U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

EDNA D. FORDHAM,

COMPLAINANT,

v.

FANNIE MAE,

RESPONDENT.

ARB CASE NO. 12-061

ALJ CASE NO. 2010-SOX-051

DATE: OCT - 9 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Thad M. Guyer, Esq. and Stephani L. Ayers, Esq.; *T.M. Guyer and Ayers & Friends, PC*; Medford, Oregon; and Richard E. Condit, Esq.; *Government Accountability Project*, Washington, District of Columbia

For the Respondent:

Madonna A. McGwin, Esq. and Damien G. Stewart, Esq.; *Fannie Mae*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and **Luis A. Corchado, *Administrative Appeals Judge.* Judge Corchado, concurring, in part, and dissenting, in part.**

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended, 18 U.S.C.A § 1514A (Thomson/West Supp. 2014) (SOX), and its implementing regulations, 29 C.F.R. Part 1980 (2013). Complainant Edna D. Fordham filed a complaint alleging that Respondent Fannie Mae violated the SOX by retaliating against her in

several ways because of several allegedly protected activities. On March 19, 2012, an Administrative Law Judge (ALJ) issued a Decision and Order dismissing Fordham's complaint.[1] Fordham appealed the ALJ's ruling to the Administrative Review Board (ARB). For the following reasons we affirm, in part, and reverse and remand, in part, for further consideration consistent with this Decision and Order of Remand.

INTRODUCTION

This case arises from Fordham's complaint that Respondent Fannie Mae violated the SOX whistleblower protection statute, 18 U.S.C.A § 1514A, when it took several unfavorable employment actions against her in 2009 because of SOX-protected activities in which she engaged in 2008 and 2009. Of Fordham's multiple allegations of SOX whistleblower protected activity, the ALJ held that Fordham's conduct constituted SOX-protected activity in certain specific instances. The ALJ found four specific instances of adverse personnel action that Fannie Mae took against Fordham, including a poor performance review, placing Fordham on a performance action plan, placing Fordham on administrative leave, and terminating her employment. Nevertheless, the ALJ dismissed Fordham's complaint, having found no "contributing factor" causal link between Fordham's protected activity and the unfavorable employment actions.

The Board affirms the ALJ's findings regarding protected activity and adverse personnel actions. However, for the following reasons, we find that the ALJ's "contributing factor" causation determination is neither supported by the substantial evidence of record nor in accordance with applicable law. The substantial evidence of record does not support the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to Fordham's protected activities of April 23-27, 2009. We additionally hold that in finding that Fordham failed to prove by a preponderance of the evidence that her protected activity was a contributing factor in the adverse personnel action taken against her, the ALJ committed reversible error by weighing evidence offered by Fannie Mae in support of its affirmative defense that it would have taken the personnel action at issue in the absence of Fordham's protected activity for legitimate, non-retaliatory reasons. SOX statutorily imposes different burdens of proof on the respective parties,[2] with the respondent required to prove by clear and convincing evidence that it would have taken the same personnel action had there been no whistleblower protected activity, should the complainant prove by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action. Consequently, a respondent's evidence of a legitimate, non-retaliatory reason or basis for its

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1 *Fordham v. Fannie Mae,* ALJ No. 2010-SOX-051 (D. & O.).

2 18 U.S.C.A. § 1514A(b)(2)(C) provides that SOX whistleblower actions shall be governed by the legal burdens of proof set forth under AIR 21 at 49 U.S.C.A. § 42121(b)(2)(B)(Thomson/West 2007), which requires that once the complainant has demonstrated that his or her protected activity was a contributing factor in the adverse personnel action at issue, the respondent must prove its affirmative defense by "clear and convincing evidence." See discussion, *infra.*

decision or action is not weighed against a complainant's causation evidence in the determination of whether a SOX complainant has met his or her initial burden of proving "contributing factor" causation. The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving "contributing factor" causation, the respondent's affirmative defense evidence is then to be taken into consideration, subject to the higher "clear and convincing" evidence burden of proof standard, in determining whether or not the respondent is liable for violation of SOX's whistleblower protection provisions.

BACKGROUND STATEMENT[3]

Respondent Fannie Mae (formally known as the Federal National Mortgage Association) is a publicly-traded corporation, and a government-sponsored enterprise established as a federal agency in 1938. Congress chartered Respondent in 1968 as a private shareholder-owned company, with the purpose of providing liquidity, stability, and affordability to the U.S. housing and mortgage markets. Fannie Mae funds its mortgage investments primarily by issuing debt securities in the domestic and international capital markets; consequently, it files regular, quarterly and yearly reports with the Securities and Exchange Commission (SEC). D. & O. at 3.

Fannie Mae operates in the U.S. secondary mortgage market. Rather than making home loans directly to consumers, Fannie Mae works with mortgage bankers, brokers and other primary mortgage market partners to help ensure that they have funds to lend to home buyers at affordable rates. At all times relevant to this litigation, Fannie Mae had three complementary businesses: the Single-Family Mortgage business, Multifamily Mortgage Business, and the Capital Markets group. As a publicly-traded corporation, with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, Fannie Mae is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d), and is subject to the whistleblower protection provisions of SOX, 18 U.S.C.A. § 1514A. D. & O. at 4.

Complainant Fordham began working for Fannie Mae in May 2006 as an IT Technical Risk Specialist in its SOX Technology Department, which was responsible for monitoring and executing Respondent's SOX Technology Management Program. This program involved the testing of IT platforms, applications, and end-user computing, some of which the parties stipulated were financially relevant. Fordham's assigned work responsibilities included defining test conditions, collecting and tracking evidence from the Technical Risk Leads of business groups (whose applications and IT platforms were being tested), responding to quality reviews of external consultants, and engaging in SOX Management testing and remediation. D. & O. at 4.

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[3] Unless otherwise specifically noted, the Background Statement is extracted from the ALJ's Decision and Order Dismissing Complaint, slip op. at pp. 73-112 (Findings of Fact).

During her employment with Fannie Mae, Fordham interacted with many individuals and reported to different supervisors. For approximately the first six months of 2008, Fordham's immediate supervisor was Robert Leonard, Director of Fannie Mae's SOX Technology Program, who was assigned to the Washington, D.C. office. Mid-2008, Nancy Hall, Manager of Fannie Mae's SOX Technology Program, assumed responsibility for Fordham's supervision. In early 2009, Fordham, together with Hall and other co-workers, were placed under the supervision of Stephanie Bahr, Director of SOX Technology, Washington, D.C. office. As a result, from approximately February 2009 until Fannie Mae terminated her employment, Fordham continued to report directly to Hall, who in turn reported to Bahr. Bahr reported to Patricia Black, Senior Vice President, Chief Audit Executive, Washington, D.C. office, who in turn reported to Jackie Wagner, Senior Vice President and General Auditor. During 2008 and 2009, Michael Gabbay, Senior Technology Risk Analyst/Manager, frequently interacted with Fordham and supervised some of her projects, although he was on a different Fannie Mae SOX team and was not part of her chain of command in the organizational structure. D. & O. at 4-5, 74-89.

On or about December 1, 2008, Fordham submitted input for the 2008 accountability survey of Robert Leonard, her immediate supervisor up until mid-2008. She submitted her input anonymously to Leonard's manager, Mr. Barton, by electronic means. Among other things, Fordham raised concerns regarding what she considered key weaknesses in Fannie Mae's SOX Technology Program involving control self-assessments – *i.e.*, that these self-assessments did not provide organizational value because they were too general and needed to be system specific, and that Fannie Mae's SOX Technology Program lacked critical process documentation, which she asserted is commonly maintained in mature SOX programs. Fordham stated in the survey that neither concern was being sufficiently addressed. Because Fordham's concerns were submitted anonymously, neither Leonard nor Barton attributed the concerns to Fordham. D. & O. at 77-78.

In late December 2008, Fordham informed Nancy Hall (who had replaced Leonard as Fordham's immediate supervisor) that she believed there were some problems with the documentation supporting the remediation status of certain SOX-related internal control deficiencies; that she was concerned that the documentation was insufficient. Hall dismissed Fordham's concerns as not valid or relevant to her job assignment. Hall did not discuss Fordham's concerns with anyone else at Fannie Mae, and Fordham did not discuss her concerns with anyone other than Hall. Fordham testified that she did not pursue the issue further at the time because she wanted to research Fannie Mae's SEC filings and conduct due diligence before proceeding further with her accusations.[4] D. & O. at 77, 116-117.

The first of March 2009, Fordham received her end-of-year 2008 Performance Review, in which Hall gave Fordham a lowered performance evaluation. Fordham also received a

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[4] Based on her independent research into Fannie Mae's SEC filings, Fordham eventually concluded that Fannie Mae had failed to file accurate reports with the Securities and Exchange Commission. However, Fordham did not report her conclusions or concerns to anyone at Fannie Mae until after she filed a complaint with the SEC on April 23, 2009, with a similar complaint filed with the FHFA on April 26th. See discussion, *infra*.

Memorandum of Concern, authored by Hall, that advised Fordham of the need for improvement and warned her of disciplinary action, including the threat of employment termination, should her job performance not improve. D. & O. at 81. The Memorandum of Concern stated in pertinent part: "Your performance will continue to be evaluated and any additional performance issues may result in more serious disciplinary action, up to and including termination of your employment." Exhibit JX-25.

Along with the Memorandum of Concern, Hall presented Fordham with a Development Goals document that identified projects Hall expected Fordham to complete during 2009, with key milestone dates. The first identified project involved a SOX Technology pilot training project that Fordham was to immediately undertake, beginning with the development of a Power Point IT training presentation. The purpose of the training was to educate Fannie Mae's SOX business team members and new technology risk specialists about the work the SOX Technology team had been performing. D. & O. at 35-36, 61, 81.

Over the ensuing weeks Fordham failed to meet training project deadlines, including a March 20th deadline for finalizing the Power Point presentation, which she attributed to Fannie Mae management's refusal to provide her with updated Scope and Approach documents that she claimed she needed to complete the presentation.[5] Despite receipt from Hall of the 2008 SOX Fourth Quarter Scope and Approach documents on March 18th, Fordham continued to assert that Fannie Mae management was withholding information she needed to complete the training presentation. However, Fordham never explained nor identified to management exactly what information was missing that she needed in order to complete the training presentation. D. & O. at 83-86.

The relationship between Fordham and management became increasingly volatile throughout March and into April, with Fordham accusing management of racial and gender discrimination, questioning Hall's technical qualifications, charging that Hall was resorting to unethical practices in an attempt to discredit Fordham professionally, and challenging management's competence. During this time, Fordham missed or was late to critical meetings, was often absent from work, and repeatedly failed to meet deadlines for completing the IT training project. The latter part of March, Fordham announced that she was refusing to complete her performance goals because she considered them unjustified. Fannie Mae management found that Fordham's behavior was generally disruptive and hindering completion of the IT training project in a timely and meaningful manner. Nevertheless, in an effort to reconcile the situation, after consultation with Fannie Mae Human Resources (Darlene Slaughter), Bahr removed Hall from management of Fordham's work on the IT training project. However, Hall's replacement, Michael Gabbay, fared no better in securing completion of the training project or in resolving management's conflicts with Fordham. In response to management's continued efforts to get her to complete the Power Point training presentation and criticism of her non-performance, Fordham accused management of incompetence, purposefully attempting to undermine her

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[5] The SOX Technology team compiles the Scope and Approach documents quarterly. The documents address, among other matters, the scope of application and platform testing for the quarter.

performance, and creating a hostile work environment. She threatened suit if management did not stop the alleged harassment. D. & O. at 83-94.

As of April 1, 2009, Fordham had not completed the Power Point training project, had not met deadlines on other projects to which she had been assigned, and had not met key Development Goals milestone dates that Fannie Mae had established. D. & O. at 90-92, 99. Sometime between April 1 and 14, Bahr began contemplating possible termination of Fordham's employment. *Id.* at 99. On April 15, Bahr and Darlene Slaughter, Director of Human Resources and Chief Diversity Officer of Fannie Mae's Washington D.C. office met with Fordham. They informed her that she was being removed from the IT training project because of the lack of progress,[6] and that she was to focus on two other projects under Gabbay's management supervision. Also discussed was Fordham's attendance. Slaughter informed Fordham that if she did not complete the other projects to which she was assigned, or if things continue to remain "heated" between herself and management, at some point they would be having a "different conversation." Mentioned was the prospect of Fordham being placed on administrative leave should that prove necessary. *Id.*.

In follow up to the April 15th meeting, Fordham addressed a memorandum to Slaughter in which she accused Bahr of making false and defamatory statements during the meeting, of bullying, and of retaliation because she had filed an EEOC complaint in early March alleging sex and age discrimination. Fordham also denied responsibility for the delays in completing the IT training presentation, charging Bahr and management with deliberately impeding her efforts to meet project goals. D. & O. at 100.

Following the April 15th meeting, Fordham failed to meet completion deadlines for the new projects to which she was assigned, for which she blamed Gabbay – asserting that he was deliberatively withholding needed information and setting her up for failure. Issues concerning Fordham's attendance also continued to arise. D. & O. at 99-103.

By close of business on April 21, Bahr had decided, after consultation with Slaughter and Patricia Black (to whom Bahr reported), to initiate proceedings terminating Fordham's employment due to unsatisfactory performance and attendance issues. Working with Slaughter, Bahr began preparing the necessary documents, including drafting an employment termination request memorandum. D. & O. at 103.

The afternoon of April 23, 2009, Fordham submitted a project status report to Gabbay, copied to Hall, in which she asserted that they were missing necessary documentation, that it did not appear that work had been performed in 2008 to document IT Application Controls to support the intended procedure, and that SOX Technology needed to address some severe information gaps. Fordham also stated that Fannie Mae's methodology did not test at a sufficient level to gain the assurance it needed for system specific IT Application Controls which, in turn, had a direct impact on Fannie Mae's financial statements. That evening, Fordham faxed a

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[6] The IT training project was reassigned to Hall, who completed it before the end of April. D. & O. at 99.

complaint to the Securities and Exchange Commission (which she supplemented with documentation on May 19, 2009), in which she asserted, among other things, that Fannie Mae did not have Risk and Control Activities documented for its financially significant applications. At the time of Fordham's filing of the SEC complaint no one at Fannie Mae was aware of its submission. D. & O. at 104-105.

