ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ROBERT POWERS,	*	
Complainant,	*	
v.	*	ARB Case No. 13-034
UNION PACIFIC RAILROAD COMPANY,	*	ALJ Case No. 2010-FRS-030
Respondent.	*	

BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

INTRODUCTION

Pursuant to 29 C.F.R. § 1982.108(a)(1) and the October 17, 2014 Order of the Administrative Review Board ("ARB" or "Board"), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae in response to the Board's invitation to address the contributing factor causation analysis set forth in *Fordham v. Fannie Mae*, ARB Case No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014).

The Board has invited the Assistant Secretary's views on whether the majority in *Fordham* correctly held that, under the burdens of proof set forth in the

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b), the determination of whether a complainant has met his or her burden of proving that protected activity was a contributing factor in the adverse employment action must be made solely based on the evidence submitted by the complainant, 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. *See Fordham*, 2014 WL 5511070, at *1.[1] According to the *Fordham* majority, if the complainant satisfies his or her burden of proving contributing factor causation, the burden then shifts to the employer to prove by clear and convincing evidence that it would have taken the same action for legitimate, non-discriminatory reasons, and the employer's reasons

[1] The whistleblower provisions of numerous statutes administered by the Department of Labor expressly incorporate or reflect AIR 21's statutory burdens of proof; these statutes are referred to herein as the "Department's contributing factor statutes." *See* Section 1558 of the Affordable Care Act, 29 U.S.C. § 218C; Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567; Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; Energy Reorganization Act (ERA), 42 U.S.C. § 5851; Section 402 of the FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Federal Railroad Safety Act (FRSA or the Act), 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; National Transit Systems Security Act, 6 U.S.C. § 1142; Pipeline Safety Improvement Act, 49 U.S.C. § 60129; Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A; Seaman's Protection Act, 46 U.S.C. § 2114; and Surface Transportation Assistance Act, 49 U.S.C. § 31105. This brief focuses primarily on AIR 21 and FRSA because those laws are specifically at issue in this case, but the arguments set forth herein apply to all of the Department's contributing factor statutes.

for taking the adverse action may be considered only at this affirmative defense stage. *Id.*

OSHA implements and enforces the Department's contributing factor statutes, and processes more than 1,000 cases under the contributing factor statutes annually.[2] The Assistant Secretary thus has a significant interest in the interpretation of those statutes. The Assistant Secretary urges the Board to reaffirm the *Fordham* majority's conclusion that the contributing factor standard is a forgiving burden for employees who need only demonstrate that protected activity contributed in any way to the adverse action in order to prove a statutory violation. However, the Assistant Secretary respectfully requests that the Board reverse the *Fordham* majority's holding that an employer's causation evidence may not be considered by an administrative law judge (ALJ) in determining whether the contributing factor standard has been met. For the reasons discussed below, the statutory text, legislative history, and case law under the Department's contributing factor statutes indicate that all relevant evidence should be considered by ALJs in deciding whether protected activity contributed to an adverse action.

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[2] *See* OSHA Whistleblower Investigation Data, Table of Cases Completed for FY 2012, 2013, and 2014, *available at* http://www.whistleblowers.gov/whistleblower/wb_data_FY05-14.pdf.

STATEMENT

A. Statutory and Regulatory Background

The anti-retaliation provisions of FRSA prohibit railroad carriers from discharging or in any other way discriminating against an employee if such discrimination is "due, in whole or in part," to the employee's protected activity under the Act. 49 U.S.C. § 20109(a); *see* 29 C.F.R. § 1982.100(a). An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Secretary of Labor. *See* 49 U.S.C. § 20109(d); 29 C.F.R. § 1982.103.[3] As previously noted, FRSA proceedings are governed by the rules and procedures, as well as the burdens of proof, set forth in AIR 21, 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2).

1. *Investigation stage:* Under AIR 21's procedures, OSHA will commence an investigation if a complaint, supplemented as appropriate by interviews of the complainant, alleges the existence of facts and evidence to make a "prima facie showing" that (1) the employee engaged in protected activity, (2) the employer had knowledge of the protected activity, (3) the employee suffered an adverse action, and (4) the "circumstances were sufficient to raise the inference that the protected

[3] The Secretary has delegated responsibility for receiving and investigating FRSA whistleblower complaints to OSHA. *See* Sec'y of Labor's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. § 1982.104.

activity . . . was a contributing factor in the adverse action." 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. §§ 1982.104(e)(1)-(3); *see Evans v. EPA*, ARB Case No. 08-059, 2012 WL 3255132, at *5 (ARB July 31, 2012) (describing OSHA's standards for docketing complaints and issuing findings). Even if the complainant makes such a showing, however, OSHA cannot investigate and must dismiss the complaint if the employer establishes by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.104(e)(4).

