UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

ROBERT POWERS,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

ARB CASE NO. 13-034

ALJ CASE NO. 2010-FRS-030

BRIEF OF *AMICUS CURIAE* EDNA FORDHAM

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I. INTERESTS OF *AMICUS CURIAE*

Ms. Edna Fordham has more direct, personal and professional interest in this case than any person in the United States, with the single exception of Mr. Robert Powers.

II. SUMMARY OF THE ARGUMENT: THE ARB AS AN INSTURMENTALITY OF A POLITICAL BRANCH OF GOVERNMENT

Fordham v. Fannie Mae, ARB Case No. 12-061, ALJ Case No. 2010-SOX-051 (October 9, 2014) is the appropriate rule of decision to apply in the resolution of the present case as to contributing factor analysis. This is so not just as matter of the correct statutory interpretation. It is also true because the *Powers* decision by the ALJ shows how muddled decisions in the field have become on contributing factor analysis— i.e., in cases before rank and file administrative law judges.[1] Perhaps most importantly, the *Fordham* rule of decision should apply to the present case as a matter of public and jurisprudential policy for the Administrative Review Board (ARB) and its individual members. The *Fordham* majority and the dissent differ in their jurisprudence based primarily upon the legal and social values each probably held on the day of his or her appointment to the ARB. A just decision and a cogent rule of law will be hard to achieve if all ARB judges are not cognizant of, and alert to, these personal and ideological values that inform their decisions. While these can be ascertained even in the unanimous decisions they write or join, dissent opinions, and majority commentary on the dissent opinion, provide a more

[1] Throughout Judge Berlin's discussion of contributing factor analysis, he continuously comingles the employer's evidence justifying its adverse decisions against Mr. Powers with it evidence rebutting contributing factor. Indeed, the reader has to spend considerable time trying to identify, much less disentangle, where the discussion of contributing factor begins or ends. This is the kind of confusion the ARB majority in *Fordham* was trying to resolve with a more bright line formulaic approach.

transparent body of data to analyze. The language of the dissent in *Fordham* makes the task of ascertaining these value predispositions particularly easy.

All judges on the ARB were appointed based on the understanding of the Administration of President Barack Obama that when applicable Acts of Congress might not be clear on an important issue or precedent, then the appointee's individual values and ideology would likely be the decisive factor. President Obama's Secretary of Labor certainly expected that each new ARB appointee would distinguish himself or herself from the more conservative decisions of their predecessors from the Bush Administration's ARB.[2] More importantly, the jurisprudential legacy of the current ARB and its individual judges will be measured by a handful of seminal and precedential decisions, of which *Fordham* will be one.

Fordham should be re-affirmed in the present case so that the current ARB's legacy will be both worthy and credible. The often heard rejoinders of judges that they are "merely following and applying the law" has been empirically disproven by studies of judicial behavior in the "close case" i.e., one where there has been a dissent and/or the legal rules of decision are novel or unclear by reference to the statutory text alone. As the reported findings published in

[2] To disregard the political aspects of ARB judge appointments on its case law would be disingenuous. Indeed, the regulations allow an incoming Secretary of Labor to clear out incumbent offices to fill them with appointees more ideologically aligned with the new Administration. ARB judges are members of the Executive Branch, the political branches, not the judiciary. While they should be fair and objective in exercising their quasi-judicial powers, and be loyal to the statutes they apply, they are not vetted through an Article III selection or confirmation process. Certainly, there can be no member of the current ARB who doubts that an incoming Republican administration will act decisively to adopt a more conservative and employer-friendly jurisprudence, to the full extent that the courts of appeal may allow precedent to be overruled or modified. As a body, the current ARB should be evolving an enduring body of jurisprudence that promotes whistleblower protection with liberal construction of whistleblower statutes.

Farnsworth, W, "*The Role of Law in Close Cases*", Boston Univ. L. R., Vol. 86:1083 (2006)[3]

demonstrate: .

