued a Final Decision and Order adopting the ALJ's factual findings and affirming the ALJ's decision with a reduction in the back pay award to $37,995.09, to reflect a deduction of temporary income benefits and other earnings. R. 58 (ARB Final Decision and Order, *Clemmons v. Ameristar Airways, Inc.,* No. 08-067, 2010 WL 2158230 (ARB May

26, 2010)). Ameristar then filed a timely Petition for Review of the ARB's decision with this Court.[4] R. 64

On August 11, 2011, this Court issued a decision affirming the ARB's decision on the merits, holding that Ameristar discharged Clemmons in violation of AIR 21 and ordering an award of back pay. *See Ameristar Airways, Inc. v. ARB*, 650 F.3d 562, 570 (5th Cir. 2011). This Court remanded the case for additional findings regarding whether the back pay award should be reduced in light of after-acquired evidence. *Ameristar Airways*, 650 F.3d at 564, 570. On April 27, 2012, the ARB remanded the case to the ALJ for further consideration pursuant to this Court's instructions. R. 72. On August 20, 2012, the ALJ issued a Decision and Order on Remand, concluding that Ameristar had failed to show that it would have fired Clemmons based on after-acquired evidence. R. 79. Ameristar filed a timely Petition for Review with the ARB. R. 80. On November 25, 2013, the ARB issued its Final Decision and Order affirming the ALJ's decision on remand. R. 85. Ameristar filed a timely notice of appeal with this Court.

[4] The agency decisions that precede this Court's decision will not be discussed in detail in this brief. For a complete discussion of those decisions, see Brief for the Secretary of Labor, *Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. v. Administrative Review Board, U.S. Dep't of Labor* (5th Cir. Jan. 10, 2011) (No. 10-60604); *Ameristar Airways, Inc. v. ARB*, 650 F.3d 562 (5th Cir. 2011).

B. Statement of Facts[5]

Ameristar hired Clemmons in September 2002 as Director of Operations in charge of hiring and scheduling pilots, maintaining training records and updating manuals and charts. Clemmons quickly discovered scheduling problems and operational difficulties. The pilots complained to him about their pay and alleged that they were being pressured to work beyond the duty-time restrictions. On December 17, 2002, Clemmons e-mailed Ameristar President Thomas Wachendorfer, Vice President of Operations Lindon Frazier, and head of dispatch Stacy Muth reporting that Ameristar was requiring pilots to exceed the 16-hour duty restriction in violation of FAA regulation 14 C.F.R. 125.37. Clemmons also complained that Ameristar's requirement that pilots confer with managers before logging maintenance problems was an FAA violation. Clemmons complained to Muth on December 31, 2002 that Ameristar was sharing another airline's call signal without FAA approval, an FAA violation. Clemmons offered to request a new call signal for Ameristar, but Frazier overruled him. On January 7, 2003, Clemmons and his chief pilot met with an FAA official at Ameristar headquarters in view of management and reported their concerns about duty-time and call

[5] This statement of facts is based on the ALJ's Decision and Order On Remand (R. 79) dated August 20, 2012; *see also Ameristar Airways*, 650 F.3d at 564-66 (stating facts).

signal violations. In late January 2003, Frazier recommended to Wachendorfer that Clemmons be terminated.

Ameristar also alleged that Clemmons had performance and disciplinary issues, including failing to maintain complete pilot training records as revealed in audits conducted in November 2002 and January 2003. On January 16, 2003, Clemmons assisted a pilot with a flight that was scheduled to transport 24 pallets of freight, but could only load half the palettes due to incorrect measurements provided by the customer. After Wachendorfer got involved, he and the pilot loaded 20 of the 24 pallets.

Scheduling was a significant issue. The managers told Clemmons to arrange schedules for the pilots to have 14 days on and 7 days off. Frazier reviewed and approved the schedules that Clemmons provided the pilots, but on January 9, 2003, Wachendorfer sent a memo to Clemmons, copying Frazier, finding the schedules were unsatisfactory. Wachendorfer rejected a revised schedule that Clemmons submitted, and instructed Frazier to schedule the pilots with 15 days on and 6 days off.

