UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,

Complainant,

v.

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL
RAILROAD COMPANY,

Respondent.

ARB CASE NO. 16-035

ALJ CASE NO. 2014-FRS-154

BRIEF OF *AMICI CURIAE* SENATORS CHARLES GRASSLEY AND RON WYDEN, AND REPRESENTATIVE JACKIE SPEIER

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The above Members of Congress submit this *amicus* brief to defend the legal burdens of proof that Congress codified in the Whistleblower Protection Act of 1989, and has reaffirmed sixteen times, including all thirteen whistleblower laws since enacted that are administered by the Department of Labor ("DOL").[1] These statutes apply a two-part test in whistleblower reprisal

[1] Relevant statutes directly affected by this proceeding include Pipeline Safety Improvement Act, 49 U.S.C. § 60129(b)(2)(8); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b)(2)(B); Energy Reorganization Act 1992 amendments and Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 U.S.C. §5851(b)(3); Federal Rail Safety Act (U.S. rail worker$) 49 U.S.C. § 20109(c)(2)(A)(i); National Transportation Safety and Security Act (U.S. public transportation) 6 U.S.C. § 1142(c)(2)(B); Consumer Product Safety Improvement Act (U.S. corporate retail products) 15 U.S.C. § 2087 (b)(2)(B), (b)(4); Sarbanes Oxley Act (U.S. publicly-traded corporations), 18 U.S.C. § 1514(b)(2)(c): Surface Transportation and Assistance Act (U.S. corporate trucking industry) 49 U.S.C. § 31105(b)(1); Affordable Care Act. sec. 1558(b)(2); Food Safety Modernization Act (U.S. food industry) 21 U.S.C. § 1012(b)(2){C) and (b)(4)(A); Dodd Frank Act (U.S. financial services industry) 12 U.S.C. § 5567; Moving Ahead for Progress in the 21st Century Act (MAP 21), 49 U.S.C. § 30171(b)(2)(B), (c)(3), Pipeline Safety Improvement Act, 49 U.S.C. 60109; and Seaman's Protection Act, 46 U.S.C. § 2114(b). Congress also included the same burdens of proof in three corporate whistleblower laws not administered by DOL. – the American Recovery and Reinvestment Act of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(1); and two provisions of the National Defense Authorization Act of 2013, P.L. 112-139, sections 827, 28, (111th Cong., 2d Sess.), 10 U.S.C. § 2409(c)(6) and 47 U.S.C. § 4712(c)(6).

cases. First, the employee in her *prima facie* case must show by a preponderance of the evidence that her protected activity was a contributing factor in a challenged adverse personnel action. The respondent employer, in turn, must prove by clear and convincing evidence that it undertook the personnel action for valid, non-retaliatory reasons. These statutory burdens of proof are the cornerstone of a longstanding and consistent bipartisan congressional intent to ease the difficulty in proving retaliation for whistleblowers who lawfully expose government and corporate misconduct.

In repeatedly enacting whistleblower laws with these statutory burdens of proof, Congress made an explicit public policy choice that prior judicial standards were unrealistic, and created a substitute that makes it significantly more difficult to retaliate. The Administrative Review Board ("ARB") has to date recognized and upheld Congress' standard of whistleblower rights for more than 20 years. However, the ARB is now suggesting that it intends to reconsider its longstanding support for these statutory principles.

INTERESTS OF THE AMICI

Sen. Grassley is the Chair of the bipartisan U.S. Senate Whistleblower Protection Caucus. Sen. Grassley is a longtime advocate for whistleblowers in the public and private sectors. He co-authored the Whistleblower Protection Act of 1989, from which the statutory burdens of proof at issue in this case derive. Sen. Grassley also was an original co-sponsor of the Whistleblower Protection Enhancement Act of 2012.

Sen. Wyden is currently Vice-Chairman of the bipartisan U.S. Senate Whistleblower Protection Caucus. He was the original sponsor of legislation in the 102nd Congress (H.R. 3941) in the House of Representatives, which ultimately became the Energy Reorganization Act

whistleblower amendments for protection of nuclear workers (42 U.S.C. 5851) – the precedential private-sector whistleblower protection statute. H.R. 3941, as introduced in 1991 and ultimately enacted, incorporated the two-part test at issue in this proceeding.