After investigating, OSHA must issue a determination either dismissing the complaint or finding "reasonable cause to believe that a violation" of FRSA has occurred and ordering appropriate relief. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.105(a)(1). Either the complainant or the respondent may file objections to OSHA's determination with an ALJ. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.106.

2. *ALJ hearing stage:* After conducting an evidentiary hearing, the ALJ must issue a decision that is "based upon the whole record." 29 C.F.R. § 18.57(b). The ALJ may determine that a violation of FRSA has occurred only if the complainant has demonstrated by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. §

42121(b)(2)(B)(iii); 29 C.F.R. § 1982.109(a). Even if the complainant satisfies this burden, the ALJ may not order relief if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b).

B. The *Fordham* Decision

On October 9, 2014, a majority panel of the ARB issued a decision in a SOX case addressing AIR 21's statutory burdens of proof and the applicable evidentiary standards discussed above. *See Fordham*, 2014 WL 5511070, at *1. In a decision authored by Judges Brown and Royce ("the *Fordham* majority"), the panel held that an ALJ's determination of whether a complainant has met his or her burden of proving that protected activity contributed to the adverse employment action must be made solely based on the evidence submitted by the complainant, 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. *Id.* The *Fordham* majority explained that, if the complainant satisfies his or her burden of proving contributing factor causation, the burden then shifts to the employer to prove its affirmative defense by clear and convincing evidence and the employer's reasons for its action may be considered at that time. *Id.* The majority primarily advanced the following arguments in support of its holding:

1. The *Fordham* majority first concluded that AIR 21's plain text clearly delineates between consideration of the complainant's causation evidence and consideration of the employer's causation evidence subject to the heightened clear and convincing evidence standard. *See Fordham*, 2014 WL 5511070, at *14-15. It reasoned that allowing an employer to defeat a whistleblower's proof of contributing factor causation by presenting its own causation evidence "would render the statutory requirement of proof of the employer's statutorily prescribed affirmative defense by 'clear and convincing evidence' meaningless." *Id.* at *15.

2. Second, the *Fordham* majority stated that Congress's adoption of the forgiving contributing factor test for a complainant's case was "designed to eliminate" the weighing of the parties' respective causation evidence. *Fordham*, 2014 WL 5511070, at *16-17. It observed that 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 *16.

3. Concluding that "ARB case authority is of no avail in resolving the issue presented" and that there is no relevant AIR 21 legislative history, *see Fordham*, 2014 WL 5511070, at *18-19, the majority thus looked to legislative history and case law under the ERA and the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221, upon which the AIR 21 burdens of proof are based. *See Fordham*,

2014 WL 5511070, at *19-22. The majority interpreted the ERA's legislative history as reflecting a congressional intent to create a "two-stage evidentiary process for determining causation and assessing liability" that distinguishes between consideration of the parties' respective causation evidence. *Id.* at *19. With respect to the WPA's history, the *Fordham* majority emphasized a statement in the Senate report for the 1994 WPA amendments indicating that an agency's stated reasons for its action were intended to be presented as part of its affirmative defense subject to the higher clear and convincing evidence standard. *Id.* at *21 (quoting S. Rep. No. 103-358, at 6-7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3556).[4] The panel also emphasized a Federal Circuit decision in a WPA case in which the court held that the ALJ erred by considering the employer's causation evidence at the contributing factor stage. *Id.* at *20-21 (citing *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998)).[5]

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[4] The *Fordham* majority stated, however, that even though consideration of the employer's causation evidence is impermissible, ALJs may analyze the employer's evidence on the other three elements required to prove a violation (*i.e.*, protected activity, employer knowledge, and adverse action) and may consider the credibility of the complainant's evidence. *See Fordham*, 2014 WL 5511070, at *16, 22 n.84.

[5] Judge Corchado dissented in part from the *Fordham* decision, expressing serious concern that, by excluding relevant evidence from the causation question, it "will lead to skewed findings of whistleblower violations" and that in some cases such findings will be "a fiction created by a rigged process and, more importantly, contrary to the law and basic notions of fundamental fairness and logic."