On January 13, 2003, Clemmons sent an e-mail to the pilots explaining that he had created a schedule where the pilots would have 14 days on and 7 days off, but it had been rejected by management. Clemmons stated that Wachendorfer had changed the schedule to 15 days on and 6 days off. R. 30 at 17; CX 17; Tr.

515-16. Clemmons complained about Ameristar's policies, referred to Wachendorfer as "Wackmeoffendorfer," stated that he planned to resign soon and would support other pilots who wanted to resign by helping them with their resignation letters and unemployment applications. CX 17. Clemmons recommended that any pilot who decided to quit should be specific regarding the reasons for quitting, i.e., "concerns about safety, pay was not as promised, days off and on are not as promised, having to ask permission before log book write ups, encouragement to violate duty rest time rules, etc. . . ." *Id.* Although Clemmons recognized that his e-mail was unprofessional, he sent it because he was upset that Ameristar had disregarded his concerns about safety issues and FAA violations. Clemmons thought that Ameristar might address these problems if the pilots who decided to resign referenced them in their resignation letters. Tr. 17-20.

On January 20, 2003, Ameristar discharged Clemmons, based on Frazer's recommendation. Ameristar did not learn of the January 13, 2003 e-mail until March 28, 2003, more than two months later.

Following his termination, Clemmons applied for unemployment benefits with the Texas Workforce Commission ("TWC"). In contesting his claim, Ameristar filed documents on February 5, and March 31, 2003, stating that it discharged

Clemmons because of his scheduling failures. On April 4, 2003, Ameristar stated in documents that Clemmons had scheduling problems and cited the January 16, 2003 freight loading incident as justification for firing him. In a document submitted to TWC on June 26, 2003, Ameristar failed to mention the e-mail. After the TWC awarded unemployment benefits to Clemmons, Ameristar appealed, asserting that it discharged Clemmons for poor performance and for failing to maintain pilot records and manuals. CX 45. At a June 30, 2003 hearing before the TWC, Ameristar first raised the January 13, 2003 e-mail as a reason for terminating Clemmons and the TWC reversed the award on the grounds that insubordination made him ineligible for benefits.

C. Court of Appeals Decision and Order of Remand

On August 11, 2011, this Court issued a decision holding that substantial evidence supported the ARB's finding that Clemmons satisfied his burden of proof to show by a preponderance of the evidence that his protected activity was a contributing factor in his discharge. *Ameristar Airways*, 650 F.3d at 569-70. This Court considered the temporal proximity between the discharge and the protected activity, combined with evidence of pretext based on Ameristar's shifting reasons for discharging Clemmons, in affirming the ARB's finding that Clemmons had proved that his protected activity was a contributing factor in his discharge. *Id.* at 569 & n.21.

Regarding Ameristar's shifting defenses, this Court noted, "[w]e cannot reject the agency's conclusion that Ameristar has simply attempted to manufacture facially legitimate reasons for termination when its true motive was retaliation, at least in contributing part." *Id.* at 569. This Court also credited the ALJ's determination, as affirmed by the ARB, that Ameristar's witness, Wachendorfer, was not credible. *Id*. Thus, the Court found that the ARB's conclusion that Ameristar retaliated against Clemmons for reporting violations of federal law relating to air carrier safety was supported by other evidence of pretext and by Ameristar's shifting defenses. *Id*.

Finally, this Court affirmed the ARB's conclusion, as supported by substantial evidence, that Ameristar did not carry its burden to prove by clear and convincing evidence that it would have terminated Clemmons in the absence of his protected activity. *Ameristar Airways*, 650 F.3d at 570. "Given the available evidence of pretext, we cannot deem Ameristar's evidence so overwhelming that a reasonable trier of fact would be compelled to agree that Clemmons would have been terminated in the absence of his protected activity, much less that Ameristar made such a showing by clear and convincing evidence." *Id*.

Although this Court affirmed the ARB's finding on the merits, it remanded the case for consideration of after-acquired

evidence, *i.e.*, the January 13, 2003 e-mail from Clemmons to the pilots, and whether Ameristar would have fired him because of it. This Court instructed the agency to determine "whether Clemmon's insubordinate e-mail 'was of such severity that [he] would have been terminated on those grounds alone'" and "to adjust the back pay award if necessary." *Ameristar Airways*, 650 F.3d at 570 (citation omitted). In other words, if Ameristar proves that it would have terminated Clemmons based on the January 13, 2003 e-mail alone, the back pay award, which was computed from the date of discharge on January 20, 2003 through July 2004, should have ended on March 28, 2003, the date Ameristar learned of the e-mail.