Rep. Jackie Speier is currently Co-Chair of the U.S. House of Representatives Whistleblower Protection Caucus. She believes that whistleblowers serve an invaluable resource to their organizations and, as stewards of the federal budget, Congress relies heavily on their willingness to come forward and expose abuse and waste. Defending all whistleblowers' ability to expose various kinds of malicious behavior without fear of reprisal is absolutely necessary. If whistleblowers fear that they will be retaliated against for simply coming forward, Congress will lose a source of information that we depend on to speak up when no one else will. That is why the Whistleblower Protection Act of 1989 defended whistleblowers, and placed the legal burdens of proof on employers when retaliatory measures are subject to debate or question. By supporting whistleblowers and protecting them from retaliation, Congress can continue to hold employers accountable when they attempt to subvert the law behind the veil of secrecy. The long-overdue 2014 decision, *Fordham v. Fannie Mae*, finally clarified these protections by placing the burden of proof on employers to prove by "clear and convincing" evidence that they would have taken the same action, such as dismissal, demotion, or other disciplinary action, in the absence of the employee's whistleblowing. For that reason, Rep. Jackie Speier submits this brief in support of the Board's decisions to date on burdens of proof.

HISTORY OF THE CASE

Amici will not detail the intricate history of proceedings leading to the current request for *amicus* briefs, which has been chronicled repeatedly. For context, however, the Board recently

moved to clarify the burdens of proof in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX—51, 2014 WL 5511070 (ARB Oct. 9, 2014). The Board reviewed what evidence --

> is appropriate to be considered at the hearing stage in determining whether a complainant has met his or her burden of proving 'contributing factor' causation by a preponderance of the evidence test[.] More specifically: Whether the respondent's test 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 proof by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue?

(slip op., at 20). The Board held that independent, non-retaliatory reasons advanced by a respondent must not be weighed against the employee's evidence that protected activity was a contributing factor to a challenged action, which the complainant must prove by a preponderance of the evidence. *Id.*, at 37. Instead, the respondent must prove it would have acted for valid non-retaliatory reasons with clear and convincing evidence as part of its affirmative defense. *Id.*, at 20-37.

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (reissued with full dissent: April 21, 2015), the Board clarified its holding in *Fordham* by considering how evidence should be addressed for issues such as pretext or motive to retaliate. Those issues are relevant both for the complainant's contributing factor case and the respondent's non-retaliatory defense. It held that if the complainant advances evidence or issues to establish a contributing factor, she must overcome the respondent's rebuttal by a preponderance of the evidence. In some cases, evidence has overlapping relevance both for the complainant and respondent's respective cases. In that case, a complainant who advances it to prove a *prima facie* case bears the burden by a preponderance of the evidence. The respondent would bear the burden by clear and convincing evidence by advancing the identical portion of the record to prove its defense of non-retaliatory reasons. *Powers, supra*, slip op. at 13-27.

On April 14, 2015, six members of the Senate Whistleblower Protection Caucus, including Senators Grassley and Wyden, wrote to Secretary Perez in support of the ARB's analysis and holding. The letter is attached. The Senators concluded, "The ARB's recent decisions are thus in line with congressional intent to level the playing field for whistleblowers in bringing retaliation claims. We commend the ARB for its commitment to a fair and accurate interpretation of the federal whistleblower provisions."

On May 23, 2016, however, acting on the respondent's motion, the ARB vacated *Powers* after retroactively recusing Judge Cooper Brown, who was in the majority both for the *Fordham* and *Powers* decisions. The Board has now directed that parties file briefs not simply on the merits of the *Powers* case itself, but also supplemental briefs directed at challenging the broad, fundamental issues related to the burden of proof standards previously decided.

RESPONSES TO ADMINISTRATIVE REVIEW BOARD QUESTIONS

In a June 17, 2016 Order, the Board asked for comments by *amici curiae* on two questions.

1. The Board's first question was --

In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that protected activity did not contribute to the adverse action?

The ALJ may not consider respondent's issues or evidence that it acted for non-retaliatory reasons, except when applied to rebut issues and evidence raised by the complainant to meet his burden of demonstrating a contributing factor.

2. The Board's second question was --

If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence an ALJ may consider?

The ALJ may not consider issues or evidence advanced solely by the respondent to prove its affirmative defense that it would have acted for non-retaliatory reasons in the absence of protected activity. Consideration of that evidence is reserved for the second part of the statutory two-part burden of proof – whether it can prove those legitimate, independent reasons by clear and convincing evidence. For purposes of the contributing factor test, the complainant controls the agenda for the complainant's *prima facie* case.