On Friday, April 24, Slaughter provided Bahr with a draft of the proposed termination request memorandum, addressed to Wagner, and asked for Bahr's review and comment. D. & O. at 105. The memorandum, dated April 24, 2009, and captioned "Request for Termination for Edna Fordham," was addressed from Bahr to Chief Audit Executive Wagner, Fannie Mae's Chief Audit Executive. In the memorandum Bahr stated: "I am requesting your approval to terminate Edna Fordham's employment from the Internal Audit department." Exhibit JX 116. The memorandum indicated that they were "working through performance and attendance issues with Fordham," but that she "continued to dispute her performance review" and had repeatedly violated the company's attendance policy "through her excessive and unauthorized absenteeism." *Id.* The memorandum concluded by requesting Wagner's approval, stating: "Human Resources [Slaughter], Legal, and Compliance and Ethics are aware of this request and approve of this action to terminate Edna Fordham. If you agree with this action, please provide your approval as well." *Id.* Bahr informed Slaughter that she was fine with the draft, whereupon Slaughter indicated that she was working with Fannie Mae's legal department to tighten the memorandum, and proposed that Bahr meet with her on Monday, April 27, to finalize the document. D. & O. at 105; Exhibit JX 115.

On Sunday, April 26, Fordham filed a complaint by e-mail with the Federal Housing Finance Agency (FHFA)[7] (which she subsequently supplemented), in which she alleged that Fannie Mae had deliberately withheld information from its board of directors and regulators regarding the true state of its IT Application environment by downplaying issues and indicating that they are relying on compensating controls to support Financial Reporting Systems. No one at Fannie Mae was aware of Fordham's complaint to the FHFA at the time of its submission. D. & O. at 105-106.

Fannie Mae became aware of Fordham's SEC and FHFA complaints on April 27, 2009, when Fordham informed Slaughter and Fischman (an investigator with Fannie-Mae's Compliance and Ethics Department) that she was reporting to the SEC and FHFA her concerns that management was deliberately withholding critical information from the company's Board of Directors and Regulators. Concurrently, Fordham provided Fischman and Slaughter with a copy of the accountability survey comments she had anonymously submitted to Fannie Mae management the first of December 2008. D. & O. at 78, 106-107.

On April 28, 2009, Fordham filed a complaint with OSHA, alleging employment retaliation because she engaged in SOX-protected whistleblower activity, *i.e.*, for having reported, internally and to federal agencies, SOX violations by Fannie Mae. Fannie Mae did not

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[7] The Federal Housing Finance Agency was formerly known as the Office of the Federal Housing Enterprise Oversight (OFHEO). D. & O. at 105, n.9.

learn of the OSHA complaint until May 13, 2009, when OSHA informed Fannie Mae of the complaint. D. & O. at 106-107, 109.

The proposed Monday meeting of Bahr and Slaughter did not occur. Instead, on Wednesday, April 29, Slaughter and Veith (also with Human Resources) met with Fordham. Slaughter informed Fordham, among other things, that they were considering terminating her employment, but wanted to gather more data to make sure that what they had was sufficient and fair. Slaughter informed Fordham that as a consequence they were placing her on administrative leave with pay while they reviewed the documentation. She explained that the action was *not* based on Fordham's performance, but on her violation of Fannie Mae's attendance policy. Slaughter also informed Fordham that her employment was *not* at that time being terminated, and that she would let Fordham know when a final decision was made. D. & O. at 108.

Having turned Fordham's termination over to Slaughter on April 24th, or at the latest on April 27th, and under the impression that Fordham's employment would be terminated when Slaughter met with her, Bahr was not aware until later, of Slaughter's decision to place Fordham on administrative leave on April 29, 2009. D. & O. at 108.

Fannie Mae subsequently terminated Fordham's employment effective July 17, 2009, when Fordham received correspondence dated that same day and signed by Slaughter. Contrary to the explanation Slaughter provided Fordham at their meeting on April 29th, Slaughter's letter informed Fordham that Fannie Mae "had determined to terminate your employment based upon your unacceptable performance, conduct, and attendance issues." Slaughter recounted in the correspondence that during the April 29 meeting, "I also shared with you that I had planned on terminating your employment the previous week" but that because of the concerns Fordham had raised in her complaints, she had placed Fordham on administrative leave pending her review of Fordham's concerns. Slaughter indicated that "[a]lthough I intended to address this issue earlier," her review had been delayed "due to my transition into a new position" with Fannie Mae. Slaughter concluded by stating:

> Nevertheless, I have retained the responsibility for this matter and I have now completed my review of the underlying documentation supporting your termination. I have not found any information that would cause Fannie Mae to reconsider its earlier decision to terminate its employment relationship with you. Accordingly, your employment with Fannie Mae is terminated effective Friday, July 17, 2009.

Exhibit JX 170; *see* D. & O. at 110.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under Section 806 of SOX, 18 U.S.C.A. § 1514A, and its implementing regulations. Secretary's Order No. 2-2012 (Delegation of Authority and

Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1980.110(a). The Board reviews the ALJ's findings of fact under the substantial evidence standard, 29 C.F.R. § 1980.110(b),[8] and reviews questions of law de novo. *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

DISCUSSION

Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A, as amended, in part prohibits any publicly-traded company from discharging or otherwise retaliating against an employee in the terms and conditions of his or her employment because the employee provided to the employer or the federal government information relating to alleged violations of 18 U.S.C.A. § 1341 (mail fraud), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), § 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.[9]

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[8] Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). An ALJ's factual finding will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera,* 340 U.S. at 488).

[9] 18 U.S.C.A. § 1514A(a), as amended by Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), expressly provides:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

An action brought under SOX's whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b). *See* 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a complainant must prove by a preponderance of the evidence that: "(1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action."[10] If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.[11]

A. THE ALJ'S DECISION AND ORDER

1. ALJ's Findings of Protected Activity

Of Fordham's multiple allegations of SOX whistleblower-protected activity, *see* D. & O. at 115-116, the ALJ held that Fordham's conduct constituted SOX-protected activity in the following instances:

- Reporting weaknesses in Control Self-Assessments and the lack of critical process documentation commonly maintained in mature SOX programs in an accountability survey for the managers of Robert Leonard (Fordham's former immediate supervisor) that she initially submitted anonymously on or about December 1, 2008, and later openly submitted to Slaughter and Fischman on April 27, 2009 (D. & O. at 117);

- Verbally reporting to her immediate supervisor (Hall) in December of 2008 that she believed there existed insufficient documentation to support Fannie

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> (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

[10] *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); *see* 29 C.F.R. § 1980.109(a).

[11] *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *see* 29 C.F.R. § 1980.109(b).

Mae's assertion that internal control deficiencies had been remediated (D. & O. at 116);

- Reporting to her immediate supervisors (Gabbay and Hall) on April 23, 2009, that Fannie Mae's methodology did not test at a sufficient level to gain the assurance it needs for system specific IT Applications Controls, which Fordham contended have a direct impact on the company's financial statements to shareholders (D. & O. at 119);

- Filing a complaint with the SEC on April 23, 2009, in which Fordham reported deficiencies in the Deficiency Management System (DMS) internal controls deficiency list that were not reflected in SEC disclosures available to the public, that significant internal control deficiencies were not disclosed in SEC filings, and subsequently providing documentation in support of her allegations on May 19, 2009 (D. & O. at 116-117, 118);

- Reporting SOX violations to the FHFA (formerly OFHEO) on April 26, 2009 (which Fannie Mae became aware of on April 27, 2009) (D. & O. at 119);

- On April 27, 2009, informing Fannie Mae officials (Fischman and Slaughter) that she was reporting to the SEC and the FHFA her concerns that SOX Technology Division management had deliberately withheld information from the company's board of directors and regulators (D. & O. at 116-117; 119-120); and

- Reporting in a retaliation complaint filed with OSHA on April 28, 2009, that she had suffered whistleblower retaliation for making reports of SOX violations (of which OSHA notified Fannie Mae on May 13, 2009) (D. & O. at 120).

2. ALJ's Adverse Action Findings

Fordham alleged that Fannie Mae took the following adverse personnel actions against her: (1) on March 4, 2009, giving Fordham a lowered performance evaluation for her end-of-year 2008 Performance Review; (2) on March 4, 2009, giving Fordham a Memorandum of Concern, which asserted that during the last six months she had been advised of unsatisfactory performance and the need for improvement; (3) removing Fordham from significant duties; (4) assigning Fordham "unachievable tasks;" (5) engaging in "intrusive surveillance" of Fordham; (6) on April 29, 2009, placing Fordham on involuntary administrative leave; (7) failing to provide Fordham with requested payroll and personnel records for her OSHA complaint; and (8) on July 18, 2009, terminating Fordham's employment. D. & O. at 121.

Of the foregoing, the ALJ found that under the standard articulated in *Menendez,* the 2008 Year-End Performance Review, the March Memorandum of Concern, placing Fordham on involuntary administrative leave, and the termination of her employment constituted adverse personnel actions. D. & O. at 121.

3. The ALJ's Causation Determination

Despite finding that Fordham engaged in SOX-protected whistleblower activities and that she suffered adverse personnel actions, the ALJ held that Fordham failed to prove a causal connection between her protected activity and the unfavorable personnel actions. The ALJ first addressed Fordham's 2008 performance evaluation and the memorandum of concern that Hall gave her on March 4, 2009. As of that date, the only protected activity that the ALJ found Fordham to have engaged in, of which Hall was aware, was Fordham's verbal complaint to Hall in late December that she believed that insufficient documentation existed to support Fannie Mae's assertion that internal control deficiencies had been remediated. Upon weighing the temporal proximity of the protected activity against overwhelming evidence of Fordham's unsatisfactory job performance during 2008, the ALJ held that Fordham failed to establish by a preponderance of the evidence that her protected activity was a contributing factor to the lowered performance evaluation and memorandum of concern. D. & O. at 122-125.

Regarding Fordham's placement on administrative leave on April 29, 2009, and the subsequent termination of her employment, the ALJ acknowledged that the temporal proximity of the personnel actions to the protected activity in which Fordham engaged between April 23 and April 27, 2009, of which Bahr and/or Slaughter were aware, constituted circumstantial evidence of causation. However, because the ALJ found that Fannie Mae (per Bahr) had decided prior to the protected activity to terminate Fordham's employment for legitimate, non-retaliatory reasons, the ALJ held that Fordham failed to establish that her protected activity was a contributing factor in the decisions placing her on administrative leave and terminating her employment. D. & O. at 125-127.

B. ANALYSIS –

1. The ALJ's rulings with respect to protected activity and adverse employment action are supported by the substantial evidence of record and in accord with law

We first consider Fordham's arguments on appeal challenging the ALJ's rulings regarding SOX-protected activity and adverse employment actions. Upon careful review of the evidentiary record, we find nothing that persuades us that any of the ALJ's protected activity rulings are legally erroneous. Nor are we of the opinion that the ALJ erred in rejecting all but four of Fordham's asserted claims of adverse employment action. The ALJ's rejection of Fordham's assertion that she engaged in protected activity beyond those activities that the ALJ found to be protected (*supra* at pp. 10-11) is supported by substantial evidence and is in accordance with applicable law. Similarly, we find that the ALJ's rejection of Fordham's assertion that she was subjected to adverse employment actions in addition to the 2008 performance review, the March memorandum of concern, the involuntary administrative leave, and Fordham's employment termination is supported by substantial evidence and in accordance with applicable law.

2. The ALJ's determination that Fordham failed to establish that her protected activity was a contributing factor in the decision to place her on administrative leave and the

termination of her employment is not supported by the substantial evidence of record; nor is it in accordance with applicable law

On appeal, Fordham challenges the ALJ's decisions regarding her placement by Slaughter on administrative leave and the termination of her employment. Fordham also objects in her petition for review to the ALJ's "contributing factor" determinations regarding the 2008 performance evaluation and the March 4, 2009 memorandum of concern. As discussed below, the ALJ's errors are two, both of which warrant reversal of the ALJ's decision and require remand of this case for further consideration.

Having reviewed and considered the arguments the parties raised in their respective briefs, we first turn to the question whether the substantial evidence of record supports the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to Fordham's protected activity of April 23-26, 2009. This, in turn, is followed by consideration of the legal propriety of the ALJ's weighing of Fannie Mae's evidence of legitimate, non-retaliatory reasons for the adverse personnel action at issue against Fordham's evidence of causation in determining that Fordham failed to meet her burden of proving that protected activity was a contributing factor in the adverse personnel action taken against her.

a. The substantial evidence of record does not support the ALJ's finding that Fannie Mae made its decision to terminate Fordham's employment prior to Fordham's protected activity

In addressing the ALJ's ruling rejecting Fordham's claims that placing her on administrative leave and terminating her employment constituted retaliation for engaging in SOX whistleblower-protected activities, we view the administrative leave as part of the employment termination process, and thus address both as one.[12] The substantial evidence of record does not support the ALJ's finding that the decision to terminate Fordham's employment and the decision to place Fordham on administrative leave occurred prior to her protected activities on April 23, 26, and 27, 2009. While the evidence of record supports the finding that Bahr decided to initiate the employment termination process prior to Fordham's protected activities of April 23-27, the substantial evidence of record does not support a finding that Bahr's decision constituted Fannie Mae's final decision. Indeed, the ALJ's own factual findings contradict her conclusion that the decision to terminate Fordham's employment was made prior to Fordham's protected activity.