D. ARB's Order of Remand

On April 27, 2012, the ARB issued an order remanding the case to the ALJ. R. 72. The ARB first instructed the ALJ to determine the proper burden of proof on the issue of after-acquired evidence in an AIR 21 case. The ARB instructed the ALJ to determine whether the January 13, 2003 e-mail from Clemmons to Ameristar pilots was misconduct that was so severe that Ameristar would have fired him for that reason alone. *R. 72* at 5. Further, the ARB ordered the ALJ to consider any "'extraordinary equitable circumstances'" affecting "'the legitimate interests of either party.'" *Id*.

E. The ALJ's Decision and Order on Remand

On August 20, 2012, the ALJ issued his decision.[6] The ALJ first concluded that in the event of after-acquired evidence, it remains the employer's burden to prove by clear and convincing evidence, rather than the preponderance of the evidence, that it would have discharged the employee based on the evidence of wrongdoing alone. R. 79 at 5.

The ALJ next analyzed Ameristar's after-acquired evidence claim under *McKennon v. Nashville Banner Publ'g Co*., 513 U.S. 352 (1995), noting that the employer "must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone," and emphasizing that Ameristar had to establish not only that it could have discharged Clemmons based on after-acquired evidence, but that it actually would have done so. R. 79 at 5-6 (citing *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996)).

Based on the record evidence, the ALJ determined that "Clemmons's managers, Frazier and Wachendorfer, did not see the e-mail until March 28, 2003." R. 79 at 6. The ALJ considered "the fact that Ameristar's three submissions to the TWC after this discovery (March 31, 2003; April 4, 2003; and June 26,

[6] On remand, both parties filed briefs. No new evidence was introduced. *See* R. 85 at 2 n.8.

2003) fail to mention the misconduct Clemmons engaged in by sending the e-mail" as a reason for his discharge. *Id*. The ALJ found that "Ameristar's omission of the e-mail in numerous filings before the TWC does not convince me that [Ameristar] would have fired [Clemmons] based on the e-mail in conjunction with its other stated grounds, let alone as the sole reason for discharge." *Id*. The ALJ emphasized that he had "discredited Frazier's testimony" and noted that Ameristar did not present any "evidence illustrating a company policy prohibiting the conduct included in the email." *Id*.

Finally, the ALJ held that Ameristar failed to prove "by clear and convincing evidence that it would have fired Clemmons if it had known of the e-mail at the time he was fired and accordingly, I see no reason to limit [Clemmons's] award of back pay from the date of his discharge, January 20, 2003, to the date of the email's discovery, March 28, 2003." *Id*.

F. The ARB's Final Decision and Order

On November 25, 2013, the ARB issued a Final Decision and Order affirming the ALJ's decision. R. 85. The ARB first reiterated that the clear and convincing standard of proof applies to an employer's burden of establishing that it would have fired a whistleblower under AIR 21 based on after-acquired evidence. R. 85 at 5. The ARB rejected Ameristar's argument that it was required to prove by a preponderance of the

evidence, rather than by clear and convincing evidence, that it would have discharged Clemmons based on after-acquired evidence. R. 85 at 7. The ARB observed that "Ameristar ignores the express language of 49 U.S.C. 42121(b)(2)(B)(iv), which applies the burden-of-proof standard *not in defense against the merits* of a complainant's claim but to the question of *whether the complainant is entitled to relief.*" *Id*. (emphasis in original). Finally, the ARB determined:

> Whether Ameristar seeks to avoid an award of damages or other relief based on information available at the time of Clemmons's discharge or seeks an order discontinuing previously-ordered relief based on subsequently-acquired information of pre-discharge wrongdoing, the burden of proof imposed on Ameristar remains the same. Ameristar must prove by clear-and-convincing evidence that the after-acquired evidence of Clemmons's wrongdoing was so severe that Ameristar would have fired him "on those grounds alone if the employer had known of it at the time of the discharge."