C. Order Setting En Banc Review in *Powers*

On October 17, 2014, the ARB ordered en banc review in the instant FRSA case. In this case, the ALJ considered, inter alia, the employer's causation evidence in concluding that the complainant had not met his burden of proving that protected activity contributed to the adverse actions at issue. *See Powers v. Union Pac. R.R. Co.*, ALJ Case No. 2010-FRS-00030 (Jan. 15, 2013).[6] As previously noted, in its en banc order, the ARB requested that the parties file supplemental briefs addressing *Fordham*'s contributing factor analysis, to the extent deemed necessary for resolution of the *Powers* case. The ARB also invited amicus briefs on the *Fordham* majority's causation analysis from interested parties, including the Assistant Secretary.

SUMMARY OF THE ARGUMENT

The *Fordham* majority correctly concluded that the contributing factor standard is a forgiving burden of proof for employees who need only demonstrate

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Fordham, 2014 WL 5511070, at *23 (Corchado, J., dissenting) (the "*Fordham* dissent"). Because this brief advances many of the same arguments raised by Judge Corchado, a full summary of that dissenting opinion would be redundant.

[6] During its investigation in *Powers*, OSHA determined that there was reasonable cause to believe that a violation of FRSA occurred. This finding is not inherently inconsistent with Judge Berlin's findings in favor of Union Pacific. As the *Fordham* majority correctly recognized, the standard of causation during an OSHA investigation is lower than the preponderance of the evidence standard that ALJs apply during a hearing on the record. *See Fordham*, 2014 WL 5511070, at *13.

that protected activity contributed to the adverse action in order to prove a violation of the statute. However, the statutory text, legislative history, and case law under the Department's contributing factor statutes indicate that all relevant evidence, including an employer's causation evidence, may be considered by an ALJ in determining whether a statutory violation occurred.

First, the plain language of the Department's contributing factor statutes reflects that a violation only occurs if the employee's protected activity is the actual cause of discrimination (*i.e.*, if protected activity has, in fact, contributed to the adverse action). The *Fordham* majority precludes ALJs from considering essential facts in determining whether the contributing factor test has been met, which may lead to findings of violations even in cases where the evidence supporting the employer's articulated reason for an adverse action is so compelling that it shows that protected activity did not contribute to the adverse action.

Second, the implementing regulations for the Department's contributing factor statutes appropriately require complainants to prove the contributing factor test by a preponderance of the evidence, which has consistently been interpreted by federal courts and the ARB itself as requiring a comparative weighing of all relevant evidence. In holding that the adoption of the contributing factor test was intended to preclude consideration of an employer's causation evidence at that

stage, the *Fordham* majority improperly conflated the contributing factor burden of proof with the preponderance of the evidence standard.

Third, the legislative histories of the ERA and the WPA do not support the conclusion that ALJs are precluded from considering an employer's reasons for its action under the contributing factor test. The *Fordham* majority's interpretation of such history is generally inconsistent with the views advanced by the Merit Systems Protection Board (MSPB) and affirmed by the Federal Circuit in enforcing the WPA and with the MSPB's regulations under that statute.

Fourth, decades of federal and administrative case law interpreting the contributing factor statutes support the conclusion that ALJs may consider all relevant evidence in deciding whether a statutory violation has occurred.

Finally, the *Fordham* decision could deprive complainants of the ability to satisfy the contributing factor test by presenting evidence of pretext and could prevent consideration of their own evidence at the affirmative defense stage.

ARGUMENT

I. THE CONTRIBUTING FACTOR TEST IS A FORGIVING STANDARD FOR WHISTLEBLOWERS WHO NEED ONLY DEMONSTRATE THAT PROTECTED ACTIVITY CONTRIBUTED IN ANY WAY TO THE ADVERSE ACTION

As the ARB and federal courts have consistently recognized, the contributing factor burden of proof is "broad and forgiving." *Lockheed Martin*

Corp. v. Admin. Review Bd., 717 F.3d 1121, 1136 (10th Cir. 2013); *see Fordham*, 2014 WL 5511070, at *15. Under this standard, a complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(ii)); *see* 49 U.S.C. § 20109(a). In other words, a contributing factor is "*any* factor which, alone or in connection with other factors, tends to affect *in any way* the outcome of the decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks omitted and emphasis added); *see Halliburton, Inc. v. Admin. Rev. Bd.*, No. 13-60323, 2014 WL 5861790, at *7 (5th Cir. Nov. 12, 2014); *Araujo*, 708 F.3d at 158; *Lockheed Martin Corp.*, 717 F.3d at 1136; *Fordham*, 2014 WL 5511070, at *15.