As previously noted, the ALJ found that Bahr had decided as of April 21st that Fordham's employment should be terminated. D. & O. at 103. It is clear from the record, however, that Bahr was not authorized to effect a final decision on behalf of Fannie Mae with respect to Fordham's termination. Instead, upon deciding that Fordham's employment should be terminated, Bahr began working with Slaughter to draft an employment termination memorandum in which Senior Vice President Wagner's approval to terminate Fordham's

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[12] Before the ALJ, Fannie Mai did not address the administrative leave as a separate action, but as part of the termination process. See D. & O. at 126.

employment was *requested.*[13] D. & O. at 103, 105; JX 116. The drafting of that memorandum was not completed until Friday, April 24.[14] D. & O. at 105. Even then, however, Slaughter indicated that Fannie Mae's legal department had yet to sign off on the memorandum, and proposed to Bahr that they meet on Monday, April 27, to finalize the document. *Id.* The Monday meeting never took place. Instead, as the ALJ found, when Slaughter met with Fordham on Wednesday, April 29, she informed Fordham that they were *in the process of making* a decision to terminate her employment, and that in the interim she was placing Fordham on administrative leave. *Id.* at 108. Slaughter informed Fordham that Fannie Mae was not terminating her employment at that time and that she would let Fordham know when a final decision was made.[15] Significantly, and as previously noted, the ALJ found that after Bahr turned the matter over to Slaughter on April 24th, Bahr was no longer involved with Fordham's employment termination. Indeed, the ALJ found that Bahr was not aware of Slaughter's decision to place Fordham on administrative leave and delay a decision regarding her employment termination until later, after Slaughter's meeting with Fordham on the 29th. *Id.*

The letter Fordham received, dated July 17, 2009, signed by Slaughter, in which Slaughter informed Fordham that her employment was terminated, further supports the conclusion that *Slaughter*, not Bahr, made the final decision terminating Fordham's employment, a decision made *after* Fordham engaged in the SOX-protected activities of April 23-27, 2009. Slaughter recounted in the termination letter that she had planned on terminating Fordham's employment prior to their April 29th meeting; however, because of the concerns Fordham had raised in her whistleblower complaints, she had instead placed Fordham on administrative leave pending her review of those concerns. "Nevertheless," Slaughter stated, "*I have retained the responsibility for this matter*" despite the lapse in time since their meeting.[16] Having completed her review, Slaughter informed Fordham that, "Accordingly, your employment with Fannie Mae is terminated effective Friday, July 17, 2009."[17]

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[13] In the memorandum to Wagner, dated April 24, 2009, Bahr states, "I am requesting your approval to terminate Edna Fordham's employment from the Internal Audit department." JX 116. After detailing the reasons in support of Fordham's discharge, the memorandum concludes: "Human Resources, Legal, and Compliance and Ethics are aware of this request and approve of this action to terminate Edna Fordham. If you agree with this action, please provide your approval as well." *Id.*

[14] Wagner testified that she received the request for termination (JX 116), but did not remember when. D. & O. at 27.

[15] Specifically, the ALJ found: "At an unspecified time [on April 29, 2009], Veith and Slaughter meet with Complainant. . . . Slaughter tells Complainant *inter alia* that they are making a decision to terminate her employment, but she wants to do more data collection to make sure what they have is sufficient and fair, so Complainant is being placed on administrative leave with pay while they review all of the documentation . . . . Slaughter tells Complainant that she is not being terminated at this point, but she will let her know when a final decision is made." D. & O. at 108.

[16] Exhibit JX 170 (emphasis added).

[17] *Id.*

Having concluded that substantial evidence does not support the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to her protected activities of April 23-27,[18] remand to the ALJ is required for a determination, consistent with the analysis required by this decision (per discussion, *infra*), of whether Fordham's SOX whistleblower protected activities of April 23-27, any or all, were a contributing factor in Slaughter's decision placing Fordham on administrative leave and in the subsequent termination of her employment on July 17, 2009.[19] If the ALJ finds upon remand that the protected activity was a contributing factor, the ALJ must then determine whether Fannie Mae's evidence clearly and convincingly establishes that it would have taken the same personnel action even if Fordham had not engaged in protected activity.

b. The determination of whether a SOX complainant has met his or her burden of proving that protected activity was a contributing factor in the adverse personnel action at issue may not include the weighing of the respondent's evidence supporting its statutorily-prescribed affirmative defense

This brings us to the second error the ALJ committed warranting reversal and remand, *i.e.* the ALJ's weighing of Respondent's evidence of legitimate, non-retaliatory reasons for the adverse personnel action at issue against Fordham's evidence of causation in determining that Fordham failed to meet her burden of proving that protected activity was a contributing factor in the adverse personnel action taken against her.

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[18] Yet, even if the ALJ was correct in finding that the decision to terminate Fordham's employment was made prior to Fordham's SOX-protected activities of April 23-27, 2009, it is not the date upon which the decision is made that is necessarily controlling. In *Stone & Webster Eng'g Corp. v. Secretary of Labor*, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit affirmed the Secretary's rejection of the argument that the complainant's protected activity in that case could be ignored because it was engaged in after the adverse personnel decision had been made but before the employer's decision was communicated to the complainant. 115 F.3d at 1573.

[19] In reconsidering the causation issue, the ALJ should address any significant factual conflicts and/or ambiguities in the record, including but not necessarily limited to: (1) Slaughter's statement to Fordham on April 29, 2009, that she was *not* at that time being terminated, (2) the impact, if any, of the investigation Fannie Mae initiated into Fordham's allegations of SOX violations at approximately the same time that it placed Fordham on administrative leave, and (3) who else in addition to Bahr and Slaughter was involved, and to what degree and in what role, in the termination decision since the record clearly shows that others such as Jackie Wagner (to whom Bahr sent a memorandum dated April 24, 2009, requesting approval to terminate Fordham's employment), and Fannie Mae's Legal Department (who advised Slaughter to "tighten up" the memo to Wagner) appear to have been involved. Additionally, should the ALJ upon remand again credit Slaughter's testimony that her change in duties after April 29, 2009, caused an almost three-month delay in finalizing the termination letter, and that this delay is of relevance, the ALJ should expressly provide findings as to how the ALJ credits Slaughter's testimony. It may be that the record does not permit the ALJ to resolve some of these issues, but if the ALJ's decision on remand results in another appeal to the ARB, the Board needs to understand how the ALJ weighed these factual ambiguities and/or gaps in the evidence in deciding the causation question.

Complainant challenges the ALJ's "contributing factor" causation analysis, arguing that under the AIR 21 burden of proof standards incorporated into Section 806 of SOX, Congress established a bifurcated two-stage process for weighing the parties' respective evidence pertaining to causation. Required, Fordham asserts, is an initial determination of whether the preponderance of the complainant's evidence of causation establishes an *inference* that unlawful reasons contributed to the adverse personnel action, thereby establishing a *prima facie* case of retaliation. "The whistleblower's *prima facie* burden by preponderance of the evidence is not to prove the employer *actually* considered her protected activity. The burden is merely to present evidence demonstrating '*an inference*' of contributing factor."[20] If the complainant meets this burden of proof, she argues, the respondent's evidence of lawful non-retaliatory reasons for the personnel action is then, and only then, considered at "stage two" for the purpose of determining whether the respondent can clearly and convincingly prove that it would have made the same decision or taken the same action had the complainant not engaged in protected activity. Fordham argues that this statutorily required two-stage bifurcated approach "is completely thwarted if in stage one the employer's evidence of lawful reasons can be sufficient to rebut the whistleblower's inference of unlawful reasons. This misguided approach would flaunt the statute by allowing the employer to win by proving its lawful reasons defense with only a preponderance of the evidence at stage one, when Congress intended that the employer must prove its lawful reasons defense by clear and convincing evidence at stage two."[21]

Given the significance of the issue, and because of the ambiguity of ARB case law on this subject, Fordham calls upon the ARB to issue a "precedential rule of decision" clarifying that only a complainant's evidence may be considered at the "contributing factor" causation stage; that the employer's evidence in support of lawful, non-retaliatory reasons for its action must await assessment under the "clear and convincing" evidentiary standard after it is found that a complainant has met his or her initial burden of proof.[22]

We find merit in Fordham's argument questioning the propriety of weighing a complainant's evidence of causation against the respondent's evidence of lawful reasons for its action in the determination of whether the complainant has met his or her burden under SOX of proving "contributing factor" causation by a preponderance of the evidence. However, before directly addressing this argument, it is necessary to consider Fordham's related contentions that the ALJ erred by failing to engage in any "*prima facie* case" analysis whatsoever, and that an *inference* of "contributing factor" causation is all that is required at the hearing stage before an ALJ to establish a *prima facie* case of retaliation.

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20 Complainant's Brief in Support of Petition of Review, at p. 23.

21 *Id.*, at p. 4. *See also* Complainant's Rebuttal Brief, at p. 4.

22 Specifically, Fordham urges the ARB to "articulate a precedential rule of decision that stage one is fully met if the employee proves the inference that it is more likely than not that the employer gave at least some small weight to unlawful reasons in deciding the adverse action; and that the employer cannot thereupon escape stage two by rebuttal evidence, even of enormous weight, that lawful reasons caused the adverse action." Complainant's Brief, at p. 4.

The ALJ's failure to analyze the evidence in terms of a "*prima facie*" case may be due, at least in part, to the ARB's confusing and at times inconsistent use of the terms "*prima facie*" and "inference" when discussing the showing required of a complainant at the investigatory stage versus that required at the hearing stage.[23] For this reason, clarification of what is meant by a "*prima facie* case" under SOX and the showing required of the complainant at the hearing stage in order to prevail is warranted.

The Supreme Court has repeatedly cautioned that the term "*prima facie* case" can acquire a different meaning depending on its context.[24] As the Court noted in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), "[t]he phrase '*prima facie* case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use '*prima facie* case' in the former sense."[25] Consequently, "[t]he '*prima facie* case' test is used in many different ways and means many different things."[26] For example, "the quantum of evidence needed to create a jury question under the traditional framework and the establishment of the facts required to establish the *McDonnell Douglas* [Title VII] presumption are both known as the '*prima facie* case.' The phrase '*prima facie* case,' however, has a meaning under the traditional framework very different from its meaning under *McDonnell Douglas* – in the former case it means a case strong enough to go to a jury, in the latter case it means the establishment of a rebuttable presumption."[27]

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23 *See, e.g., Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (*prima facie* showing irrelevant once case goes to hearing before ALJ); *Barry v. Specialty Materials*, ARB No. 06-005, ALJ No. 2005-WPC-003, slip op. at 7 n.32 (ARB Nov. 30, 2007) (same); *Journeay v. Barry Smith Transp.*, ARB No. 01-046, ALJ No. 2001-STA-003, slip op. at 3 n.5 (ARB June 25, 2001) (same); *Zinn v. American Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 10 (ARB Mar. 28, 2012) (equating *prima facie* case with inference of causation); *Jordan v IESI PA Blue Ridge Landfill*, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012) (same); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (equating *prima facie* case with inference of discrimination); *Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-039, slip. op at 3 n.3 (ARB Feb. 23, 2011) (identifying investigatory stage before OSHA as the "*prima facie* level of proving a case"); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-6 (ARB Sept. 30, 2003) (suggesting *prima facie* showing only required at investigatory stage).

24 *See, e.g., Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 525 (1993) (J. Souter, dissenting); *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973).

25 *Burdine*, 450 U.S. at 254 n.7 (citations omitted).

26 *In re United States*, 441 F.3d 44, 58 (1st Cir. 2006).

27 *Wright v. Southland Corp.*, 187 F.3d 1287, 1292 (11th Cir. 1999).

As the Eleventh Circuit has noted, incorporation of the term "*prima facie* case" into whistleblower statutes such as SOX has "bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law."[28] However, as the appellate court further noted, these whistleblower statutes supply their "own free-standing evidentiary framework," thereby employing the term "*prima facie* case" in a different sense than under Title VII.[29] The term merely refers to the four basic elements required of a whistleblower complaint in order to prevail: "(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."[30] Under SOX, the complainant is required to establish these four basic elements whether at the investigatory stage before OSHA or at the hearing stage before an ALJ, although subject at each stage to a different showing.[31] "[T]he same basic four-part framework of the complainant's *prima facie* case applies not only when deciding whether the allegations are legally sufficient, *see* 29 C.F.R. § 1980.104(e)(2), but also when an ALJ considers whether the complainant has satisfied his or her evidentiary burden under 49 U.S.C.A. § 42121(b)(2)(B)(iii)."[32]

The distinction between the showing required of the complainant at the evidentiary hearing stage before an ALJ and that required at the investigatory stage is thus not in the four elements of the *prima facie* case that must be established. Rather, at the evidentiary stage the complainant is required to *prove* the four *prima facie* elements by a preponderance of the evidence, including proof that protected activity was a contributing factor in the adverse action, 29 C.F.R. § 1980.109(a), and not merely *allege* circumstances sufficient to establish the four

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28 *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (citations omitted).

29 "After a complainant has cleared the *prima facie* gatekeeper test – and assuming she has not been knocked out by a preemptory "clear and convincing" response from the employer – the Secretary is to investigate whether the complainant's behavior actually was 'a contributing factor in the unfavorable personnel action.' The burden to persuade the Secretary falls upon the complainant, and she must do so by a preponderance of the evidence." *Stone & Webster,* 115 F.3d at 1572 (citations omitted). "If the complainant succeeds, the employer has a second chance to offer 'clear and convincing evidence' that it would have done the same thing anyway, *i.e.*, 'in the absence of such behavior.'" *Id.*

30 *Bechtel v. Administrative Review Bd., U.S. Dep't of Labor,* 710 F.3d 443, 447 (2d Cir. 2013).

31 *Id.* at 447 n.5.