R. 85 at 9 (quoting *McKennon*, 513 U.S. at 362-63).

The ARB next determined that substantial evidence supported the ALJ's determination that Ameristar did not prove that it would have discharged Clemmons because of the e-mail alone. R. 85 at 9. The ARB explained:

> Ameristar offered no additional proof beyond the contents of the e-mail to establish that it would have fired Clemmons because of the e-mail alone. To the contrary, in appealing the unemployment award and opposing Clemmons's complaint, Ameristar proffered to the TWC and OSHA at least six bases supporting its discharge of Clemmons, only including Clemmons's "insubordinate" e-mail as another reason in its May 9,

> 2003 submission to OSHA and on its June 30, 2003 response to the TWC.

R. 85 at 9-10. The ARB concluded that "Ameristar's hyperbolic description of the e-mail as 'blatant wrongdoing' does not in fact establish that it would have fired Clemmons on that basis alone." R. 85 at 10. Further, the ARB observed that "'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *Id*. (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1982)).

In his concurring opinion, Judge Corchado concluded, "Ameristar's fundamentally inconsistent positions easily justify the ALJ's rejection of the January 13 e-mail as credible after-acquired evidence that Ameristar would have fired Clemmons on March 28, 2003." R. 85 at 11. Further, he added that Ameristar's "own lack of credibility prevented it from proving to the ALJ what it 'would have done.'" R. 85 at 12.[7]

SUMMARY OF THE ARGUMENT

This Court should affirm the ARB's Final Decision and Order, affirming the ALJ's decision, in this AIR 21 whistleblower case. The ARB correctly concluded that substantial evidence supports the ALJ's determination that

[7] Judge Corchado also suggests that Ameristar should be barred from relying on the January 13 e-mail by the doctrines of judicial admissions and judicial estoppel. R. 85 at 12.

Ameristar failed to prove by clear and convincing evidence that Clemmons's January 13, 2003 e-mail was so severe that it would have discharged Clemmons on those grounds alone.

Ameristar's assertion that a preponderance of the evidence rather than the clear and convincing burden of proof applies to its burden of proving that it would have terminated Clemmons on the basis of the January 13 e-mail is wrong as a matter of law. AIR 21 contains its own burden shifting language that leaves no doubt that an employer has to prove that the employee is not entitled to relief by clear and convincing evidence.

With regard to the proof that the e-mail was so severe that Ameristar would have discharged Clemmons on that basis alone, Ameristar failed to present any credible evidence on that issue. Not only did Ameristar fail to raise the e-mail in all but the last of its communications with the TWC, undermining its assertion that it would have fired Clemmons for the e-mail, but also Ameristar produced no evidence that any company policy prohibited e-mails such as the January 13 e-mail to support its claim that it would have discharged Clemmons based only the e-mail. The only evidence offered by Ameristar, other than the e-mail itself, was the testimony of Frazer, which the ALJ specifically found unworthy of credence. Ameristar, therefore, did not satisfy its burden to establish that this after-acquired evidence of wrongdoing was so severe that it would have fired

Clemmons on those grounds alone. Accordingly, Ameristar failed to show by clear and convincing evidence that it would have fired Clemmons because of the January 13, 2003 e-mail. This factual determination by the ALJ, as affirmed by the ARB, is supported by substantial evidence and should be affirmed by this Court.

Therefore, the ARB's back pay award was properly calculated from the date of discharge on January 20, 2003 through July 2004, and should not be cut off on March 28, 2003, the date Ameristar discovered Clemmons's e-mail.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DECISION, AS AFFIRMED BY THE ARB, CONCLUDING THAT AMERISTAR FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE DISCHARGED CLEMMONS BASED ON AFTER-ACQUIRED EVIDENCE ALONE

A. Standard of Review

AIR 21 provides for review of a final order of the Secretary under chapter 7 of title 5, United States Code. 49 U.S.C. 42121(b)(4)(A). Under the Administrative Procedure Act ("APA") standard of review, the agency's decision must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E). *See Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 108 (5th Cir. 2014).