As noted in *Fordham*, the contributing factor test was "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Araujo*, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1140); *see Fordham*, 2014 WL 5511070, at *15; *Bobreski v. J. Givoo Consultants, Inc.*, ARB Case No. 13-001, 2014 WL 4660840, at *9 (ARB Aug. 29, 2014). Where there is no direct evidence that the protected

act was a contributing factor, the employee may satisfy the burden by offering circumstantial evidence. *See, e.g.*, *Araujo*, 708 F.3d at 160-61; *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 759336, at *3 (ARB Feb. 29, 2012).

The contributing factor test is thus not an onerous burden for employees to satisfy. However, for the reasons explained below, the contributing factor test requires the consideration of all relevant evidence.

II. ALJS SHOULD CONSIDER ALL RELEVANT EVIDENCE, INCLUDING EVIDENCE SUPPORTING AND REFUTING AN EMPLOYER'S REASONS FOR TAKING ACTION AGAINST AN EMPLOYEE, TO DETERMINE WHETHER WHISTLEBLOWING CONTRIBUTED TO THE EMPLOYER'S ACTIONS

A. The Department's Contributing Factor Statutes Establish a Basic Causation Requirement That Must be Satisfied Before an Employer is Required to Prove an Affirmative Defense

1. The plain text of the Department's contributing factor statutes imposes a "straightforward causation requirement" that requires complainants to prove that protected activity contributed to the adverse action at issue. *Fordham* dissent, 2014 WL 5511070, at *23; *see, e.g.*, 49 U.S.C. § 42121(b)(2)(B)(iii) ("a *violation* of [the whistleblower provision] *has occurred only* if the complainant demonstrates" that protected activity was a "contributing factor" in the adverse action) (emphasis added). A violation of the FRSA whistleblower provision only occurs if discrimination is "*due, in whole or in part,*" to the employee's protected

activity. 49 U.S.C. § 20109(a) (emphasis added).[7] In other words, if an adverse action occurred solely due to non-retaliatory reasons, an employer did not violate the law because protected whistleblowing did not contribute to the adverse action. *See Fordham* dissent, 2014 WL 5511070, at *23-25.

2. The determination of whether protected whistleblowing contributed to an adverse action (and thus a violation of the whistleblower statute occurred) necessarily requires consideration of all of the available evidence, including the evidence supporting the employer's reasons for taking action against the employee. To hold otherwise would preclude consideration of an employer's reasons for its action even in situations in which the employer's evidence is so compelling that it shows that protected activity did not contribute in any way to the employer's decision. Such an interpretation is inconsistent with the fundamental causation requirement imposed by the statute because it would deem an employer to have violated the statute, when in fact no violation had occurred. *See* 49 U.S.C. § 20109(a).[8]

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[7] AIR 21 similarly only prohibits retaliation that occurs "because" of protected activity. 49 U.S.C. § 42121(a).

[8] For example, consider a case in which an employee files a safety complaint with his or her supervisor on Monday. On Tuesday, a tornado strikes the train yard where the employee works and destroys all of the buildings. On Wednesday, the railroad determines that its facilities are damaged beyond repair and terminates all

3. This reading of the statute does not render the employer's affirmative defense of demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of protected activity meaningless as the *Fordham* majority suggests. *See Fordham*, 2014 WL 5511070, at *15. AIR 21's plain language requires a finding of a violation *before* the employer is required to prove by clear and convincing evidence that, notwithstanding that protected activity contributed to its decision, it would have taken the same action in the absence of protected whistleblowing. *See* 49 U.S.C. §§ 42121(b)(2)(B)(iii), (iv). Proof of the employer's affirmative defense does not negate the finding of a statutory violation. Rather, it merely allows an employer to escape liability for a proven violation in a mixed-motive case in which the employer's evidence supporting its reasons for taking an adverse action clearly and convincingly show that it would have taken the same action even if the protected activity had not occurred. *Id.* at § 42121(b)(2)(B)(iv) ("*Relief may not be ordered*" if the employer demonstrates its affirmative defense) (emphasis added); *see Fordham* dissent, 2014

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100 workers stationed at that train yard. Based on *Fordham*, an ALJ would likely conclude that FRSA was violated because the employee engaged in protected activity and was terminated only two days later; the ALJ could not consider the evidence of the tornado or the fact that all of the employee's co-workers were also fired. The railroad would likely avoid liability for damages by later proving its affirmative defense but would not be able to negate the finding that it violated the law (even though the record as a whole clearly would not support such finding).