32 *Bechtel,* 710 F.3d 443. *Accord, Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009); *Van Asdale v. Int'l Game Tech.*, 557 F.3d 989, 996 (9th Cir. 2009); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008); *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999); *Klopfenstein v. PCC Flow Techs. Holdings*, ARB No. 04-149, ALJ No. 04-SOX-011, slip op. at 17 n.19 (ARB May 31, 2006); *aff'd sub nom. Klopfenstein v. Administrative Review Bd.* 402 Fed. Appx. 936 (5th Cir. 2010).

elements, including circumstances sufficient to raise the inference that the protected activity was a contributing factor, 29 C.F.R. § 1980.104(e)(2)(iv).[33]

At the same time, Fordham is correct that the lesser showing required of a complainant at the investigatory stage, of alleging circumstances sufficient to raise the inference that the protected activity was a contributing factor in the adverse action, does not preclude a complainant from meeting his or her burden of proof at the hearing stage before an ALJ through circumstantial evidence and the inferences to be drawn therefrom. As the ARB has repeatedly held, a complainant may rely upon circumstantial evidence to prove by a preponderance of the evidence that protected activity contributed to the unfavorable employment action at issue.[34] The requirement at the investigatory stage before OSHA that a complainant allege circumstances sufficient to raise the *inference* that protected activity was a contributing factor in the adverse action at issue is not a burden of proof requirement, but a pleading requirement. Where a complainant's allegations are found to be sufficient, a rebuttable presumption is established of a *prima facie* case of retaliation. On the other hand, for a complainant to prove at hearing before an ALJ a *prima facie* case of retaliation through circumstantial evidence, that evidence must establish by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action.

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

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33 *Bechtel*, 710 F.3d 443. *Accord Brune*, ARB No. 04-037, slip op. at 12-14; *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 8-9 (ARB Jan. 30, 2004).

34 *See Speegle v. Stone & Webster*, ARB No. 11-029A, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan. 31, 2013); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9 (ARB Sept. 26, 2012); *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12-13, 28 (ARB Sept. 30, 2011), *aff'd sub nom. Bechtel v. Administrative Review Bd.*, 710 F.3d 443 (2d Cir. 2013); *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Pierce v. U.S. Enrichment Corp.*, ARB No. 06-055, ALJ No. 2004-ERA-001, slip op. at 12-13 (ARB Aug. 29, 2008); *Negron v Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010 (ARB Dec. 30, 2004), *aff'd sub nom. Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006). *Accord Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). *See also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003) (noting, in the context of Title VII employment discrimination cases, that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence").

inconclusiveness of the case law on this subject,[35] we treat this issue as a matter of first impression.

As previously mentioned, we find merit in Fordham's argument that the evidentiary basis upon which the determination of whether a complainant has met his or her burden under SOX of proving "contributing factor" causation does not involve the weighing of the respondent's evidence of lawful, non-retaliatory reasons for its action against the complainant's evidence of causation under the "preponderance of the evidence" test. As discussed below, should a respondent seek to avoid liability by producing evidence of a legitimate, non-retaliatory basis for the personnel action at issue, the respondent must prove, not by a preponderance of the evidence, but *by clear and convincing evidence*, that its evidence of a non-retaliatory basis or reason for its action was the sole basis or reason for its action; that it would have taken the same personnel action based on the demonstrated non-retaliatory reasons even if the complainant had not engaged in the protected activity.

In concluding that Fordham failed to prove that protected activity was a contributing factor in the adverse personnel action taken against her, the ALJ discounted Fordham's circumstantial evidence of contributory causation upon weighing it against Fannie Mae's evidence of ostensibly legitimate, non-retaliatory reasons for placing Fordham on administrative leave and terminating her employment.[36] In doing so, the ALJ ran afoul of the governing statute's legal imperative that, to avoid liability, the respondent's evidence of legitimate, non-retaliatory reasons for its action is subject to a higher burden of proof than the preponderance of the evidence standard required of the complainant for proving "contributing factor" causation. As the ARB and courts alike have held, if the complainant establishes by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action at issue, "the employer may avoid liability if it can prove 'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that protected activity'."[37]

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35 In his concurrence/dissent, Judge Corchado labels as "unique" the majority's interpretation of the SOX whistleblower burden of proof provisions reached in this case. Given the inconclusiveness of the existing ARB case law on this issue, it is hardly fair criticism. Compare, for example, *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 11-12 (ARB May 31, 2014), with *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014), and *Benninger v. Flight Safety Int'l*, ARB No. 11-064, 2009-AIR-022 (ARB, Feb. 26, 2013). *See* discussion, *infra* pp. 33-34. *See also*, *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998), and discussion *infra* at p. 30.

36 *See* D. & O. at 122-127.

37 *Bechtel*, 710 F.3d at 447 (quoting *Harp,* 558 F.3d at 723; *Allen,* 514 F.3d at 475-76). *Accord White v. Action Expediting,* ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 6 (ARB June 6, 2014). *Accord Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020, slip op. at 9 (ARB May 13, 2014); *Speegle,* ARB No. 11-029A, slip op. at 9; *Jordan,* ARB No. 10-076, slip op. at 2; *Bechtel v Competitive Techs.*, ARB No. 06-010, ALJ No. 2005-SOX-033, slip op. at 4-5 (ARB Mar. 26, 2008).

Statutory analysis necessarily begins with the plain language of the statute.[38] As previously noted, SOX incorporates the legal burdens of proof set forth under AIR 21 at 49 U.S.C.A. § 42121(b)(2)(B). Subsections (b)(2)(B)(iii) and (B)(iv), which are applicable at the hearing stage before an ALJ, provide:

> (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.

The statutory provisions distinguish, as do the SOX implementing regulations,[39] between the showing required of a whistleblower in order to establish that protected activity was a contributing factor in the adverse personnel action at issue, and the respondent's burden of proving by "clear and convincing evidence" that it would have taken the personnel action for legitimate, non-retaliatory reasons had there been no protected activity. It would thus seem self-evident from this statutory delineation that the respondent's evidence in support of its affirmative defense as to why it took the action in question is not to be considered at the initial "contributing factor" causation stage where proof is subject to the "preponderance of the evidence" test. To afford an employer the opportunity of defeating a complainant's proof of "contributing factor" causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a

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38 *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

39 In implementation of the foregoing under SOX, 29 C.F.R. § 1980.109, pertaining to decision and orders of the administrative law judge, provides at subsections (a) and (b):

> (a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.
>
> b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

preponderance of the evidence would render the statutory requirement of proof of the employer's statutorily prescribed affirmative defense by "clear and convincing evidence" meaningless.[40]

Quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), the ARB has repeatedly noted two critical aspects of the "contributing factor" causation test: (1) that by "contributing factor" is meant "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision,"[41] and (2) that the "contributing factor" standard was "intended to overrule existing case law which required a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in [the] personnel action."[42]

The significance of the definitional aspect of the "contributing factor" test is that (again as the ARB has repeatedly noted) under this proof standard a complainant need not prove that the respondent's asserted reason for its action is pretext,[43] which would be necessary as one means of prevailing if the respondent's evidence in support of its action was to be weighed against the complainant's causation evidence. Even if the respondent establishes a legitimate basis for its action, the complainant will nevertheless prevail at the "contributing factor" causation stage as long as the complainant can prove by a preponderance of the evidence that his or her protected activity was also a factor in the adverse personnel action. "A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity."[44]

Regarding Congress's elimination of the previously existing requirement that the complainant prove that protected activity was a "significant," "motivating," "substantial," or "predominant" factor in the personnel action by adoption of the "contributing factor" test, it is pointed out that the prior requirement necessitated the *weighing* of the parties' respective

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40 It is an elementary canon of construction that a statute should be interpreted so as not to render any word or part meaningless. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Principles of statutory construction direct that a statute be construed such that no word is rendered superfluous, and that all language in a statute be given operative effect. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficenica*, 524 F.3d 54, 59 (1st Cir. 2008).

41 *Bechtel*, ARB No. 09-052, slip op. at 12. *Accord Klopfenstein, supra*, ARB No. 04-149, slip op. at 18.

42 *Bechtel,* ARB No. 09-052*; Klopfenstein,* ARB No. 04-149.

43 *Klopfenstein,* ARB No. 04-149, slip op. at 19.

44 *Bechtel,* ARB No. 09-052. *Accord Walker v. Am. Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007); *Klopfenstein,* ARB No. 04-149.

causation evidence under the preponderance of the evidence test.[45] This weighing is *exactly* what the "contributing factor" statutory provision was designed to eliminate. Different ultimate facts are at issue in the two separate stages of proof. In the first stage, the question is whether protected activity (or whistleblowing) was *a factor* in the adverse action. Certainly at this stage an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. However, the question of whether the employer has a legitimate, non-retaliatory reason for the personnel action and the question of whether the employer would have taken the same adverse action *in the absence of the protected activity* for that reason only require proving different ultimate facts than what is required to be proven under the "contributing factor" test. An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action. Rather, the respondent must prove the statutorily prescribed affirmative defense that it would have taken the same personnel action had the complainant not engaged in protected activity by the statutorily prescribed "clear and convincing" evidentiary burden of proof.

To the extent that the Administrative Review Board has previously addressed the question whether a respondent's evidence supporting its affirmative defense is to be weighed against the complainant's evidence in determining whether the complainant has met his or her burden of proving "contributing factor" causation, the ARB's decisions are inconclusive and, if anything, have only served to confuse what otherwise appears straightforward. *Hutton*, ARB No. 11-091, and *Bobreski*, ARB No. 13-001, are two recent examples of the inconclusive nature of ARB decisions on the question of whether the parties' respective causation evidence is, or is not, appropriately weighed at the "contributing factor" causation stage. In *Hutton*, the ARB panel majority reversed the ALJ's "contributing factor" determination in part because the ALJ rejected the complainant's circumstantial evidence of causation in favor of the employer's evidence of a legitimate business reason for the adverse personnel action.[46] On the other hand, in *Bobreski* a different panel majority affirmed the weighing of the respondent's rebuttal evidence of causation, pertaining to its asserted legitimate business reasons for its action, against the complainant's causation evidence at the "contributing factor" stage.

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45 *See, e.g., Onysko v. State of Utah*, ARB No. 11-023, ALJ No. 2009-SDW-004, slip op. at 10-12 (ARB Jan. 23, 2013).

46 "Despite correctly identifying evidence that supported a contributing factor finding . . . the ALJ ultimately ignored this evidence and ruled, in effect, that the Respondent need only articulate a legitimate business reason for its action to prevail. . . . The ALJ appeared to base his dismissal [of Hutton's complaint] solely on a finding that Hutton committed a dismissible offense (failure to attend investigative hearing), similar to the 'legitimate business reason' burden of proof analysis that does *not* apply to FRSA whistleblower cases. Under the FRSA whistleblower statute, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor 'which, alone or in connection with other factors, tends to affect in any way' the decision to take an adverse action." *Hutton*, ARB 11-091, slip op. at 11-12 (citations omitted).

Brune v. Horizon Air Indus., ARB No. 04-037, ALJ No. 2002-AIR-008 (ARB Jan. 31, 2006), is a prime example of the confusion ARB decisions have to date created. There, after distinguishing the showing required of a complainant at the investigatory stage under AIR 21 from the burden of proof required at the hearing stage, the same distinction that exists under SOX,[47] the ARB went on to state that at the hearing stage, "[t]he ALJ . . . may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action."[48] This statement can be interpreted in two significantly different ways. One interpretation is legally acceptable. The other is not.

The foregoing quoted statement from *Brune* is excerpted word-for-word from *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 10 (ARB Jan. 30, 2004), which *Brune* cites at footnote 35 of the opinion. Consequently, if understood in the context in which it was made in *Peck*, the statement stands for the legally acceptable proposition that a complainant may meet his or her "contributing factor" burden of proof through circumstantial evidence by showing that the respondent's reasons for its action are pretext.[49] On the other hand, if the quoted statement is construed in light of the Title VII burden-shifting context in which it is made and the Title VII case authority that is immediately cited by *Brune* for the proposition,[50] that Title VII context and case authority is of no relevance where Congress has statutorily

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47 Compare AIR 21's implementing regulations, at 29 C.F.R. §§ 1979.104 and 1979.109, with 29 C.F.R. §§ 1980.104 and 1980.109, pertaining to SOX. As previously discussed, *supra* at pp. 18-19, these regulations merely require that at the investigatory stage before OSHA, the complainant *allege* a *prima facie* case of unlawful retaliation, including allegations sufficient to raise the inference that the protected activity was a contributing factor in the alleged adverse personnel action. Whereas, at the evidentiary stage before an ALJ the complainant must *prove* the four *prima facie* elements by a preponderance of the evidence, including proof by a preponderance of the evidence that protected activity was a contributing factor in the adverse action.

48 *Brune*, ARB No. 02-028, slip op. at 14.

49 *See Bechtel*, ARB No. 09-052, slip op. at 13 ("[I]f a complainant shows that an employer's reasons for its action are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor."). *See also Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 27 (ARB May 25, 2011) ("Circumstantial evidence may include temporal proximity, evidence of pretext, inconsistent application of [an employer's] policies, shifting explanations [for an employer's actions] and more.").

50 The quoted language from *Peck* discusses the Title VII methodology for analyzing the parties' respective burdens of proof and the burden shifting pretext framework where the complainant initially makes in inferential case of discrimination by circumstantial evidence, in which case, *Peck* noted, "[t]he ARB may thus examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant . . . has proved by a preponderance of the evidence that protected activity contributed to the dismissal." *Peck*, ARB No. 02-028, slip op. at 10 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792).

imposed the "contributing factor" burden of proving causation on the complainant and the "clear and convincing" evidentiary burden of proof on the respondent for avoiding liability.[51] Construed as a Title VII legal proposition, the statement in *Brune* fails to heed the legal significance of the statutory language in AIR 21, SOX, and similarly-worded "contributory factor" causation whistleblower protection provisions that imposes the higher burden of proof standard of "clear and convincing evidence" on the respondent's affirmative defense of showing why it took the adverse personnel action at issue.[52]

The ALJ's consideration of Fannie Mae's evidence of why it took the personnel action that it did at the "contributing factor" proof stage is not surprising, given the ARB's historical proclivity for retaining the Title VII case law establishing the burdens of proof required of the parties under that legislation. Often the Board has relied, as it did in *Brune*, upon *McDonnell Douglas,*[53] *Mt. Healthy,*[54] *Burdine*,[55] and their progeny[56] without appreciating the significance of the legislative changes effected by Congress in its adoption of whistleblower protection provisions such as those found under SOX. In *Salata v. City Concrete*, ARB No. 08-101, ALJ

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51 See discussion, *infra*.