A court's review under the substantial evidence standard is deferential. *See Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). "Substantial evidence" means "more than a mere scintilla, and less than a preponderance." *Carey Salt Co. v. NLRB*, 736 F.3d 405, 410 (5th Cir. 2013) (internal quotation marks and citation omitted). Under this standard, the ARB's decision will be upheld if reasonable. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). In applying the substantial evidence standard, this Court may not "reweigh the evidence, try the issues de novo, or substitute its judgment for that of the Secretary." *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001) (internal quotation marks and citation omitted).

Further, where credibility determinations are involved, the Court must be especially deferential to the ALJ's conclusions. "Because the ALJ is in a unique position to evaluate the credibility and demeanor of the witnesses, this court defers to plausible inferences he drew from the evidence, even where this court might reach a contrary result if it were to decide the case *de novo*." *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 563 (5th Cir. 2003) (citation omitted). Additionally, the Court "must have a 'compelling reason' based in evidence to overturn a credibility choice, beyond a mere party's urging us to adopt its version of the facts." *Carey Salt*, 736 F.3d at 410 (citation omitted).

The ARB's legal determinations are generally reviewed de novo. *See Allen*, 514 F.3d at 476; *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 326 (5th Cir. 1999). However, the ARB's interpretation of ambiguous provisions of AIR 21 is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and must be upheld as long as it is a "permissible construction of the statute." *Id.* at 843; *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (explaining appropriateness of granting *Chevron* deference to agency's statutory interpretations made through formal adjudication); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013) (according ARB's interpretation of Sarbanes-Oxley whistleblower provision *Chevron* deference); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008)(same); *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609 (11th Cir. 1997)(granting *Chevron* deference to Secretary's reasonable interpretations of Energy Reorganization Act ("ERA") whistleblower provision).

B. Substantial Evidence Supports the ALJ's Determination, as Affirmed by the ARB, That Ameristar Failed to Prove by Clear and Convincing Evidence That Clemmons Would Have Been Discharged Based on His January 13, 2003 E-Mail to Pilots

The ARB correctly concluded that substantial evidence supported the ALJ's finding that Ameristar failed to prove by clear and convincing evidence that Clemmons's January 13, 2003

e-mail, acquired by Ameristar almost two months after it terminated Clemmons, "was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-63 (1995); *see also Ameristar Airways, Inc. v. ARB*, 650 F.3d 562, 570 (5th Cir. 2011); *Smith v. Berry Co.*, 165 F.3d 390, 395 (5th Cir. 1999).

On appeal, Ameristar contends first that the ARB's finding is not supported by substantial evidence, and, alternatively, that the ARB erred in concluding that the clear and convincing burden of proof applied to the after-acquired evidence issue. (Pet. Br. at 7-8). Ameristar is mistaken on both counts.

1. Ameristar Must Satisfy the Clear and Convincing Burden of Proof When Alleging An After-Acquired Evidence Defense

AIR 21 establishes its own burden shifting framework. The Act provides, in relevant part:

> **(iii) Criteria for determination by Secretary.**--The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> **(iv) Prohibition.**--Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. 42121(b)(2)(B)(iii), (iv); 29 C.F.R. 1979.109(a); *Allen*, 514 F.3d at 476 (noting that AIR21's "'independent burden-shifting framework' is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims"). AIR 21 places the initial burden on the whistleblower to prove a violation, by a preponderance of the evidence, by showing that the protected activity contributed to the employer's decision. *Allen*, 514 F.3d at 476 n.1 (citing *Dysert*, 105 F.3d at 610). The burden then shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity. If the employer succeeds in meeting its burden, the Secretary may not order relief. "For 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) (interpreting the same burden-shifting framework in the ERA). Congress intended this standard to provide strong protection for whistleblowers unless the employer could clearly show that it would have taken the same action for non-retaliatory reasons. *See id*.

Based on the language of AIR 21, the ALJ and the ARB correctly found that when after-acquired evidence is raised to limit the employee's remedy, the employer has the same burden of proof that it would have to avoid an award of relief based on conduct it knew of before the termination. *McKennon*, itself,

does not discuss the burden of proof applicable to after-acquired evidence, but the language of AIR 21 plainly requires the application of the clear and convincing standard of proof for an employer to avoid an award of relief. R. 85 at 7 (noting the express language of AIR 21 applies the clear and convincing evidence standard to the question of whether the complainant is entitled to relief).