> There may be occasional exceptions, but the implication over the long run of decisions seems the same for both types of courts: in close cases – cases close enough to provoke dissent – judges appear to seek guidance from the same place regardless of the source of law involved. Exactly what that same place is might be debated, *but it likely involves some feature of the judges' own beliefs or values*: how they weigh the competing interests of accuracy and finality; or how they weigh the risks of guilty people going free and innocent people being imprisoned; or how they assess various empirical probabilities – that a jury will faithfully follow its instructions***. Theories of constitutional interpretation, such as originalism, may explain why a judge would vote for the government much more or less often than for defendants in constitutional cases. *But there is no comparable theory to explain such lopsided results in cases involving statutes and rules* – or to explain why the results in constitutional and nonconstitutional situations, even if each were based on a coherent interpretive theory, would end up being so similar.

Id at 1088, emphasis added. It takes a judge with considerable self-awareness and candor to acknowledge that his or her own predispositions are often as important as the text of the law.[4]

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[3] Professor of Law and Nancy Barton Scholar, Boston University. This Article is adapted from a talk given on April 21, 2006, at a symposium sponsored by the Boston University School of Law on "The Role of the Judge in the Twenty-First Century."

[4] As Professor Farnsworth notes, with input and review by Richard Posner himself:

> Judge Posner's recent account of how he decides cases helps explain the data presented here:
>
> > The way I approach a case as a judge . . . is first to ask myself what would be a reasonable, sensible result, as a lay person would understand it, and then, having answered that question, to ask whether that result is blocked by clear constitutional or statutory text, governing precedent, or any other conventional limitation on judicial discretion.
>
> This is a complete explanation of why Posner's numbers on the graph are fairly close together; for in nonunanimous cases of any kind, constitutional or not, *there usually will be no impediment to his wish to vote for the result he thinks sensible* (the lack of unanimity suggests that the legal materials plausibly can be viewed as consistent with either side's

The collective political and ideological perspectives of its individual members, therefore, determine how a particular court will be regarded and remembered, and how long lasting its jurisprudence may remain relevant. As Professor Farnsworth concluded:

> The resulting conjecture, then, is not that judging is mostly political. Much of the time it is not, as in the usual, unanimous appellate cases where everyone can agree that the expression of whatever policy preferences the judges may have is, as Posner puts it, "blocked" by text, precedent, or other conventional limits. The view I offer is slightly different. *When the legal materials bearing on a case are flexible enough to comfortably admit of more than one reading, the choice between those readings tends to be made according to beliefs the judges bring to the case that don't owe much to law.* The most important traits of most judges may well be their similarities – their ability to agree so often; but the most important *differences* between them tend to be their views about human behavior or about questions of policy.

Id at 1095, emphasis added.

The individual beliefs of ARB judges who determine this case, and the future of *Fordham,* will be those regarding the role and importance of whistleblowers, the autonomy of employers in an "at will" employment regime, and his or her inclinations to apply liberal constructions to reform legislation. As a distinct judicial body constituted by judges appointed by the Obama Administration, the expectation should be that protection of whistleblowers is paramount; whistleblower statutes are intended to be exceptions to the harshness of at will doctrines, and reform legislation is to be given liberal interpretation. By those standards, any "close questions" presented by *Fordham*, and of reconciling the *Fordham* dissent to the majority

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> position). *And since Posner's views about what result is sensible are matters of policy rather than law*, they will tend not to vary between cases where the disputed source of law is different. The question is whether Posner's account also is a good description of what most other judges do, consciously or not. The data here suggest that it may well be.

Id at 1095, emphasis added.

opinion, should result in the reaffirmance of the contributing factor approach adopted by Judges Royce and Brown. *Fordham v. Fannie Mae* should take its place with cases like *Sylvester v. Parexel Int'l* in realizing the Board's legacy.

III. SUMMARY OF WHAT THE *FORDHAM* DECISION IS AND IS NOT ABOUT

On October 9, 2014, *amicus* Edna Fordham won a precedent setting victory in an administrative appeals court, the Department of Labor's Administrative Review Board. In the ARB's precedential decision, all three judges ruled that the trial judge committed error requiring a remand in concluding that Ms. Fordham, a former CPA at Fannie Mae, had not proven that her complaints to the Securities Exchange Commission and federal housing officials played *any role whatsoever* in her firing. Two of the three judges viewed whistleblower protections, as applied by the ALJ in that case and others, as not in keeping with the objectives of reform legislation under the Sarbanes Oxley Act. The majority concluded that a new "rule of decision" needed to be articulated to bring accuracy and uniformity to the divergent and muddled contributing factor analysis being seen in cases coming before the ARB from ALJs below. The third judge agreed that the ALJ in Ms. Fordham's case had erred, but dissented from the new approach adopted by the majority. Unless overruled, the new *Fordham* rule will be that employers are allowed to present only limited kinds of evidence when denying that the whistleblowing played any role in the adverse action against employees. By following the strictures of *Fordham*, ALJ's will be better equipped to author cogent and consistent decisions as to the contributing factor element in whistleblower cases.