52 *Brune* is not alone in this regard. *See, e.g., Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038 (ARB July 31, 2002) (applying Title VII burden-shifting framework and burdens of proof in finding no "contributing factor" causation under the ERA, as amended in 1992, 42 U.S.C.A. § 5851(b)(3)(C)). Another confusing ARB decisions on the subject is *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031 (ARB Sept. 30, 2003). Seemingly supportive of Fordham's position, the ARB in *Kester* upheld the ALJ's determination that the complainant met his burden of establishing "contributing factor" causation based on a showing of temporal proximity and evidence of illegitimate reasons on the respondent's part for the personnel action at issue, while reserving the respondent's asserted non-retaliatory reasons for the action that was taken for consideration under the "clear and convincing" evidentiary burden of proof test. Yet, the ARB invoked the Title VII burden-shifting pretext framework as "warranted in [the] typical whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Kester*, ARB No. 02-007, slip op. at 10-12, & n.17. On the other hand, in *Paynes v. Gulf States Utils.*, ARB No. 98-045, ALJ No. 1993-ERA-047 (ARB Aug. 31, 1999), the ARB affirmed the ALJ's finding that the complainant failed to prove "contributing factor" causation based upon weighing of the complainant's evidence against the employer's evidence of legitimate, nondiscriminatory reasons for the adverse personnel action. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011), another decision arguably relevant, merely discusses at length the various kinds of circumstantial evidence to be taken into consideration "on the record as a whole" in proving "contributing factor" causation.

53 411 U.S. 792.

54 *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

55 450 U.S. 248.

56 *E.g., St. Mary's Honor Ctr.,* 509 U.S. 502.

No. 2008-STA-012 (ARB Sept. 15, 2011), the ARB sought to draw this distinction, noting that the legal burdens of proof and burden-shifting analytical framework AIR 21imposed replaced the *McDonnell Douglas* Title VII burden of proof standards and analytical framework. Nevertheless, *Salata* also left lingering confusion. Consequently, in two recent decisions, *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 13, 2014), and *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014), the ARB has sought to definitively put to rest reliance upon *McDonnell Douglas* and its progeny where Congress has imposed the "contributing factor" and "clear and convincing evidence" burden of proof standards.[57]

Finding ARB case authority of no avail in resolving the issue presented, resort to federal appellate case law arising under SOX, AIR 21, and similar whistleblower protection provisions such as the Energy Reorganization Act as amended in 1992 is of no greater assistance. For the most part, the appellate case authority does little more than recite that, 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. . . . If the employee established these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior."[58]

Dysert v. U.S. Secretary of Labor, 105 F.3d 607 (11th Cir. 1997), is occasionally cited (as it was in *Brune*) for establishing the requirement that a complainant prove by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable personnel action. Since the requirement of proof by a preponderance of the evidence generally implies a weighing

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57 Nevertheless, as we explain *infra* at pp. 32-24, the prototypes for the current SOX burdens of proof were initially drafted against the backdrop of Supreme Court Title VII jurisprudence, and that jurisprudence necessarily informs our interpretation of the current statutory language.

58 *Harp*, 558 F.3d at 723 (quoting *Allen,* 514 F.3d at 475-476). *See also Livingston v. Wyeth, Inc.,* 520 F.3d 344, 351 (4th Cir. 2008); *Welch v. Chao,* 536 F.3d 269, 275 (4th Cir. 2008); *Trimmer v. U.S. Dept. of Labor*, 174 F.3d at 1101-1102; *Stone & Webster*, 115 F.3d at 1572. *Cf. Araujo,* 708 F.3d 152, wherein the Third Circuit addressed the burden-shifting scheme and burdens of proof requirements under the Federal Rail Safety Act, 49 U.S.C.A. § 20109 (Thomson/West Supp. 2014), which, like SOX, incorporates by reference the AIR 21 whistleblower burdens of proof found at 49 U.S.C.A. § 42121(b)(2)(B), stating: "First, Araujo must show, by a preponderance of the evidence, that his reporting of his injury was a 'contributing factor' to NJT's decision to discipline him. If he can do so, NJT must show by 'clear and convincing evidence' that it would still have disciplined him, absent the reported injury." 708 F.2d at 160.

of all relevant and competent evidence,[59] *Dysert* could be read as standing for the legal proposition that the respondent's non-retaliatory evidence of why it took the contested personnel action should be weighed against a complainant's evidence in assessing whether the complainant has met his or her initial burden of establishing "contributing factor" causation. *Dysert* did not, however, address this question. Instead, *Dysert* narrowly focused on the meaning of the term "demonstrate" as found in the Energy Reorganization Act's whistleblower protection provision, at 42 U.S.C.A. § 5851(b)(3)(C), which requires (as is required under SOX) that the complainant "demonstrate" that protected activity was a "contributing factor" in the alleged unfavorable personnel action, and whether the Secretary of Labor's interpretation of "demonstrate" as meaning "to prove by a preponderance of the evidence" was reasonable.[60] Had *Dysert* addressed the question of whether a respondent's evidence in support of its affirmative defense as to why it took the action in question should be considered at the "contributing factor" causation stage, it would have necessarily had to reconcile the language in the statute that separately requires the respondent to "demonstrate by clear and convincing evidence" that it would have taken the personnel action for non-retaliatory reasons in the absence of the complainant's protected activity.

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[59] *See, e.g., In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2009); *Piper v. Sec'y of Health & Human Servs.*, 29 Fed. Cl. 628, 642 (Fed. Cl. 1993); *Chiles v. Bowen*, 695 F. Supp. 357, 360 (S.D. Ohio 1988).

[60] *Dysert*, 105 F.3d at 609-610. Upon concluding that the statutory term "demonstrated" was ambiguous, the Eleventh Circuit deferred in its interpretation to that of the Secretary of Labor in the decision from which appeal to the court was taken, *Dysert v. Florida Power Corp.*, No. 1993-ERA-021 (Sec'y Aug. 7, 1995). Our opinion of the Secretary's interpretation is that it is fraught with error, including ignoring the very definition of "demonstrate" that is cited in the decision ("to prove or make evident by reasoning or adducing evidence"), conflating the requirements for establishing a *prima facie* case with the burden of proof concept, ignoring the legislative history explaining that a "prima facie showing" was all that was required for a complainant to prevail at the hearing stage (138 Cong. Rec. H.11409, H.11444 (daily ed. Oct. 5, 1992)), and erroneously relying upon the *McDonnell Douglas* Title VII understanding of the term "*prima facie* case" in disregard of the more applicable alternative meaning of the term as recognized in *Burdine*, 450 U.S. at 254 n.7 ("The phrase '*prima facie* case' . . . also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue."). As a result, we consider the Secretary's interpretation, standing alone, as unworthy of precedential adherence. However, *Dysert* is the genesis of the Department of Labor's regulatory adoption of the requirement that a whistleblower establish "contributing factor" causation by a preponderance of the evidence. *See, e.g.*, 72 Fed. Reg. 44,956; 44,959 (Aug. 10, 2007); 76 Fed. Reg. 2808, 2812-2813 (Jan. 18, 2011). Thus, in the absence of Department of Labor reconsideration of the regulatory provisions requiring proof of "contributing factor" causation at the hearing stage by a preponderance of the evidence, the ARB is obligated under the Secretary's Order conferring jurisdiction on the Board to adhere to the regulatory provisions as currently promulgated. *See* Secretary's Order No. 2-2012, 77 Fed. Reg. at 69,379 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.").

Given the interpretive ambiguity generated by the cited case law in the AIR 21 whistleblower provisions that we are called upon to construe, we necessarily turn elsewhere for guidance. Regrettably, there is nothing in AIR 21's legislative history that addresses the "contributing factor"/"clear and convincing evidence" delineation. The legislative history accompanying the 1992 amendments to the Energy Reorganization Act, upon which the AIR 21 whistleblower burden of proof provisions are modeled,[61] nevertheless provides some useful insight into Congress's intent. Reps. Miller and Ford, principal co-sponsors of the ERA's 1992 amendments, explained that under the amendments adopting the respective "contributing factor" and "clear and convincing evidence" burdens of proof, "At the administrative law judge hearing . . . [o]nce the complainant makes a *prima facie* showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, a violation is established unless the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The conferees intend to replace the burdens of proof enunciated in *Mt. Healthy*, to facilitate relief for employees who have been retaliated against for exercising their rights under section 210 [of the ERA]."[62]

The comments of Representatives Miller and Ford inform us in two ways: (1) They indicate that Congress intended a two-stage evidentiary process for determining causation and assessing liability in which the complainant's evidence of "contributing factor" causation was to first be considered, with the employer's evidence of any non-retaliatory reason or basis for its action considered only should the complainant's evidence prove sufficient to meet the "contributing factor" proof requirement. (2) Secondly, the expressed intended supplanting of the burdens of proof articulated in *Mt. Healthy* ties the 1992 ERA amendments (and thus, the AIR 21 whistleblower provisions) to the virtually identical provisions of the Whistleblower Protection Act, at 5 U.S.C.A. § 1221(e), as originally adopted, where the legislative history similarly refers to the intended purpose of supplanting *Mt. Healthy's* burdens of proof.[63]

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61 "Congress modeled AIR 21 section 519(b)(2)(B) on section 211 of the ERA, 42 U.S.C.A. § 5851." *Peck,* ARB No. 02-028, slip op. at 9.

62 138 Cong. Rec. H11,409; H11,444 (daily ed. Oct. 5, 1992). Under *Mt. Healthy*, if the trier of fact concludes that the complainant has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, to avoid liability, has the burden of proving by a preponderance of the evidence that it would have reached the same decision or taken the same action in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287; *Consolidated Edison Co. of New York v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982). Although *Mt. Healthy* involved a 42 U.S.C. § 1983 action, its analysis had been applied to ERA cases. *See, e.g., Dartey v. Zack Co. of Chicago*, No. 1982-ERA-002 (Sec'y Apr. 25, 1983).

63 135 Cong. Rec. S2784 (Mar. 16, 1989) ("With respect to the agency's affirmative defense, it is our intention to codify the test set out by the Supreme Court in the case of *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977). The only change made by this bill as to that defense is to increase the level of proof which an agency must offer from 'preponderance of the evidence' to 'clear and convincing evidence.'"). *See also*, 234 Cong. Rec. H9321 (Oct. 3, 1988).

As the ARB has previously noted,[64] the AIR 21 and ERA burden of proof provisions are ultimately modeled after the burden of proof provisions of the Whistleblower Protection Act (WPA), 5 U.S.C.A. § 1221(e)(1) and (2), as originally adopted.[65] The relevant language of the three statutory provisions is virtually identical.[66] Consistent with the statutory construction principle of *in pari materia*,[67] we thus turn to the WPA for further guidance.[68] Indeed, the ARB has consistently looked to the Federal Circuit's decision in *Marano,*[69] which interpreted the virtually identical whistleblower protection provisions of the WPA, to address the distinction in the parties' respective burdens of proof under the "contributing factor"/"clear and convincing evidence" standards.[70] *Marano* explains in detail, with citation to the WPA's exhaustive

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64 *See Bechtel*, ARB No. 09-052, slip op at 24, n.124; *Kester*, ARB No. 02-007, slip op. at 7, n.15.

65 As adopted in 1989, the WPA pursuant to Pub. L. No. 101-12, 103 Stat. 16 (1989), 5 U.S.C.A. § 1221(e), provided in pertinent part:

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

66 Compare the WPA at 5 U.S.C.A. § 1221(e)(1) and (2) with AIR 21's burden of proof requirements found at 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv), and those of the ERA at 42 U.S.C.A. § 5851(b)(3)(C) and (D).

67 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:1 (7th ed. 2013) ("Other statutes dealing with the same subject as the one being construed, commonly called statutes *in pari materia*, are another extrinsic aid useful in questions of interpretation. . . . The principle that statutes *in pari materia* are construed together is a variation of the principle that all parts of a statute also are construed together, and its corollary that an amendment and the original act are construed together.").

68 *Id.* at § 53:3 ("Courts are able to learn the purpose and course of legislation in general by referring to other similar legislation. And by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, courts are able to give effect to the probable legislative intent and also to establish a more uniform and harmonious system of law.").

69 2 F.3d 1137.

70 *See, e.g., Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Speegle* ,ARB No. 11-029A; *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012). *Accord Araujo,*708 F.3d at 158, 160-61.

legislative history, the significance of the substantial reduction in the whistleblower's burden of proof, and the heightened burden imposed upon the respondent for proving any affirmative defense it might have.[71]

Marano nevertheless left open the issue now before us in this case, *i.e.*, the question of *what evidence* is to be taken into consideration in determining whether the complainant has met his or her burden of establishing "contributing factor" causation. Fortunately, this question was subsequently addressed by the Federal Circuit in *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998), a case arising under the WPA, wherein the appellate court held that the ALJ committed reversible error by relying upon the respondent's affirmative defense evidence of legitimate, non-retaliatory reasons for its action in concluding that the claimant failed to prove "contributing factor" causation by a preponderance of the evidence.[72] Citing WPA's legislative history, the court rejected the respondent's argument that its countervailing evidence of non-retaliatory reasons for why it acted as it did negated the complainant's showing at the "contributing factor" causation stage. The court held that it was error for the ALJ to weigh the respondent's evidence supporting a non-retaliatory basis for its action against the complainant's causation evidence in determining that the protected activity was not a contributing factor. "Evidence such as responsiveness to the suggestions in a protected disclosure or lack of animus against petitioner may form part of [the respondent's] rebuttal case. Such evidence is not, however, relevant to a [claimant's] prima facie case under section 1221(e)(1)(A) and (B)."[73] "[B]ecause the agency's affirmative defense under section 1221(e)(2) requires a higher burden of proof, we hold that the AJ's causation finding that Ms. Kewley's protected disclosure was not 'a contributing factor' was legally erroneous as contrary to the statutory command as correctly construed."[74]

To fully understand *Kewley's* precedential relevance to the case presently before us, it is helpful to recount the legislative origins of the WPA and its accompanying legislative history upon which *Kewley* relies. In 1994, Congress amended sections 1221(e)(1) and (2) of the WPA[75] to clarify the circumstances under which a complainant may meet his or her

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71 2 F.3d at 1140-1141.