SUMMARY OF ARGUMENT

Unfortunately, the Administrative Review Board for the third time is considering a fundamental issue that it twice has responsibly addressed and resolved for 17 corporate and government whistleblower laws unanimously passed since the enactment of the Whistleblower Protection Act of 1989 ("WPA"),[2] including 13 enforced by the Department of Labor—the two-part test establishing parties' burdens of proof. Congress acted to replace earlier, judicially-created burdens of proof for Title 7 Equal Employment Opportunity (EEO) discrimination cases, *McDonnell Douglas v. Green*, 411 U.S.792 (1973), and for First Amendment actions, *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). The Board is now considering whether to substitute its own judicially-created burdens of proof for the structure that Congress has enacted in 17 different laws.

Congress acted, because the earlier standards were too difficult for whistleblowers to have a realistic chance of defending themselves. In order to better protect those who defend the public against misconduct that betrays the public trust, Congress made it significantly more difficult to retaliate by unanimously adopting these burdens of proof to govern 16 more whistleblower statutes

[2] Pub. L. No. 101-12, 103 Stat. 16 (1989), codified at 5 U.S.C. § 1210-1221)

after the WPA, including all those enforced by the DOL. Under *McDonnell Douglas*, after a three-part test the employee has the burden to disprove as pretexts any nondiscriminatory, legitimate reasons offered by the employer for its actions. *Mt. Healthy* imposes a two-part test in which the employee first must prove that protected speech was a "substantial" or "predominant" motivating factor. *Mt. Healthy,* 429 U.S. at 287. If successful, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action anyway. *Id.*

The WPA adopted the *Mt. Healthy* structure for a two-part test, which requires separate consideration of the whistleblower's and employer's cases.[3] The court reviews the employer's independent justifications only after the employee first establishes a *prima facie* case of retaliation. But Congress additionally altered the burdens: the whistleblower only has to prove that retaliation for protected activity was a "contributing factor" to an action. A contributing factor is any factor, which alone or in combination with other factors, tends to affect the outcome in any way. If the employee succeeds, the employer must prove its independent justifications by clear and convincing evidence. Unlike the bare majority necessary to prevail by a preponderance of the evidence, clear and convincing evidence requires 70-80% of the record.

In *Dietz v. Cypress Semi-Conductor Corp.*, ARB No. 150-017, ALJ No. 2014-SOX-002 (Mar. 30, 2016), slip op. at 24, the dissent contends that employers should be able to apply the independent justification twice, both to rebut that protected activity was a contributing factor and to prove it would have taken the same action if the whistleblower had remained silent. That analysis, however, turns the statutory burdens of proof on their head, essentially re-drafting them. It would permit the employer to prevail if the whistleblower cannot *disprove* non-pretextual justifications, instead of the employer having to *prove* them by clear and convincing evidence.

[3] 5 U.S.C. §§ 1214, 1221 (1997 ed.)

The structure of the congressional two-part test is clear. Each party controls the agenda for issues it advances to meet its burden of proof. The only matters relevant for the complainant's case are to prove by a preponderance of the evidence that the employer's action was tainted "in any way" by retaliation. Only then does the court consider whether the employer would have acted anyway for non-retaliatory reasons, which must be proved by clear and convincing evidence. If there is overlapping evidence relevant to both parties' cases, such as pretext or retaliatory motive the ALJ separately considers the evidence for the employee's *prima facie* case and the employer's affirmative defense, applying the relevant burdens of proof specified by Congress for each context – preponderance of the evidence for the employee's case; and if the employee prevails, clear and convincing evidence for her employer's defense.

It is inaccurate to suggest that the two-part test as it has been enforced in all contexts since 1989 deprives employers of a fair chance to present non-retaliatory reasons for a decision based on the whole record. The Administrative Law Judge must consider the whole record within the structure of Congress' two-part test. The first half solely concerns retaliation, but the ALJ may consider any rebuttal evidence to overlapping factors raised by the employee. If the employee prevails, the ALJ may consider any other evidence of non-retaliatory factors raised by the employer.

Under all circumstances, however, the ALJ must require the employer to prove by clear and convincing evidence any arguments it makes for non-retaliatory reasons. If the ARB eliminates that premise, it will defeat the unanimous congressional mandate for stronger whistleblower protection in all relevant laws passed since 1989.