IV. A SOBER PERSPECTIVE ON THE FACTS IN *FORDHAM* SHOWS WHY THE ARB MAJORITY HAD TO RULE AS IT DID

Edna Fordham began working for Fannie Mae in May 2006 as an IT Technical Risk Specialist in its fraud prevention Sarbanes Oxley ("SOX") Technology Department. Fordham's assigned work included quality reviews of external consultants, and SOX Management testing and remediation. On April 23, 2009, Ms. Fordham reported that Fannie Mae had "severe information gaps", and lacked the necessary documentation to show it was remediating the woefully inadequate financial internal controls that had effectively bankrupted the housing mortgage behemoth, thus causing it to be placed under federal receivership. Ms. Fordham submitted reports showing that Fannie Mae's internal controls methodology could not be shown to be functioning reliably, which in turn could have a direct impact on Fannie Mae's financial reporting of how healthy or ill the publicly funded organization actually was. Believing that Fannie Mae was covering-up her findings, Ms. Fordham faxed her concerns and disclosures to the Securities and Exchange Commission and to the Federal Housing Finance Agency, the latter being charged with insuring that taxpayer dollars are being effectively spent. She alleged that from the evidence she had reviewed, Fannie Mae was deliberately withholding critical information from regulators, as well as its own board of directors, about the state of its internal financial reporting systems.

On April 27, 2009, Ms. Fordham notified Fannie Mae officials of her disclosures to these government regulators. *Two days later*, Fannie Mae informed her that they were considering terminating her employment based on time and attendance claims against her, and that during the investigation of her, she would be denied access to the workplace and placed on involuntary paid administrative leave. After almost two months of administrative leave in which she was given

no work to perform, she received a letter of termination stating that Fannie Mae "had determined to terminate your employment based upon your unacceptable performance, conduct, and attendance issues." *Fordham, id at* 8.

V. THE ALJ'S CONTIBUTING FACTOR ANALYSIS WAS NOT *SUI GENERIS*, BUT REFLECTED A FREE-FOR-ALL OF GROSSLY DIVERGENT APPLICATIONS OF THAT FACTOR WITHIN THE OFFICE OF ADMINISTRATIVE LAW JUDGES

Despite the fact that Fannie Mae whisked Ms. Fordham out of the workplace within 48 hours of learning of her disclosures to federal securities and housing officials, the trial judge ruled that there was insufficient evidence to show any connection of her whistleblowing to either the involuntary administrative leave or the firing. The trial judge found that although Fannie Mae managers were aware of Ms. Fordham's whistleblowing, it was "more likely than not" (i.e., a preponderance of the evidence) that the adverse actions against her were motivated by legitimate concerns over her job performance and attendance. The trial judge rejected Ms. Fordham's arguments that the Sarbanes Oxley whistleblower statute does not allow the employer's evidence as to the reason for a firing to be weighed on a simple preponderance of the evidence, regardless of at what stage that analysis is being deployed. Ms. Fordham argued that Congress had found such a low evidentiary burden on employers to be incompatible with public policy promoting protection of stockholders, just as it is with statutes protecting against dangers in the nuclear, aviation and petrochemical industries. These protections for whistleblowers, Ms. Fordham contended, apply equally to private and public sector employees, as with civil servants under Merit System Protection Board (MSPB) jurisdiction. Because the trial judge's ruling deprived Ms. Fordham of her rights, and presented a significant risk to the viability of whistleblower protection laws, she petitioned the ARB for review.