72 *Kewley*, 153 F.3d at 1362-1364.

73 *Id.* at 1363.

74 *Id.* at 1364. Merit System Protection Board decisions have reiterated the delineation expressed by this legislative history, as identified in *Kewley*. *See, e.g.*, *Grant v. Dept. of Air Force*, 61 MSPR 370, 376 (1994); *Caddell v. Dept. of Justice*, 52 MSPR 529, 533-34 (1992). *Accord Caddell v. Dept. of Justice*, 57 MSPR 508, 513-17 (1993) ("The initial decision's analysis is also erroneous because, as in the first initial decision, it relies upon evidence that the agency would use to show that it would have taken the actions at issue against the appellant in the absence of his disclosure, to determine that the appellant did not show that retaliation was a contributing factor in his suspension.").

75 *See* Pub. L. No. 103-424, 108 Stat. 4361 (1994).

"contributing factor" burden of proof.[76] In doing so, Congress explicitly vitiated the decision of the Federal Circuit in *Clark v. Dept. of the Army*, 997 F.3d 1466 (Fed. Cir. 1993), to the extent that *Clark* had held that the WPA did not encompass a *per se* "contributing factor" causation test based on the protected activity's temporal proximity to the challenged personnel action and proof that the respondent was aware of the protected activity.[77] The legislative history accompanying the 1994 WPA amendments explained that *Clark* had failed to take into consideration pertinent legislative history accompanying the original 1989 WPA enactment. That legislative history – contained in a Joint Explanatory Statement accompanying a WPA legislative forerunner that was introduced but not passed by Congress in 1988, which was subsequently incorporated into the legislative history accompanying the 1989 WPA enactment[78] – expressed Congress's intent that a whistleblower could meet his or her burden of proof in "one of many possible ways" based on circumstantial evidence, including temporal proximity and knowledge on the part of the respondent.[79]

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[76] As amended in 1994, 5 U.S.C.A. § 1221(e)(1) and (2), now provide (language added by 1994 amendment in italics):

> (1) [I]n any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) *or section 2302(b)(9)(A)(i), (B), (C), or (D)*, the Board shall order such corrective action as the Board considers appropriate if the employee . . . has demonstrated that a disclosure or protected activity described under section 2302(b)(8) *or section 2302(b)(9)(A)(i), (B), (C), or (D)* was a contributing factor in the personnel action which was taken or is to be taken against such employee . . . . *The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--*
> *(A) the official taking the personnel action knew of the disclosure or protected activity; and*
> *(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.*
>
> (2) Corrective action under paragraph (1) may not be ordered if, *after a finding that a protected disclosure was a contributing factor*, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

[77] *Kewley*, 153 F.3d at 1361-1362.

[78] 135 Cong. Rec. 5032, 5033 (Mar. 21, 1989) (explanatory statement accompanying 1989 enactment of S.20 intended to be read in conjunction with the Joint Explanatory Statement that appeared in the Congressional Record of October 3, 1988, during floor consideration of S.508).

[79] Senate Report No. 103-358, at 6 (1994), reprinted in 1994 USCCAN 3548, 3556 (citing 135 Cong. Rec. S2784 (Mar. 16, 1989)) ("One of many possible ways to show that the whistleblowing

Clark also held that evidence pertaining to a respondent's affirmative defense of legitimate, non-retaliatory reasons for its action could be taken into consideration at the "contributing factor" causation stage in determining whether or not the complainant met his or her burden of proof by a preponderance of the evidence.[80] However, because of the court's failure in *Clark* to take into consideration the Joint Explanatory Statement accompanying the 1989 WPA enactment, the court also failed to heed the congressional distinction intended by the 1989 WPA enactment between the evidence required of the complainant to prove "contributing factor" causation and the evidence required of the respondent to establish its affirmative defense of a non-retaliatory basis for its action. The Joint Explanatory Statement provided:

> The bill establishes an affirmative defense for an agency. Once the prima facie case has been established, corrective action would not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. . . . The only change made by this bill as to that defense is to increase the level of proof which an agency must offer from "preponderance of the evidence" to "clear and convincing evidence".[81]

The Explanatory Statement accompanying the 1989 WPA enactment further explained this distinction, stating:

> The individual's burden is to prove that the whistleblowing contributed in some way to the agency's decision to take the personnel action. . . . If an employee shows by a preponderance of the evidence that whistleblowing was a contributing factor in a personnel action, the agency action may be upheld only if the agency can demonstrate, by clear and convincing evidence, that it would have taken the same action in the absence of the whistleblowing. This is the standard in last year's bill and it is unchanged by the Senate amendment. "Clear and convincing evidence" is a high burden of proof [that] comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action.[82]

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was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.").

80 *Clark*, 997 F.3d at 1473.

81 135 Cong. Rec. S2784 (Mar. 16, 1989).

82 Explanatory Statement on Senate Amendment S.20, 135 Cong. Rec. 5033 (Mar. 21, 1989).

Lest there be any lingering ambiguity in the congressional pronouncements accompanying the original enactment of the WPA's whistleblower protection provisions in 1989, the legislative history accompanying the *1994 amendments* to the WPA made Congress's intent perfectly clear:

> [T]he Whistleblower Protection Act creates a *clear division* between a whistleblower's prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative defense, which must be proven by clear and convincing evidence. *The [1994] amendment reaffirms that Congress intends for a[n] agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.*[83]

It is clear from WPA's legislative history, which we find both relevant and instructive, that when a respondent offers evidence in support its defense that legitimate, non-retaliatory reasons were the actual basis for the personnel action at issue, that evidence is not weighed under the preponderance of the evidence standard against the complainant's evidence of "contributing factor" causation. Rather, the respondent's evidence of a non-retaliatory basis for its action is subject to the higher "clear and convincing evidence" burden of proof standard by which the respondent must prove SOX's statutorily prescribed affirmative defense that it would have taken the same personnel action had there been no protected activity.[84]

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83 Senate Report No. 103-358, at 6-7 (emphasis added).

84 To be clear, our ruling does not preclude an ALJ's consideration, under the preponderance of the evidence test, of a respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower complainant in order to prevail, *i.e.* whether the complainant engaged in protected activity, whether the employer knew that complainant engaged in the protected activity, and whether the complainant suffered an unfavorable personnel action. As we stated earlier, *supra* at p. 23, in addressing the question of whether the complainant has met his or her burden of proving these elements by a preponderance of the evidence, an ALJ may consider (among other relevant evidence) an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. It is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn. As discussed, in determining whether or not the complainant has met his or her burden of demonstrating a "contributing factor" causal relationship between the protected activity and the adverse personnel action, the employer's evidence supporting its affirmative defense of a legitimate, non-retaliatory basis or reason for its action is not weighed against the complainant's causation evidence, given that the statutory affirmative defense of a legitimate, non-retaliatory basis or reason for its action had there been no protected activity must be proven by clear and convincing evidence.

In concluding in this case that Fordham failed to prove by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue, the ALJ relied on the evidence Fannie Mae introduced supporting its contention of legitimate, non-retaliatory reasons for its action. In weighing Fannie Mae's causation evidence against Fordham's evidence of causation in disregard of the statutory differentiation in the respective burdens of proof required of the parties, the ALJ committed reversible error.

We recognize that the evidentiary methodology mandated by the "contributing factor"/"clear and convincing evidence" burdens of proof distinction differs from the traditional evaluation of evidence under the preponderance of the evidence burden of proof standard whereby findings of fact are based on the weighing of all the evidence introduced by both parties. However, this is neither a legal aberration nor inconsistent with the Supreme Court's basic allocation of burdens and order of presentation of proof in Title VII cases alleging discriminatory treatment, as initially established in *McDonald Douglas*.[85] This Title VII evidentiary framework in turn has provided the legal context in which the statutory whistleblower burdens of proof over which the ARB has jurisdiction were developed,[86] and as such informs our interpretation of the SOX burdens of proof and order of presentation.[87]

As previously noted, the Title VII allocation of burdens of proof and evidentiary framework governed whistleblower cases over which the ARB has jurisdiction until 1992 when Congress amended the ERA to replace the allocation of burdens and order of presentation of proof enunciated in *McDonald Douglas*, *Burdine,* and *Mt. Healthy* with standards intended to make it easier for whistleblowers to prevail in court. Explicit reference in the legislative history of the 1992 ERA amendments to *Mt. Healthy* by the co-sponsors of the amendments[88] demonstrates the legal context in which Congress acted (similar to that in passage of the

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[85] *See Burdine*, 450 U.S. at 252-253; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *accord Mt. Healthy,* 429 U.S. 274. For decades Title VII and this body of law have been interpreted as dictating a sequential consideration of each party's evidentiary proof. *See* Mark R. Bandsuch, *Ten Troubles With Title VII*, 37 CAP. U. L. REV. 965, 967 (2009).

[86] *See, e.g., Dartey,* No. 1982-ERA-002.

[87] As previously noted, *supra* at p. 25, the "contributing factor" and "clear and convincing evidence" burdens of proof and burden-shifting analytical framework SOX and AIR 21 imposed, replaced the *McDonnell Douglas* Title VII burden of proof standards and analytical framework. Even so, the prototypes for the current SOX and AIR 21 burdens of proof, contained in the whistleblower protection provisions of the ERA and the WPA, were drafted against the backdrop of Supreme Court Title VII jurisprudence. As one commentator aptly characterized the 1991 Title VII amendments that partially enshrined the Title VII framework, "the outcome was dictated by the starting position – the test enunciated by the Supreme Court." Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 122 (Oct. 2011).

[88] 138 Cong. Rec. H11,409 (daily ed. Oct. 5, 1992) (statement of Rep. Miller); 138 Cong. Rec. H11,444 (Oct. 5, 1992) (statement of Rep. Ford).

Whistleblower Protection Act) and Congress's intent (as with the WPA) of adopting a modified version of the Title VII legal and evidentiary framework "in order to facilitate relief for employees who have been retaliated against for exercising their [legal] rights"[89] – namely, by lowering a complainant's burden of proving causation and raising an employer's burden of proving a legitimate, non-retaliatory basis for its action.

Commentators generally agree that the creation of the Title VII presumption of discrimination served both to promote the social policies of Title VII as well as account for the fact of the employer's greater access to relevant evidence.[90] Similar justifications informed Congress when it created the statutory burdens of proof upon which SOX is modelled. In whistleblower cases, as in Title VII discrimination cases, evidence is typically in the possession of the employer and direct evidence of retaliation for whistleblowing is rare. As the legislative history of the 1992 ERA amendments demonstrate, Congress unambiguously sought to benefit whistleblowers by altering the existing burdens of proof.[91] Proof by a complainant of the elements of a *prima facie* case of retaliation by a preponderance of the evidence, including proof of "contributing factor" causation, shifts to the employer the burden of proving by "clear and convincing evidence" not only the existence of a legitimate, non-retaliatory basis for the contested personnel action but that the employer would have taken the contested action on that basis alone had the complainant not engaged in protected activity.

CONCLUSION

The ALJ's findings of protected activity and adverse personnel action are supported by the substantial evidence of record and in accord with applicable law, and are therefore **AFFIRMED**. Having concluded that the substantial evidence of record does not support the ALJ's finding that Fannie Mae's decision to terminate Fordham's employment was made prior to her protected activity of April 23-27, 2009, and that the ALJ erred as a matter of law in holding

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89 *Id.*

90 *See e.g.,* Mark A. Schuman *The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S L. LEGAL COMMENT. 67, 83-84 (1993); Miguel Angel Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130, 1159-1160 (1980).

91 Further, as explicitly stated in the WPA and the regulations governing the ERA, the element of "contributing factor" causation may be inferred by proving knowledge and close temporal proximity between the protected activity and the adverse action. These favorable presumptions benefiting the whistleblowing employee are warranted, just as were creation of the Title VII presumptions, by the compelling public policies which inform the respective substantive laws. We agree with Fordham; "Thus, Congress chose extraordinary measures for protecting extraordinary public policies such as averting airliner crashes, nuclear contamination, and financial catastrophes. That extraordinary means includes separating contributing factors from the predominant factors for the employer's decision." Complainant's Rebuttal Brief at 9.

that Fordham failed to prove by a preponderance of the evidence that Fordham's SOX-protected activities, any or all, were a contributing factor in the adverse personnel action taken against her based upon consideration of Fannie Mae's evidence supporting its affirmative defense, the ALJ's Decision and Order is **VACATED** and **REVERSED, IN PART**. Accordingly, the case is **REMANDED** to the ALJ for reconsideration consistent with this Decision and Order of Remand. Should the ALJ find that any or all of Fordham's protected activity was a contributing factor in any or all of the adverse employment actions affirmed by this Decision and Order of Remand, including Fannie Mae's decision placing Fordham on administrative leave and in the subsequent termination of her employment, the ALJ should then determine whether Fannie Mae is nevertheless able to establish by clear and convincing evidence that it would have taken the same adverse personnel action against Fordham in the absence of her protected activity.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Luis A. Corchado, *Administrative Appeals Judge,* concurring in part and dissenting in part:

I agree that a limited remand is necessary, but I write separately to address four issues that I identify below and then more fully explain. First, contrary to the majority decision, I agree with Fannie Mae that the ALJ provided insufficient reasons and bases in finding that protected activity occurred before April 29, 2009. Second, I disagree with the majority's remand of the administrative leave decision. Third, regarding the termination decision, I agree that the ALJ needs to provide additional findings, which the Board could have requested more efficiently if a limited-remand process existed between the ARB and OALJ.