WL 5511070, at *25. It is well-established that employers are not required to prove an affirmative defense unless the complainant first proves a violation. *See, e.g., Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999); *Bobreski*, 2014 WL 4660840, at *10; 76 Fed. Reg. 2808, 2812 (Jan. 18, 2011) (under the ERA, if the complainant fails to prove a statutory violation, "the burden never shifts to the employer").

B. The Implementing Regulations for the Contributing Factor Statutes Appropriately Require Complainants to Prove the Contributing Factor Standard by a Preponderance of the Evidence, Which Necessitates Judicial Consideration of All Relevant Evidence

The *Fordham* majority asserted that, by adopting the contributing factor test, Congress intended to eliminate the weighing of the parties' respective causation evidence. *See Fordham*, 2014 WL 5511070, at *16. However, in so ruling, the *Fordham* majority improperly conflated the contributing factor burden of proof with the preponderance of the evidence standard, which has been consistently interpreted to require that a court consider the entire record.

1. The contributing factor burden and the preponderance of the evidence standard "are entirely different concepts . . . . 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." *Fordham* dissent, 2014 WL

5511070, at *24 n.110; *see Clark v. Dep't of the Army*, 997 F.2d 1466, 1473 (Fed. Cir. 1993), *superseded by statute on other grounds*, 5 U.S.C. §§ 1221(e)(1)(A), (B) (rejecting the argument that an employer's evidence of its reasons for the adverse action cannot be considered under the preponderance of the evidence standard in evaluating the contributing factor test because such an argument "confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue").

2. The Department's contributing factor statutes require complainants to demonstrate that whistleblowing activity contributed to the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii). Because the statutes do not define the term "demonstrate," the Assistant Secretary has promulgated regulations requiring that, at the ALJ evidentiary stage, a plaintiff must demonstrate "by a *preponderance of the evidence*" that his or her protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1982.109(a) (emphasis added). The preponderance of the evidence standard has been consistently applied to the complainant's burden of proof under the Department's contributing factor statutes since 1995. *See Dysert v. Fla. Power Corp.*, No. 1993-ERA-021 (Sec'y Dec. Aug. 7, 1995). The regulatory directive that complainants prove the contributing factor test by preponderant evidence is drawn from "traditional Title VII discrimination

law," 76 Fed. Reg. 2808, 2812 (Jan. 18, 2011), and mirrors the WPA regulations and cases discussed below. *See, e.g.*, 5 C.F.R. §§ 1201.56(c)(2), 1209.7(a).

3. The Department's application of the preponderance of the evidence standard to the complainant's contributing factor burden has been affirmed as reasonable by the Eleventh Circuit in *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997) and subsequently adopted and consistently applied by federal courts and the ARB itself for nearly twenty years. *See, e.g.*, *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008); *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, 2006 WL 282113, at *8 (ARB Jan. 31, 2006); *Zinn v. Univ. of Missouri*, Case Nos. 93-ERA-34, 36, 1996 WL 171417, at *3 (DOL Off. Adm. App. Jan 18. 1996).

4. The Supreme Court has explained that the preponderance of the evidence standard "goes to how convincing the evidence in favor of a fact must be *in comparison with the evidence against it* before that fact may be found." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (emphasis added). This "most common standard in the civil law" requires a party to prove "that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). Federal courts have therefore

interpreted the preponderant evidence standard to require a comparative weighing of all relevant and competent evidence. *See, e.g.*, *United States v. C.H. Robinson Co.*, 760 F.3d 1376, 1383 (Fed. Cir. 2014); *United States v. Clum*, 492 F. App'x 81, 85 (11th Cir. 2012); *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011).[9]

Moreover, the ARB itself has consistently interpreted the preponderance of the evidence standard as requiring evaluation of all relevant evidence. *See, e.g.*, *Brune*, 2006 WL 282113, at *8. Shortly before the *Fordham* decision, a majority panel of the ARB discussed the preponderance of the evidence standard as it applies to the contributing factor test:

> [W]here the complainant presents his case by circumstantial evidence . . . 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

[9] Model jury instructions promulgated by numerous federal appellate courts explicitly state that, when applying the preponderance of the evidence standard in civil cases, juries must consider all relevant evidence regardless of which party presented it. *See, e.g.*, Third Cir. Model Civil Jury Instructions, ¶ 1.10, http://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions (2014); Ninth Cir. Manual of Model Civil Jury Instructions, ¶ 1.3, http://www3.ce9.uscourts.gov/jury-instructions/model-civil (2007); Eleventh Cir. Pattern Jury Instructions (Civil), ¶ 1.1, http://www.ca11.uscourts.gov/pattern-jury-instructions (2013).

only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action.