AIR 21 requires the employee to prove a violation by a preponderance of the evidence, but AIR 21 places a heavier burden on the employer in asserting an affirmative defense, that of clear and convincing evidence. Thus, just as an employer must prove by clear and convincing evidence that it had a legitimate reason to take an adverse action against a whistleblower to avoid relief, under AIR 21, the employer bears that same burden to limit the employee's relief by proving that it would have fired the employee on the basis of after-acquired evidence of the employee's wrongdoing had it known about the misconduct at the time of the discharge. As the ARB properly noted, after-acquired evidence of an employee's prior wrongdoing goes to the question of relief -- its only benefit to the employer is to limit the extent of the relief to which the employee is entitled. R. 85 at 7. As the ARB recognized in its decision on remand:

> It seems strange that the burden of proof would change in this case where the after-acquired evidence involved an incident occurring before the termination but merely discovered afterwards; that would result in a windfall to the employer solely because it learned of such information later.

R. 72 at 5. *See O'Day v. McDonnell Douglas Helicopter Co*., 79 F.3d 756, 761 (9th Cir. 1996) (employer's burden of proof to limit employee's remedy is the same, whether based on after-acquired evidence or on evidence of additional legal motive in a mixed motive case).

The ARB's plain reading of the statute avoids a windfall to an employer who asserts that backpay should be limited based on after-acquired evidence. AIR 21 draws no distinction between the burden that applies for an employer to avoid an order of relief based on conduct that it knew of prior to the termination versus conduct it only learned of later. In either case, based on the language of the statute, the Secretary may not order relief if the employer shows by clear and convincing evidence that it would have taken the unfavorable personnel action in the absence of the protected activity.[8]

[8] The Secretary believes that the Court should affirm the ARB's decision to apply the clear and convincing evidence burden of proof based on a plain reading of the statute. However, should the Court believe the statute is ambiguous, the Secretary's reasonable interpretation of AIR 21 would be entitled to *Chevron* deference. *See, e.g. Lockheed Martin Corp*., 717 F.3d at 1131. Contrary to Ameristar's assertions (*Pet. Br.* at 18 n.6), the Secretary is due the same deference to his reasonable interpretations of AIR 21's burdens of proof that he receives

2. Substantial evidence supports the ALJ's fact-based determination that Ameristar failed to prove that the January 13, 2003 e-mail was so severe that it would have fired Clemmons for that reason alone

For after-acquired evidence to constitute sufficient grounds for limiting a backpay award, an employer "must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon*, 513 U.S. at 362-63. For the reasons discussed above, under AIR 21, the employer must make its showing by clear and convincing evidence. "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." See R. 58 at 11 (citing BLACK'S LAW DICTIONARY 577 (7th ed. 1999). Moreover, "*McKennon* places the burden of proof with respect to this [after-acquired evidence] issue on the employer, carefully articulating that the employer must establish not only that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so." *O'Day*, 79 F.3d at 759 (citations omitted). The ARB properly determined that substantial evidence supported the ALJ's decision that Ameristar failed to prove by

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for his interpretations of other provisions in AIR 21. *See Dysert*, 105 F.3d at 609 (granting *Chevron* deference to Secretary's view that "demonstrate" in ERA's burdens of proof means by a preponderance of the evidence).

clear and convincing evidence that it would have terminated Clemmons based solely on the January 13, 2003 e-mail.

The ALJ correctly found, as affirmed by the ARB, that Frazer and Wachendorfer did not see the e-mail until March 28, 2003 and "Ameristar's three submissions to the TWC after this discovery (March 31, 2003; April 4, 2003; and June 26, 2003) fail to mention the misconduct Clemmons engaged in by sending the e-mail."[9] R. 79 at 6. As the ARB observed, "[t]he fact that in opposing Clemmons's unemployment claim Ameristar did not see fit to include the e-mail in its March 31, April 4, and June 26, 2003 responses to the TWC undermines its claim that the e-mail alone would have caused his firing, especially as the ALJ had previously found that Frazier and Wachendorfer were not credible in testifying about when they became aware of the e-mail." R. 85 at 10 (citing R. 30 at 55-56). The ALJ correctly concluded, "Ameristar's omission of the e-mail in numerous filings before the TWC does not convince me that [Ameristar] would have fired [Clemmons] based on the e-mail in conjunction with its other stated grounds, let alone as the sole reason for discharge." R. 79 at 6.