Fourth, and most importantly, I wholeheartedly disagree with the majority's new view that requires the ALJ to ignore essential facts in ultimately deciding *after an evidentiary hearing* whether the complainant proved that her alleged protected activity contributed to her administrative leave and termination of employment. As I explain below, the majority's view contradicts the plain meaning of the phrase "contributory factor" and other plain words in the SOX whistleblower statute and regulations, obfuscates two simple statutory questions, and ultimately violates principles of fundamental fairness. To be entitled to relief, the statute and regulations expressly require that a SOX whistleblower prove her protected activity did, *in fact*, contribute to an employer's unfavorable employment action, that is, it factored into the employer's reasons. Proving that protected activity actually contributed to an unfavorable

employment action establishes that the employer *violated* the SOX whistleblower law. Undoubtedly, the employer will offer a different explanation for the unfavorable employment action and the ALJ must decide which party to believe in deciding whether protected activity had anything to do with the unfavorable employment action. If, and only if, the complainant proves protected activity played some role in the employer's unfavorable actions (that a violation occurred), the employer must pay damages unless it proves with clear and convincing evidence that it would have made the same decision apart from the protected activity. The majority alters the statutory affirmative defense to mean that ALJs cannot consider all the relevant evidence in deciding the question of contributory factor. In my view, by precluding relevant evidence from the causation question, the majority's view will lead to skewed findings of whistleblower violations. I address these points in the order listed.[92]

Protected Activity

On the issue of protected activity, I agree with Fannie Mae that we need more reasons and bases from the ALJ to properly review this issue. Fannie Mae objected to the ALJ's finding of protected activity.[93] The ALJ sufficiently explained the basic proof requirements for protected activity under 18 U.S.C.A. § 1514A(a)(1), that a complainant must have subjectively and objectively reasonably believed that she disclosed information related to violations referenced in the SOX whistleblower statute. But, as Fannie Mae argues, and despite an excellently detailed opinion, the ALJ summarily found that Fordham satisfied the objective reasonableness component and established protected activity. Brief at 12; D. & O. at 116. The majority fails to address Fannie Mae's arguments that the ALJ erred in summarily finding any protected activity. But without reasons and bases, the Board cannot review, much less affirm, the ALJ's decision on the issue of protected activity.[94]

The SOX whistleblower statute identifies various kinds of protected disclosures and filings (or assisting with filings) specifically described in 18 U.S.C.A. § 1514A(a)(1) and 1514A(a)(2), respectively.[95] Subsection 1514A(a)(1) requires reasonable belief, while protected

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92 I disagree with many points made by the majority and so my silence on any particular issue should not be understood as agreement. In my view, the majority unnecessarily addressed and created confusion on significant issues not relevant in this case.

93 Respondents Brief in Opposition to Complainant's Petition for Review, p. 12. *See, e.g., Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir.1974) (appellate court can affirm on any ground supported by the record and discussed in the appellate court briefs).

94 5 U.S.C.A. § 557(c)(ALJ's opinion must "include findings of fact and conclusions of law, with supporting reasons, upon each material issue of fact or law presented on the record."); 29 C.F.R. § 18.57(b)(2010). *See, e.g., Guthrie v. Astrue,* 604 F. Supp. 2d 104, 112 (D.D.C. 2009) (under the Social Security Act); *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2010).

95 In referencing "protected activities on April 23, 26, and 27, 2009," the majority does not expressly account for the different proof standards required under § 1514A(a)(1) and (2) in analyzing

activity under subsection 1514A(a)(2) requires that the filing relate to an "alleged violation" so long as the employer has "any knowledge" of such proceedings. The Board has repeatedly held that "reasonable belief" must be both subjectively and objectively reasonable. Subjective belief means the employee must have actually believed that the conduct she complained of constituted a SOX violation.[96] Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[97]

In this case, given Fordham's level of sophistication with SOX laws, we need more findings to review the ALJ's finding of objective reasonableness for the alleged protected disclosures covered by subsection 1514A(a)(1).[98] Fordham was a certified public accountant, aware of requirements for sufficient internal controls and perhaps even the Public Company Accounting Oversight Board's (PCAOB) standards applicable to SOX regulations,[99] and worked with several companies for approximately nine years focusing on SOX issues before working for Fannie Mae. D. & O. at 5. She began working for Fannie Mae in May 2006 as an IT Technical Risk Specialist in its SOX Technology Department, which was responsible for monitoring, testing and executing Fannie Mae's SOX Technology Management Program. Fordham's assigned work responsibilities included (1) defining test conditions, (2) collecting and tracking evidence from Technical Risk Leads of business groups undergoing testing, (3) responding to quality reviews of external consultants, and (4) engaging in SOX Management testing and remediation. Consequently, in litigating her claim, it may not be enough for her to simply say

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the ALJ's rejection of a causal link between protected activity and the administrative leave and termination of employment. This distinction can make a difference where the ALJ found that Bahr had definitely decided to fire Fordham on April 21, 2009, and Fannie Mae placed her on leave on April 29, 2009. For example, if the alleged protected activities on these dates are "filings" protected under § 1514A(a)(2), then the majority must take into account whether Fannie Mae had "any knowledge" of such filings before April 29, 2009, a factor expressly required under § 1514A(a)(2).

96 *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14-15 (ARB May 25, 2011).

97 *Sylvester,* ARB No. 07-122, slip op. at 15 (quoting *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009).

98 This test does not apply to filings protected under § 1514A(a)(2), which has different requirements. But it is undisputed that the earliest protected activity covered by this subsection occurred after April 24, 2009 (e.g., Fordham's reports to the SEC and OFHEO reports were filed and/or became known to Fannie Mae after April 24, 2009).

99 For example, see the details in Fordham's SEC complaint dated May 19, 2009 (JX 178 - attached Deposition exhibit 1). Regarding the PCAOB, *see* 15 U.S.C.A. § 7201(5)(defines "Board" as the PCAOB), (13)(defines "rules of the Board"), and 15 U.S.C.A. § 7262 (Title I and IV of the SOX, describing the PCAOB and the requirements for sufficient internal controls, including the relevant rules adopted by the PCAOB).

there was "insufficient documentation to support the remediation status of some internal control deficiencies" or that there were "weaknesses" in Control Self-Assessments and process documentation. If the ALJ found that her level of sophistication was very high, she might have to provide more details as to why a similarly situated employee[100] would objectively reasonably believe that her disclosures related to violations of SOX laws or SEC laws, perhaps even identify particular SEC rules she believed were violated. Fordham does not need to prove that she was correct or prove that she explained the basis for her belief in 2008 or 2009, but only that it was objectively reasonable for her to believe that she was engaging in SOX-protected activity.[101] But we must be able to understand the basis upon which the ALJ concluded that Fordham's beliefs were objectively reasonable. I saw no such detailed discussion in the ALJ's summary findings of protected activity.

Involuntary Administrative Leave

The ALJ finds that Bahr was the moving force behind firing Fordham, rejecting protected activity as a cause. Specifically, the ALJ found that Bahr definitely decided on April 21, 2009, to fire Fordham. Implicit in this finding is that Bahr was the force behind removing Fordham from the office. Multiple e-mails and Bahr's and Slaughter's hearing testimony support the ALJ's finding that, throughout April 2009, Bahr was contemplating personnel actions against Fordham and decided on termination on April 21, 2009, and requested such in writing on April 24, 2009; therefore, we cannot disturb this finding even if we have legitimately different views of the evidence. Bahr believed that Fordham would be fired sometime around April 24, 2009. The ALJ found that Bahr turned over the termination decision to Slaughter possibly by April 24 but no later than April 27, 2009. Bahr wanted to terminate Fordham's employment because of performance issues, but Slaughter wanted to focus on attendance problems. It is undisputed that, on April 29, 2009, Slaughter did not terminate Fordham's employment as Bahr requested but did remove Fordham from the office, most likely due to Bahr's push for termination. Slaughter expressly stated that she needed more time to look into the attendance issues. From these findings, we can infer that the ALJ found that Bahr's efforts to seek termination caused Slaughter to at least remove Fordham from the office and that Bahr's actions alone caused Fannie Mae to place the Complainant on administrative leave. Before recommending termination, Bahr did not know of the protected SEC filing that Fordham made on April 23, 2009, or the protected filings thereafter. Logically, then, substantial evidence supports the ALJ's finding that protected

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[100] The ALJ recognized that some Fannie Mae employees may have superior knowledge and experience when he rejected Hall's belief as irrelevant because she was a manager. D. & O. at 116. But the ALJ did not explain why someone with Fordham's knowledge, experience, and education held an objectively reasonable belief that she was reporting violations covered by the SOX whistleblower statute.

[101] *Sylvester,* ARB No. 07-122, slip op. at 15 (citing *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006)).

activity did not contribute to Fannie Mae's decision to remove Complainant from the office and place her on leave on April 29, 2009, given Bahr's substantial efforts to fire Fordham.[102]

Termination

I agree with remanding this case to the ALJ for additional findings and analysis of Fannie Mae's termination decision. The majority sufficiently explains, and I agree, that the record does not support the ALJ's finding that, by April 21 or 24, 2009, Bahr's decision to terminate Fordham's employment was the end of Fannie Mae's decision-making process as to Fordham's employment. This finding directly contradicts the audio recording of April 29, 2009, where Slaughter expressly said that Fordham was not being terminated as of that date and that Slaughter had to do more due diligence into the attendance issues.[103] It is undeniable from the undisputed record evidence and the ALJ's findings that the termination decision was still pending as of April 29, 2009, and that Fannie Mae knew of Fordham's SOX-protected filings by that date. Given the Board's decision, it is appropriate that the ALJ decide if our ruling affects the determination of "no contributory factor" and address the specific factual issues identified in the majority opinion, keeping in mind that the complainant bears the burden of proof on causation even under the majority's unique view of the burdens of proof. Unfortunately, exactly how these questions factor into the majority's model of causation is difficult for me to understand.

In my view, we could more efficiently resolve the need for a few additional fact findings from the ALJ if a process existed for quick and limited remands. We owe it to the public to shorten the time it takes to resolve appeals. Perhaps in the near future, and to reduce the OALJ's work on some remands, the ARB could propose a procedure that relies on an electronic file transfer system with proper certifications, tracking, and security measures that permit the Board to temporarily transfer electronic "possession" of the record and obtain additional findings.[104]

Contributory Factor

Turning to my main objection, I have many reasons to disagree with the majority opinion's fundamental alteration of the "causation" standard and its remand instructions to the ALJ, who found no causal link in this case. It is important to recall that this matter comes to the Board after a full evidentiary hearing and raises questions about the ALJ's decision on the merits, not the order of presentation of evidence during the evidentiary hearing.[105] As I

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[102] For record support on the issue of administrative leave, see D. & O. 97, 103, 105, 108, 125 - 126; JX 81, 115, 116, 126.

[103] JX 177.

[104] Of course, such an electronic file-sharing system would also save labor and expenses within the Department in many areas (printing, copying, repairing copiers, mailing, storage, among others).

[105] This distinction makes irrelevant the cases cited by the majority that focus on the standards pertaining to motions to dismiss and motions for summary judgment (and OSHA investigations).

understand the majority opinion, it requires the ALJ to ultimately decide whether protected activity contributed to Fannie Mae's decision to fire her without considering the reasons Fannie Mae provides for firing her. So, in adjudicating Fordham's accusation that Fannie Mae unlawfully retaliated, the majority prohibits Fordham from arguing that it relied on non-retaliatory reasons for its actions to rebut the accusation of whistleblowing retaliation. More troubling, the majority deems the employer's stated reasons irrelevant to the question of "contributory factor" even if they truly are the sole reasons for firing an employee, and retaliation was not. Under the majority's view, the ALJ can rule that the complainant "proved" contributory factor if, among other ways, an employee simply proves that (1) her employer knew of her protected activity and (2) it fired her shortly after learning of the protected activity. Under the majority's model, even if the employer fired all of its employees on the same day as the SOX-protected employee because of a financial collapse, the employee can "prove" solely through knowledge and timing that protected activity "contributed" to being fired regardless of the financial collapse. Such a finding would be a fiction created by a rigged process and, more importantly, contrary to the law and basic notions of fundamental fairness and logic. It is with this understanding of the majority's opinion that I mention briefly my top reasons for opposing this view, leaving a full discussion for another day.[106]

See, e.g., Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002)(motion to dismiss); *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999)(summary judgment). The discussion about prima facie elements unnecessarily complicates the questions pending before us in this case. Moreover, I disagree with some of the majority's analysis on this point, but my reasons and bases are irrelevant to this case. In Title VII employment discrimination cases, as should be the case here, courts have repeatedly recognized that the question after a trial or hearing is a single question of whether the complainant or plaintiff proved that unlawful discrimination caused an adverse employment action. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)(at trial, the trier of fact decides the ultimate question whether the plaintiff proved that the defendant intentionally discriminated against him); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 347 n.1 (3d Cir.1999)(extensively discussed impropriety of discussing prima facie issues after a trial); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)(providing a thorough example of applying what the whistleblower statutes have required for years: weighing the complainant's version of events against the employer's opposing reasons in determining the question of contributory factor).

[106] The Board has never held that the employer's reasons cannot or should not be considered in deciding whether protected activity contributed to an unfavorable employment action. In fact, this new model directly contradicts what this same ARB panel recently did in *Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022 (ARB Feb. 27, 2013). In *Benninger*, the same Board panel affirmed an ALJ's rejection of causation based on the employer's reasons for firing the employee and expressly ruled that it did not need to review the issue of clear and convincing. *See Benninger*, ARB No. 11-064, slip op at 2, n.3. *See also Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013)(same ARB panel); *Cf. Onysko v. Utah, Dep't of Envtl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004 (ARB Jan. 23, 2013).