ARGUMENT

I. IN THE WHISTLEBLOWER PROTECTION ACT OF 1989, CONGRESS CREATED A CLEAR AND UNAMBIGUOUS STATUTORY TWO-PART BURDEN OF PROOF THAT GOVERNS ALL SUBSEQUENT CORPORATE WHISTLEBLOWER STATUTES ADMINISTERED BY THE DEPARTMENT OF LABOR.

The cornerstone of the Whistleblower Protection Act of 1989 for federal employees was re-structuring the burdens of proof to demonstrate illegal retaliation. The final burdens reflected an evolution from judicial standards developed by the Supreme Court initially for equal employment discrimination cases in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and modified for First Amendment actions in *Mt. Healthy v. Doyle*, 429 U.S. 277 (1977). The new burdens of proof, which reflected some three years of hearings and debate, sparked a Presidential pocket veto when the Whistleblower Protection Act was first passed in 1988.[4] Congress was determined, however, and unanimously reaffirmed the new standards in the Whistleblower Protection Act of 1989.[5] Those standards overtook prior judicially-endorsed burdens of proof that Congress determined were not sufficient to protect whistleblowers and the public at large from government and corporate misconduct. The new burdens are applicable to this case.

The new burdens include a two-part test. First, in order to prove a *prima facie* case the employee must demonstrate that protected activity was a "contributing factor" for the challenged personnel action.[6] Although not further defined by statute, this standard repeatedly was defined in

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[4] *See* Devine and Vaughn, *The Whistleblower Protection Act of 989: Foundation for the Modern Law of Dissent,* 51 Admin. L. Rev. 531, 535n.19, and 555n.17 (Spring 1999).

[5] Pub. L. No. 101-12, 103 Stat. 103 Stat. 16 (codified at 5 USC 1201-1222 (1994 & III. 1997).

[6] The AIR21 whistleblower statute has been most frequently cross-referenced for statutory references to burdens of proof. In 49 U.S.C. § 42121(b)(2)(B)(i) it specifies – "REQUIRED SHOWING BY COMPLAINANT-The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing 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."

legislative history: "Any factor, which alone or in combination with other factors, tends to affect the outcome in any way."[7] If the employee succeeds, the burden of proof shifts to the employer to prove by "clear and convincing evidence" that it would have taken the same action for independent, non-retaliatory reasons even if the employee had remained a silent observer.[8]

Congress further reinforced this sequence in the Whistleblower Protection Enhancement Act of 2012, which provided clarifying amendments for the WPA. An employer's independent justification evidence may not be considered until *after* the employee has established a *prima facie* case by passing the contributing factor test.[9]

Revisions to the burdens of proof suggested in the supplemental briefing questions represent an attempt at judicial legislation whose immediate impact would be to reverse the unanimous congressional mandate for 13 remedial laws, violating basic relevant rules of statutory construction in the process. The bases for these concerns are summarized below.

A. There is no basis to deviate from the plain meaning of language in the two-part test.

All statutory analysis begins with an inquiry whether the plain meaning of a statute's text is clear. *Am. Tobacco Co. V. Patterson*, 456 U.S. 63, 68 (1982). Thus "[absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The burdens of proof that apply in this case derive from statute. The statutory text is clear and unambiguous. Part one of the test requires that the complainant demonstrate protected activity was a contributing factor to the alleged retaliation. If so, part two prohibits relief anyway if the

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[7] 135 *Cong. Rec.* 5033 (1989) (Statement on S. 20, the Whistleblower Protection Act of 1989).
[8] "SHOWING BY EMPLOYER - Not withstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).
[9] 5 U.S.C. § 1214(b)(4)(B)(1ii); 5 U.S.C. §1221(e)(2).

respondent demonstrates by clear and convincing evidence that it would have taken the same action in the absence of protected activity.[10]

Indeed, there is no contention that the congressional two-part test is unclear in 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv), the AIR21 provisions incorporated by reference in other DOL statutes relevant for this proceeding, or that the dissent is concerned with eliminating ambiguity. As summarized in *Stone and Webster*, 115 F.3d at 1572, the Energy Reorganization Act's identical language in 42 USC 5851(b)(3)(C) and (D) on burdens of proof "is clear and supplies its own free-standing evidentiary framework."