Bobreski, 2014 WL 4660840, at *10 (internal citations omitted). Indeed, the *Fordham* majority recognized that "the requirement of proof by a preponderance of the evidence generally implies a weighing of all relevant and competent evidence." *Fordham*, 2014 WL 5511070, at *18.

C. The Legislative Histories of the ERA and the WPA Do Not Reflect That the Contributing Factor Standard Was Intended to Prevent Comparative Evaluation of Causation Evidence

In support of its conclusion that adoption of the contributing factor test was intended to preclude judicial consideration of an employer's explanation for an adverse action in deciding whether a violation occurred, the *Fordham* majority relied heavily on the legislative history of the ERA and the WPA. *See Fordham*, 2014 WL 5511070, at *19-23. Although the *Fordham* majority's decision finds some support in the Senate report for the 1994 WPA amendments, *see Fordham*, 2014 WL 5511070, at *21, subsequent case law interpreting that history and relevant regulations counter such a view.

1. With regard to the ERA, the *Fordham* majority relied on the statements of two of the statute's principal sponsors in which they explained the ERA's 1992 amendments adopting the respective "contributing factor" and "clear and convincing evidence" burdens of proof. *See Fordham*, 2014 WL 5511070, at *19.

As those sponsors stated, "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 burden of proof enunciated in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), with this lower burden in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210 [of the ERA]." 138 Cong. Rec. H11,409 (daily ed. Oct. 5, 1992); *see id.* at H11,444-45. These statements are most fairly read as reflecting Congress's intent to replace the "motivating factor" burden of proof set forth in *Mt. Healthy* with the more forgiving "contributing factor" burden of proof. They do not indicate whether an employer's causation evidence may be considered under the contributing factor test.

2. With respect to the WPA's legislative history, the *Fordham* majority accurately observed that, in 1994, Congress amended the WPA to clarify that a complainant may satisfy the contributing factor standard solely by establishing that the employer knew of the complainant's protected activity and that there was temporal proximity between such activity and the adverse action. *See Fordham*,

2014 WL 5511070, at *20-22. These 1994 amendments were enacted, in part, in response to the Federal Circuit's 1993 decision in *Clark*, 997 F.2d at 1472. *See* S. Rep. No. 103-358, at 7-8. In *Clark*, the Federal Circuit held that circumstantial evidence of knowledge and timing alone was insufficient to prove the contributing factor test per se. *See Clark*, 997 F.2d at 1471-72.

However, in *Clark*, the Federal Circuit also ruled upon the precise question at issue in *Fordham*: "when the agency offers evidence to prove that the disclosure was not a contributing factor (an issue evaluated under the preponderant evidence standard), and this evidence is also relevant to the agency's affirmative defense that the same action would have been taken absent the disclosure, must the agency meet the higher 'clear and convincing' evidence standard reserved for its affirmative defense?" *Clark*, 997 F.2d at 1470. In response to that issue, the Federal Circuit held that, at the contributing factor stage, the employer "may introduce any relevant and competent evidence to counter [the whistleblower's] evidence, including the reason it acted." *Id.* at 1473. The court further concluded that, at this stage, the ALJ must decide "on the basis of all the evidence whether [the employee] proved her claim by a preponderance of evidence." *Id.* at 1472-73.

With the 1994 WPA amendments, Congress intended to overrule the Federal Circuit's holding in *Clark* that evidence of knowledge and timing alone could not

prove the contributing factor test. *See Fordham*, 2014 WL 5511070, at *20-21 (citing S. Rep. No. 103-358, at 7-8). However, the MSPB, the tribunal charged with adjudicating the WPA, has expressly concluded that the 1994 amendments did not overrule the Federal Circuit's holding that an employer's causation evidence may be considered in evaluating whether the complainant has satisfied the contributing factor test by a preponderance of the evidence. *See Powers v. Dep't of Navy*, 69 M.S.P.R. 150, 155-57 (MSPB 1995). As the MSPB explained, "Congress has not disturbed the other holdings in *Clark*, such as that *any and all relevant evidence, including 'the reason for the agency's action,' may be considered in determining the contributing factor issue.*" *Powers*, 69 M.S.P.R. at 156 n.7 (quoting *Clark*, 997 F.2d at 1472-73) (emphasis added).[10]

Accordingly, the MSPB has consistently held that if a whistleblower cannot satisfy the knowledge and timing elements of the WPA's contributing factor test, the court must consider all relevant evidence such as that pertaining to "the strength or weakness of the agency's reasons for taking the personnel action" in determining whether protected activity was a contributing factor in the adverse