1. The Words in the SOX Statute and Regulations

First and most significantly, the majority's paradigm contradicts the straightforward causation requirement that the SOX whistleblower statute imposes on complainants. While acknowledging that its understanding of the contributory factor must begin with the plain language of statute, the majority opinion skips over the words of the statutes.[107] As evidenced by many words, the SOX statute unequivocally requires complainants to prove that protected activity did, in fact, contribute or factor into an employer's unfavorable employment decision. To begin with, section 1514A(a) of the SOX whistleblower statute prohibits covered entities and persons from discharging or otherwise discriminating against an employee "*because of*" the employee's protected activity. 18 U.S.C.A. § 1514(A)(a)(1)(emphasis added)(the "Anti-retaliation Clause"). While courts have long debated whether the statutory phrase "because of" means a "substantial," "motivating," or an essential ("but for") factor, all have recognized that this phrase requires a true causal link.[108] Simply stated, if an unfavorable action occurred because of non-retaliatory reasons and not because of protected activity, the employer did not violate the SOX whistleblower statute.

Aside from the phrase "because of," other simple text in the statute cements the idea that a complainant fails to prove her case if reasons other than protected activity were the cause of the employment action in question. The SOX whistleblower statute provides (through incorporation) that "[t]he Secretary may determine that *a violation* of subsection (a) of this section has *occurred* only if the complainant demonstrates that any [SOX Protected Activity] was a *contributing factor* in the unfavorable personnel action alleged in the complaint." See 42121(b)(2)(B)(iii)(emphasis added)(the "Violation Clause"). Again, the phrase "contributing factor" plainly requires that the protected activity actually "hav[e] a share in bringing about a result," such as an unfavorable employment action.[109] If non-retaliatory factors cause an

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[107] The majority fails to first determine whether any ambiguity exists in the relevant words of the statute and, if so, identify that ambiguity. *See Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 25 (ARB May 25, 2011)(There is no need for interpretation if the statute's meaning is plain and unambiguous). To the contrary, the majority declares that its new view of the whistleblower statute should be "self-evident" in the statute and then it searches high and low for legal support and writes a dozen pages trying to explain this self-evident interpretation. It criticizes the Board's precedent for making unclear what is "clear," while at the same time reaching for a different statutory scheme enforced by a different governing board to interpret the SOX whistleblower statute.

[108] *See, e.g., Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517, 2523 (2013)(In curiously redefining the meaning of "because of" for Title VII retaliation claims, the Court generally stated that "when the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged.")

[109] WEBSTER'S NEW WORLD BASIC DICTIONARY OF AMERICAN ENGLISH (1998), Michael Agnes, Editor-in-Chief, Wiley Publishing, Inc.

unfavorable employment action, but protected activity does not share in causing that action, no SOX whistleblower violation occurs under the whistleblower statute. Next, the term "violation" means the employer broke the law, a conclusion that can be reached only if the employer truly broke the law. The term "occurred" means that an event actually happened, that the "violation" actually happened. Taken together, these terms ("because of," "violation," "occurred," and "contributory factor") require the employee to convince the ALJ that protected activity truly contributed to an unfavorable employment action and that unlawful retaliation really happened. When employers deny that protected activity contributed to the employment actions and provide non-retaliatory reasons, it will be the complainant's burden to convince the ALJ that protected activity contributed in spite of the employer's assertions.

The complainant must prove the "contributory factor" element of her case by a preponderance of the evidence.[110] This standard derives from the word "demonstrate" in the statute.[111] This means that the complainant's supporting evidence must outweigh the evidence offered to rebut the complainant's claim of whistleblower retaliation. The Board's recent discussion of "contributory factor" in *Bobreski* discussed this point:

> To answer that question, where the complainant presents his case by circumstantial evidence, we repeatedly stated that the ALJ must consider "all" the evidence "as a whole" to determine if the protected activity did or did not "contribute." By "all" of the evidence, we mean all the evidence that is relevant to the question of causation. This requires collecting the complainant's evidence on causation, assessing the weight of each piece, and then determining its collective weight. The same must be done with all of the employer's evidence offered to rebut the complainant's claim of contributory factor. For the complainant to prove contributory factor before the ALJ, all of his circumstantial evidence weighed together against the defendant's countervailing evidence must not only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action. Because contributory factor permits unlawful retaliatory reasons to co-exist with lawful reasons, a

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110 The "contributory factor" concept and the "preponderance of the evidence" are entirely different concepts, apples and oranges. The first concept describes how thin the "causation link" can be between protected activity and the unfavorable employment action; the second pertains to the weight of the evidence presented for and against the very existence of a causal link.

111 *See Dysert v. U.S. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997)(affirming the Secretary's interpretation of the word "demonstrate" as requiring proof by a preponderance of the evidence).

> complainant does not need to prove that lawful reasons were pretext.[112]

After the parties present all of their evidence supporting their versions of the events, then the ALJ must decide which version to believe. Unlawful retaliation cannot be found until the ALJ decides whether he or she believes the complainant's version or the employer's version of the causes of the unfavorable action, that is, whether protected activity reasons or non-retaliatory reasons or both led to the unfavorable action. If the ALJ believes the employer's version, that only non-retaliatory reasons caused the unfavorable employment action, the complainant loses under the Violation Clause. Consequently, the employer's stated explanations for the challenged employment actions form an essential part of deciding causation under the Violation Clause.

As I see it, the majority misunderstands the Congressional intent for lowering the causation standard from "but for" (essential cause) and "motivating factor" (or significant) cause to "contributory factor." By choosing "contributory factor," Congress only re-defined how strong the causal link must be between protected activity and the unfavorable employment action, but it did not eliminate the need to prove a causal link based on all the evidence. Perhaps, it may help to use an analogy of an employer rolling a boulder of employment discipline in a race toward a finish line while the crowd watches on the sidelines. An observer wearing a protected-activity hat steps out of the crowd and helps the employer push the boulder. The amount of help the observer provides can correlate to the different definitions of causation ("but for," "motivating factor," and "contributory factor"). In a "but for" causation case, the observer's help must be so significant that the boulder would not have made it to the finish line without his help.[113] In "motivating factor" case, the observer's help must be substantial and perhaps noticeable but not necessary for the boulder to reach the finish line. In "contributory factor" cases, it is enough that the observer put his hands on the boulder and pushed, regardless of how much. If the observer (the protected activity) never stepped out of the crowd but only stood by with the employer's knowledge, there is no causal link at all between the observer's hands and the rolling boulder. Similarly, in whistleblower cases, protected activity might have temporal proximity with an unfavorable employment action, and the employer may know of the protected activity, but the complainant must prove (convince the ALJ) that it actually contributed to the employment action, viewing the record as a whole.

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[112] *Bobreski*, ARB No. 13-001, slip op. at 16-17. *Bobreski* was a nuclear safety case but the ERA whistleblower statute includes the same critical words in its statute in a similar manner as AIR 21 ("because of," "contributory factor," "violation," "occurred").

[113] *See, e.g., Nassar*, 133 S. Ct. at 2525 (in essence stating that "but for" causation means that the harm would not have occurred in the absence of the discrimination).

2. The "Clear and Convincing" clause creates an Affirmative Defense

Again, from my view, it seems the majority also misunderstands the purpose of a "clear and convincing" clause. As previously discussed, Congress placed the "contributory factor" phrase in the Violation Clause (49 U.S.C.A. § 42121(b)(2)(B)(iii)), while placing the "clear and convincing" phrase in the "Relief Clause" (49 U.S.C.A. § 42121(b)(2)(B)(iv)). This violation/relief model in the AIR 21 whistleblower statute is not new but merely parallels the long established principle[114] that the complainant (or plaintiff in court cases) must always prove a violation first, but the employer could avoid paying damages by proving the affirmative "same decision" defense. With respect to the violation question, the employer's non-retaliatory reasons serve as rebuttal to the accusation of being a violator of whistleblower laws. For the clear and convincing question, the employer must prove that its non-retaliatory reasons are so strong that it would have made the same decision even if it violated the whistleblower laws. In the majority's model, the statute makes no sense because the majority would delay consideration of the employer's allegedly lawful reasons until the "clear and convincing" phase (the "relief" phase) where it is too late for the employer to prevent being labeled a violator. Moreover, under the majority's model, the employer is subjected to a high burden of proof even where its non-retaliatory reasons may have been the true and sole reasons for the unfavorable employment action. This is simply unfair.

3. Other problems with the Majority's View

The majority's view contravenes other important principles in whistleblower litigation. Briefly, those are:

a. The majority's view effectively flips the burdens of proof. In other words, under the majority's view, the employer will now always have the burden of proving that it had legitimate reasons and prove by clear and convincing evidence that it would have suspended or fired the employee. Under existing law, employees maintain the burden of proving a violation and employers could rebut the complainant's case with its legitimate reasons. The "same decision" affirmative defense was optional.

b. Fundamental fairness requires that the factfinder consider both the employee's version and the employer's version of events before deciding that an employer violated whistleblower laws. It seems universally accepted that there are always two sides to every story.

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[114] *See, e.g., NLRB v. Transp. Corp.*, 462 U.S. 393, 403 (1983)(employee proved unfair labor practice and so employer bore the burden of proving the "same decision" defense); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)(Court remanded to permit the employer to prove "same decision" defense after employee proved a violation). This model parallels the model Congress adopted in Sections 107(a) and (b) in the Civil Rights Act of 1991, providing that an employee must first prove a violation and then the employer may avoid paying damages if it proves it would have made the same decision in the absence of the unlawful discrimination. *See* 42 U.S.C.A. § 2000e-2, e-5.

c. The majority's view will fundamentally alter whistleblower proceedings after the ALJs fully understand the majority's view and if the majority's view is adopted by a majority of the Board. ALJs may begin holding pretrial conferences to determine whether the hearing should skip directly to the employer's side of the case. For example, if the employer acknowledges that (1) there was protected activity, (2) it knew of the protected activity before acting against the employee, and (3) there was close temporal proximity between its action and the protected activity, then the ALJ can find "contributory factor" as a matter of law and proceed directly to the employer's side of the case to address the "clear and convincing" question.

Consequently, in Fordham's case, I do not understand why the majority is remanding the question of contributory factor. Certainly, by April 27, 2009, Fordham engaged in protected activity when she submitted a written complaint to the SEC alleging SOX violations, a fact that Fannie Mae learned no later than April 29, 2009. Therefore, there is close temporal proximity and knowledge. I do not understand what else is missing under the majority's model for the majority to find that Fannie Mae violated the SOX whistleblower statute.

4. The Majority's Reliance on the WPA

The WPA

Not surprisingly, after settling upon a new understanding of the terms "contributory factor" and the "clear and convincing" affirmative defense, the majority finds no support for its view in the SOX or AIR 21 statutes or implementing regulations, the legislative history for these statutes and regulations or even in ARB precedent.[115] That should have been the end of the matter. But the majority turned to the ERA and still found no support for its new view. Ultimately, the majority turned to the federal employment Whistleblower Protection Act of 1989 (WPA) and incorrectly claimed that the WPA supported its view and asserts that the WPA served as the impetus to the ERA-SOX-AIR 21 laws.[116]

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[115] I disagree with much of the majority's criticism of ARB precedent, including its criticism of the *Brune* decision, saying that it "only served to confuse what otherwise appeared straightforward." I reserve further discussion of this point for another day. I agree that the *McDonnell Douglas* framework is unnecessarily confusing and that it does not entirely correlate to SOX whistleblower cases as we have explained in prior decisions. But the majority's view only further complicates the ALJ's role after a hearing, committing the same error the U.S. Supreme Court warned about: complicating the single question of causation by applying rules that should only govern the presentation of evidence. *See St. Mary's Honor Ctr.*, 509 U.S. at 524.

[116] To focus only on the WPA oversimplifies the complex civil rights landscape that existed immediately after Congress adopted the WPA in 1989. In 1989, the U.S. Supreme Court decided five notoriously controversial civil rights cases: *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989)(discussing "same decision" defense in mixed motive cases); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Techns., Inc.*, 490 U.S. 900 (1989); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In 1990, Congress passed a Civil Rights Act that was vetoed by President Bush. In 1991, the U.S. Supreme issued two more controversial civil rights decisions: *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227

For many reasons, aside from being an entirely different statute serving a different purpose under the jurisdiction of another board, the WPA does not justify fundamentally altering the statutory burdens of proof in SOX/AIR 21 whistleblower law. First, a plain reading of the WPA reveals no requirement that the ALJ should ignore relevant evidence, like the employer's explanation for its actions, in deciding the question of contributory factor. Nor do the 1994 amendments to the WPA (the Amended WPA) support the majority's view. The Amended WPA expressly provides that knowledge and timing "may" (not "shall") show contributory factor.[117] Nowhere does it dictate that the employer's reasons should be ignored. The MSPB cases interpreting the Amended WPA are not binding on the Board's enforcement of the SOX whistleblower law. I do not wish to criticize the manner in which the MSPB interprets the laws passed to protect federal workers in their employment, but the MSPB cases cited by the majority do not and cannot point to any statutory provision expressly requiring that an ALJ ignore the employer's reasons.

Second, legislative history demonstrates that Congress did not intend to conform the ERA whistleblower to the MSPB laws. When it amended the WPA in 1994, it did not amend the ERA to conform to the language in the Amended WPA and to this day has not amended the ERA for that purpose. Congress has never included the 1994 WPA language in any of the many whistleblower laws and amendments to whistleblower laws it passed after 1994 and under the Board's jurisdiction (AIR 21, SOX, STAA amendments, and Pipeline Safety Improvement Act of 2002, among others).

In the end, the majority's view of causation contradicts the plain meaning of the SOX and AIR 21 statutes and their implementing regulations. It is not supported by Board precedent. It is not even supported by the WPA or amended WPA. Lastly, it is simply unfair.

LUIS A. CORCHADO
Administrative Appeals Judge

(1991); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991). These cases provided the backdrop for the Civil Rights Act of 1991 that was signed by the President. After all of this, in the next year, Congress amended the ERA to define causation as "contributory factor."

117 5 U.S.C.A. §§ 1221(e)(1), (2).

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ARB CASE NAME: ***Edna D. Fordham v. Fannie Mae***

ARB CASE NO. : **12-061**

ALJ CASE NO. : **2010-SOX-051**

DOCUMENT : **ORDER**

A copy of the attached document was sent to the following parties on

OCT - 9 2014.

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