VI. THE MAJORITY ADOPTED A CLEAR RULE OF LAW TO BRING CLARITY AND UNIFORMITY TO THE CHRONIC CONTRIBUTING FACTOR MISPPLICATION WITHIN THE OALJ.

Two of the judges, Joanne Royce and Cooper Brown, agreed with Ms. Fordham's clarion call for significant legal reform to arrest the growing practice of trial judges in either misapplying or ignoring the statutory whistleblower protections that the Government Accountability Project (GAP), the Project on Government Oversight (POGO), and their legislative coalition, have worked hard to achieve in Congress for the past three decades. GAP's founders, Tom Devine and Louis Clark, no less than Thurgood Marshall in combating racial discrimination, have dedicated their careers to prompting Congress to achieve sophisticated, if not unlikely, *bipartisan* successes in condemning the American scourge of whistleblower retaliation. The key to this success was replacement of the old Title VII *McDonnell Douglas* "preponderance of the evidence" standard, a burden of proof which always remains with the employee, with a more modern and protective standard imposing a burden of proof shift requiring employers to disprove retaliation by "clear and convincing evidence". That is, statutes such as the Sarbanes Oxley Act and the Energy Reorganization Act deliberately and pointedly raise the bar for employers winning in two ways: (1) they impose a complete shifting of the burden of proof *away from the employee* to the employer; and (2) they measures the employer'ss success in carrying that burden by an enhanced evidentiary requirement of clear and convincing evidence. Under this reform legislation, once a whistleblower shows that her disclosures of illegality, threats to public safety, or other wrongdoing contributed to the adverse actions against her, the employer must disprove retaliatory intent by clear and convincing evidence. This also means that, just as in Ms. Fordham's case, if a whistleblower is fired or removed from the

workplace within hours or days of her reports of wrongdoing to regulators or company officials, the employer must present compelling evidence that the whistleblowing and adverse actions were mere coincidence or otherwise completely unconnected.

The perpetuation of this legislative success through a succession of new and amended whistleblower statutes was empirically based, through citation to the increasing incidences of trial judges ignoring, often through perverse semantic gymnastics, the reform prescription mandating a shift in the burden of proof and clear and convincing evidence in evaluating employer actions.[5] Judges having personal values favoring employers, or having antipathy for whistleblowers, have shown considerable ingenuity in applying a preponderance of the evidence measure to employer claims of "coincidence" as the cause of the whistleblowers' careers being destroyed soon after they made their disclosures. Other judges have thwarted the reform prescriptions by simply not knowing what they are doing, and the lack of clear guidance from the ARB has been an unfortunate contributing factor to that misapplication of the legislation.

Thus, Judges Royce and Brown decided to act as Congress expected, noting:

> 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 an [employee'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 [the employee] has met his or her initial burden of proof.

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[5] In the Whistleblower Protection Act (WPA) legislation applicable to the federal civil service, for example, Congress was forced to repeatedly amend the statute to respond to the ongoing hostility of MSPB and federal circuit judges to the WPA. Each amendment would contain a long list of cases that were being "legislatively reversed" because of creative artifices such as "irrefragable proof", and semantic gymnastics around whether "any disclosure" meant any disclosure. It would be preposterous, if not dishonest, to suggest that the hostility of these Article III and MSPB judges did not result from their personal and political ideologies.

Fordham v. Fannie Mae, id. at 16. To align both trial judges and previous ARB decisions with the new regime that a *bipartisan* Congress has repeatedly tried to establish, the majority adopted Ms. Fordham's proposed "rule of decision", holding as follows:

> The determination whether an [employee] 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 [employee], in disregard of any evidence submitted by the [employer] in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the [employee] meet his or her evidentiary burden of proving "contributing factor" causation, the [employer'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 [employer] is liable for violation of SOX's whistleblower protection provisions.

Id at 3. The majority found that to hold otherwise will continue to allow employers to dodge the evidentiary scales Congress has put in place:

> 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 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. *** An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action.

Id at 21-22. The question now is whether the present case can be used as a vehicle to preserve the *status quo ante*, and keep whistleblowers subjected to the stream of erroneous ALJ decisions that flow at a rate the ARB cannot effectively address by *ad hoc* rulings on a case-by-case basis.