[9] Ameristar first raised the e-mail before the TWC at a hearing on June 30, 2003. The ALJ also noted that on May 9, 2003, Ameristar presented the e-mail to OSHA as one of *several* reasons for firing Clemmons, not the sole reason. R. 79 at 6.

In its brief on appeal, Ameristar argues that the ALJ did not give due consideration to the "meaning, intent, context, or consequence" of the e-mail. *Pet. Br.* at 9. Further, Ameristar suggests that the ALJ should have drawn an inference from the e-mail, specifically, that Clemmons was trying to "cripple or destroy Ameristar" by "undermining Ameristar's president and fomenting mass pilot resignations." *Id*. The ALJ's decision not to draw such an inference was well within his discretion. R. 79.

Certainly, the e-mail can be read not to be "fomenting mass pilot resignations." The e-mail states: "I have received a few resignations. If you decide to leave, be very explicit in your letter of resignation." R. 85 at 4 n.10. Clemmons suggests specific reasons pilots could cite for resigning and offers to support any individual claims for unemployment. At any rate, as the ARB recognized in affirming the ALJ's decision, Ameristar's "hyperbolic" characterizations do not prove that it would have fired Clemmons upon learning of his January 13, 2003 e-mail. R. 85 at 10.

The ALJ noted that Clemmons admitted that "the e-mail was insubordinate, unprofessional, and grounds for termination." R. 79 at 6. However, that admission is not proof that Ameristar,

in fact, would have discharged him based solely on the e-mail.[10] As the ARB noted, "'proving that the same decision would have been justified . . . is not the same as proving the same decision would have been made.'" R. 85 at 10 (*quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1982)).

Ameristar did not satisfy its burden of proving by clear and convincing evidence that the e-mail was so severe that it would have discharged Clemmons for that reason alone. Not only did Ameristar repeatedly fail to mention the e-mail, in any way, as a basis for its firing in all but the last of its communications with the TWC, but also Ameristar offered no credible evidence apart from the e-mail itself to the ALJ that it would have fired Clemmons for the e-mail. As the ALJ observed, "the undersigned has already discredited Frazier's testimony and Ameristar did not otherwise enter evidence illustrating a company policy prohibiting the conduct included in the email." R. 79 at 6. In affirming the ALJ's findings, the ARB observed that "Ameristar offered no additional proof

[10] As the ARB recognized, in an earlier decision in this case the ALJ found while referring to Wachendorfer as Wachmeoffendorfer would appear to be inappropriate when considering the fact that "Wachendorfer had adopted a policy that had pilots flying excess hours with unsafe aircraft that needed maintenance and engaged in non-authorized common carriage on 112 separate occasions, all in violation of Federal Aviation Administration (FAA) regulations," he was in effect abusing pilots, creating unnecessary safety issues, and justifying Clemmons' action in encouraging pilots to resign rather than fly under those conditions. R. 85 at 10 (citing R. 51 at 7).

beyond the contents of the e-mail to establish that it would have fired Clemmons because of the e-mail alone." R. 85 at 9. Accordingly, the ALJ was "not convinced that Ameristar has shown by clear and convincing evidence that it would have fired Clemmons if it had known of the e-mail at the time he was fired and accordingly, I see no reason to limit [Clemmons's] award of back pay from the date of his discharge, January 20, 2003, to the date of the e-mail's discovery, March 28, 2003." R. 79 at 6. Indeed, as the ARB explained, Ameristar did not satisfy its burden of proof, regardless the standard. "We note that even if a preponderance-of-the-evidence standard is applicable, the absence of any evidence in the record showing that Ameristar would have fired Clemmons solely because of his earlier e-mail precludes Ameristar from meeting the lesser standard of proof." R. 85 at 9 n.32. Thus, Ameristar's arguments regarding after-acquired evidence are without merit, and the ARB's decision is both legally correct and supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the ARB's Final Decision and Order finding that Ameristar failed to prove by clear and convincing evidence that

it would have discharged Clemmons based on after-acquired evidence, and, accordingly, the back pay award should not be reduced.

Respectfully submitted,

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Dated: June 9, 2014

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