[10] *See also Schmittling v. Dep't of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (recognizing that congressional abrogation of *Clark* was limited in scope). Significantly, the MSPB cases relied upon by the *Fordham* majority in support of its view of the WPA's legislative history, *see Fordham*, 2014 WL 5511070, at *20 n.74, were issued prior to the MSPB's *Powers* decision.

action. *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259, 273 (MSPB 2013); *Dorney v. Dep't of the Army*, 117 M.S.P.R. 480, 486 (MSPB 2012). Moreover, the MSPB permits ALJs to consider the employer's evidence on the knowledge and timing elements of the contributing factor test. *See, e.g., Finston v. Health Care Fin. Admin.*, 83 M.S.P.R. 100, 102 (MSPB 1999).[11]

Moreover, and significantly, the WPA's regulations have applied a preponderance of the evidence standard to the complainant's contributing factor burden since 1990 and that evidentiary standard expressly requires a comparative weighing of all the relevant record evidence. *See* 55 Fed. Reg. 28,591, 28,592-94 (July 12, 1990); 5 C.F.R. §§ 1209.7(a) (applying preponderance of the evidence standard to the WPA's contributing factor test), 1201.56(c)(2) (defining "[p]reponderance of the evidence" as the "degree of relevant evidence that a

[11] The *Fordham* majority relies on the Federal Circuit's 1998 decision in *Kewley*, 153 F.3d 1357, for its conclusion that an employer's causation evidence may not be weighed against the complainant's contributing factor causation evidence. *See Fordham*, 2014 WL 5511070, at *20. The *Kewley* decision provides that if an employee proves by preponderant evidence that the knowledge and timing elements of his case are satisfied, a prima facie case has been established per se under the WPA's unique statutory language and the burden then shifts to the employer to prove its affirmative defense. *See Kewley*, 153 F.3d at 1362-63. That decision does not preclude consideration of an employer's evidence on temporal proximity nor does it prohibit consideration of an employer's causation evidence under the contributing factor test should the complainant fail to prove knowledge and timing. *See, e.g., Goines v. Dep't of Agric.*, 113 F. App'x 925, 929 (Fed. Cir. 2004) (affirming MSPB's consideration of agency's reasons for adverse action at the contributing factor stage where temporal proximity was not established).

reasonable person, *considering the record as a whole*, would accept as sufficient to find that a contested fact is more likely to be true than untrue") (emphasis added); *see, e.g., Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, 42 (MSPB 2014). Notably, the MSPB did not amend its 1990 regulations to adopt a different evidentiary standard or prohibit judicial consideration of an employer's causation evidence under the contributing factor test after the 1994 WPA amendments.

D. Federal Appellate Case Law and ARB Precedent Do Not Support the *Fordham* Majority's Holding That ALJs Are Precluded From Considering an Employer's Causation Evidence at the Contributing Factor Stage

Although the *Fordham* majority viewed prior decisions of the ARB and federal courts under the Department's contributing factor statutes as inconclusive on the issue, such prior decisions have consistently considered the totality of the evidence in determining whether a complainant has met the contributing factor standard. Courts have expressly considered – and rejected – the precise argument regarding the employer's causation evidence advanced in *Fordham*.

1. For nearly two decades, the ARB has considered employers' causation evidence in determining whether complainants have proved by a preponderance of the evidence that protected activity contributed to the adverse action at issue. *See, e.g., Bobreski*, 2014 WL 4660840; *Hasan v. Enercon Servs., Inc.*, ARB Case No. 12-063, 2013 WL 4928240 (Aug. 20, 2013); *Bechtel v. Competitive Techs, Inc.*,

ARB Case No. 09-052, 2011 WL 4889269 (ARB Sept. 30, 2011); *Majali v. AirTran Airlines*, ARB Case No. 04-163, 2007 WL 3286329 (ARB Oct. 31, 2007); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, 2004 WL 230770 (ARB Jan. 30, 2004); *Trimmer v. Los Alamos Nat'l Laboratory and Univ. of Calif.*, ARB Case No. 96-072, 1997 WL 235807 (ARB May 8, 1997).