VII. THE DISSENT VIEW IN *FORDHAM* PROMOTES THE HISTORICAL IMBALANCE IN THE LAW THAT FAVOR EMPLOYERS

Victories in Congress for protecting whistleblowers and the public have been historically resisted by many, if not most, judicial and administrative judges, notwithstanding that those victories were won through bipartisan legislative campaigns and votes. Thus, it is particularly

disappointing that there was any dissent from the *Fordham* majority opinion, and Congress' reform agenda. The dissent erroneously labels the majority's clarification of the law as unnecessary, unsupported by the law, and most troubling, "simply unfair" to employers. *Fordham v. Fannie Mae, id* at 45. As to the majority's decision in trying to get trial judges to better understand and apply the whistleblower protections repeatedly enacted by both Republicans and Democrats in near unanimous voting, Judge Corchado erroneously contends not only that the majority "misunderstands the Congressional intent", *id at* 44, but has ignored what the dissent calls the "universally accepted" rule that "there are always two sides to every story". *Id at* 45.

In the dissent's overtly employer-friendly formulation of the law, the majority failed to give sufficient lip service to the employer's right to tell its "side of the story". Yet when it came to the employer's claims of coincidence, or illusory connections, with the fact that the employee was fired *just hours or days after blowing the whistle*, the dissent was tone deaf to the points stressed by Judges Royce and Brown:

> To be clear, our ruling does not preclude *** consideration, under the preponderance of the evidence test, of [an employer's] evidence directed at three of the four basic elements required to be proven by a whistleblower [employee] in order to prevail, *i.e.* [1] whether the [employee] engaged in protected activity, [2] whether the employer knew that [the employee] engaged in the protected activity, and [3] whether the [employee] suffered an unfavorable personnel action. *** It is only with regard to the fourth element, of [4] whether the [employee's] protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn. As discussed, *** the employer's evidence supporting its affirmative defense of a legitimate, non-retaliatory basis or reason for its action is not weighed against the [employee'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.

Id at 33, n. 84. The majority decision reiterated repeatedly that while the employer's side of the story must be fairly considered, Congress intentionally weighted the balancing of the scales to favor whistleblowers in trying to protect the public's health, safety and financial security. Unprotected whistleblowers equates with an unprotected public in stock markets, living near nuclear power facilities, and strapped into airliners. Congress did this by requiring the employee to prove only that it is more likely than not that her whistleblowing was at least partially held against her, and that if the employee could prove that, then the employer would need very compelling evidence to show that the firing was justified by legitimate reasons. This is simply legislative risk management.

However, undaunted by the majority's efforts to explain why ALJ application of the causation element is in need of clarification, the dissent persisted in trying to make whistleblower cases easier and less burdensome for employers to win:

> 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.

Id at 45. Yet, nothing in the statute indicates Congress had any such elevated concern with litigation convenience for employers. Ironically, in an area of law in which statistically *employers almost always win and whistleblowers almost always lose* (or are forced to accept anemic settlements), the dissent predicted that the majority's legal reforms would effectively *rig the system against employers*. The dissent lamented:

> [Trial judges] 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.

Id at 46. The dissent's heightened, if implausible concern with the rights of employers is exactly the opposite of what Congress intended with its reform whistleblower legislation. Under these new laws, the heightened concern is to protect whistleblowers, not corporations and institutions having a history of sacrificing the public good in favor profits and executive advancement.

VIII. CONCLUSION

The dissenting opinion in *Fordham* put out the call for *amicus* briefs by industry in the present case in order to prevent the majority's clarification of the causation standard from becoming ARB legal doctrine. Indeed, the dissent was not subtle in sounding the alarm on behalf of employers when it warned in the dissent opinion: "The majority's view will fundamentally alter whistleblower proceedings after the [trial judges] fully understand the majority's view *and if the majority's view is adopted by a majority of the Board.*" *Id at* 46. By this *amicus*, Edna Fordham continues her vigorous advocacy for whistleblowers like herself, to protect the gains that are hard to come by in any body of judges charged with protecting the small shareholder, the flying public and democratically adopted reforms. *Fordham v. Fannie Mae* should be soundly and unapologetically reaffirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of *Amici Curiae* was served by regular mail on the following persons on this 17th day of December, 2014:

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