2. Federal courts have consistently affirmed the consideration of an employer's causation evidence by ALJs and the ARB in determining whether protected activity contributed to the adverse action. *See, e.g., Hasan v. Dep't of Labor,* 553 F. App'x 135 (3d Cir. 2014); *Mizusawa v. Dep't of Labor*, 524 F. App'x 443 (10th Cir. 2013); *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443 (2d Cir. 2013); *Robinson v. U.S. Dep't of Labor*, 406 F. App'x 69 (7th Cir. 2010); *Klopfenstein v. Admin. Rev. Bd.,* 402 F. App'x 936 (5th Cir. 2010); *Addis*, 575 F.3d 688. In fact, the Eleventh Circuit expressly considered and rejected the argument advanced by the *Fordham* majority that, under AIR 21, the burden is always on the employer to show clear and convincing evidence that it would have taken the same action in the absence of whistleblowing activity. *See Majali v. U.S. Dep't of Labor*, 294 F. App'x 562, 567 (11th Cir. 2008). The Eleventh Circuit rejected the employee's argument that the ALJ and the ARB erred by considering the employer's causation evidence in determining that protected whistleblowing did

not contribute to the action taken against the employee. *Id.* (stating that "in accepting [the employer's] non-retaliatory explanation for firing petitioner, the ALJ and Board found that petitioner had not proved that his protected activity was a 'contributing factor' to the decision to fire him. We agree. . . . Accordingly, [the employer] was under no obligation to prove that it would have taken the same personnel action regardless of petitioner's protected activities."). Moreover, earlier this year, the Fourth Circuit held in a SOX case that the contributing factor test would "simply be toothless" if the court did not consider all of the relevant evidence, including evidence of intervening events that caused the employer to view the plaintiff as insubordinate. *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014).

E. The *Fordham* Decision Could Impair the Ability of Some Whistleblowers to Prove the Contributing Factor Test

Although the *Fordham* decision would ease the burden of satisfying the contributing factor test for many complainants, it could be construed to deprive some whistleblowers of their ability to satisfy the contributing factor test. The ARB has consistently held that employees may satisfy their contributing factor burden through circumstantial evidence, including evidence indicating that the employer's proffered reason for taking the adverse action was pretextual. *See, e.g.*, *DeFrancesco*, 2012 WL 759336, at *3; *Bechtel*, 2011 WL 4889269, at *7.

Because an employee's evidence of pretext necessarily requires at least some consideration of the employer's proffered reasons for taking the action in the first place, *Fordham* could be read to prevent employees from making such a showing. Similarly, if the parties' burdens of proof are as clearly segregated as described in *Fordham*, ALJs could reasonably construe the decision to preclude consideration of an *employee's* causation evidence at the affirmative defense stage.[12]

Finally, the *Fordham* decision requires ALJs for the first time to determine, as a threshold matter, what types of testimonial and documentary evidence qualify as an employer's affirmative defense evidence but it does not offer specific guidance for judges in making such a determination. Are ALJs precluded from considering any causation evidence *submitted* by the employer? Or are they prohibited from considering any causation evidence that is *favorable* to the employer, regardless of which side presented it? Or are they precluded from considering all evidence that is, in any way, *relevant* to the employer's reasons for taking the adverse action?[13] In the instant case, for example, the complainant

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[12] The *Fordham* majority stated that ALJs may still evaluate the credibility of the complainant's causation evidence. *See Fordham*, 2014 WL 5511070, at *16, 22 n.84. However, it is difficult to imagine how such a credibility determination could be made without considering the employer's causation evidence.

[13] *See, e.g., Carter v. CPC Logistics, Inc.*, ALJ Case No. 2012-STA-00061 (ALJ Oct. 31, 2014) (in light of the "sea change" caused by *Fordham*, the ALJ requested

called several managerial and supervisory employees as adverse witnesses; some of this testimony supported the employer's proffered reasons for its adverse actions. *See Powers* ALJ Dec. at 1. Does such testimony qualify as an employer's "affirmative defense evidence" precluded from ALJ consideration, even though it was actually elicited by the complainant? Such questions reflect the important and challenging ambiguities resulting from *Fordham*'s approach to causation.

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supplemental briefs on issues such as which, if any, of the employer's evidence should be considered to be submitted in support of its affirmative defense). The *Fordham* decision may also lead to similar confusion at the investigatory stage of a whistleblower case in which OSHA often develops record evidence through its own investigations. Evidence developed by OSHA, such as statements made by a manager during an interview with the agency, cannot be easily categorized as belonging to or supporting either party in a case.

CONCLUSION

The Assistant Secretary respectfully requests the Board to hold that the contributing factor standard only requires employees to demonstrate that protected activity contributed to the adverse action in order to prove a violation of the statute, but that all relevant evidence, including an employer's causation evidence, should be considered by ALJs in deciding whether that standard has been met.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae have been served this 17th day of December, 2014, by first-class certified mail, postage prepaid, upon the following:

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