B. Interpretations must be consistent with legislative purpose.

If there is ambiguity, the statute must be interpreted to further its purpose. "We must (as usual) interpret the [relevant statute's] relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)). *See also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518–19 (2015) (courts must discern Congress' intent from a "statute's text, history, purpose, and structure.").

This principle is particularly significant for remedial statutes, where the consequences of conflicting interpretations are decisive. A remedial statute must be interpreted in a manner "to effectuate its remedial purposes.'" *S.E.C. v. Zandford,* 535 U.S. 813, 819 (2002) (citations omitted). See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("remedial legislation" should be construed "broadly to effectuate its purposes."); *Affiliated Ute Citizens of Utah v. United States,*

[10] 49 U.S.C. § 42121(b)(2)(B)(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.

406 U.S. 128, 151 (1972) (same). *See also Tammi v. Porsche Cars N. Am., Inc.*, 536 F.3d 702, 710 (7th Cir. 2008) ("remedial statutes ... 'should be liberally construed to suppress the mischief and advance the remedy the statute intended to afford.'") (citation omitted).

As explained more fully below, restructuring the burdens of proof would cleanly defeat the remedial purpose of the whistleblower laws. Each has the same purpose—to serve the public interest by better protecting those who risk their livelihood to defend it. The immediate, devastating effect of such a restructuring for all 13 DOL-administered statutes would be to reduce protection by rolling back free speech rights more than forty years to 1973. It would restore a repeatedly-rejected doctrine by making whistleblowers *disprove* an employer's stated innocent reasons, instead of the congressional structure that requires employers to *prove* their explanations by clear and convincing evidence.

C. Statutory language cannot be rendered superfluous.

A first principle for statutory construction is that Congress has a reason for including each word in legislation, and that a court may not render them superfluous. Among the "most basic of interpretative canons," is the maxim that "[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and citations omitted).[11]

The error is particularly egregious if a court goes beyond editing words to effectively removing an entire provision. "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (internal quotation marks and citations omitted). Indeed, courts must be especially ""hesitant to adopt an interpretation of a congressional enactment which renders

[11] *See also Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

superfluous another portion of that same law.'" *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)). *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

By merging the employer's affirmative defense into the plaintiff's burden, the ARB would make both halves of the two-part test meaningless. The April 24, 2015, letter from multiple members of the Senate Whistleblower Protection Caucus to Secretary Perez expressed appreciation that the Board in *Powers* declined to make "meaningless" the congressional requirement for an employer's affirmative defense. But that is precisely what this merging would accomplish. If a complainant fails to rebut the respondent's non-retaliatory reasons, the case is over with no need to present an affirmative defense. If the complainant disproves non-retaliatory reasons with a preponderance of the evidence, the case is over as well because by definition the respondent does not have clear and convincing evidence for the opposite conclusion.

The proposed revision also renders the first part of the test superfluous. Even if a complainant proves one or more retaliatory factors were contributing, it will not matter anymore unless the complainant also fails to defeat a respondent's innocent explanation. In short, the proposal seeks to render the congressional two-part test with burdens for each party superfluous, by effectively replacing it with a single burden for the complainant.

D. Only Congress can add new statutory language.

The ban on judicial editorial authority extends to supplementing statutory language. When Congress is silent, except in extraordinary circumstances, the courts may not fill the vacuum. *Burns v. U.S.*, 501 U.S. 129, 136 (1991). As summarized by the doctrine of *expressio unius est exclusion alterius*—including one item means that Congress intended to exclude those which were omitted. *Iselin v. United States*, 270 U.S. 245, 250 (1926). The Supreme Court further explained the ban

on "enlargement," *id.*, in *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004), by explaining that courts should not add an "absent word" to the statute: "[T]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."

Unfortunately, the ARB appears to seek to add a whole new actor in part one of the two-part test. Congress has acted "affirmatively and specifically" in 17 statutes with the WPA/AIR-21 burdens. None includes the word "employer" for part one of the test. Every statute exclusively describes the evidence which must be presented by the employee to prove the employee's case. There is no basis in statutory language or legislative history that permits the ARB to add new dimensions to part one of the statutory test.

II. THE LEGISLATIVE HISTORY DEMONSTRATES CONGRESSIONAL INTENT TO EASE THE BURDENS OF PROOF FOR WHISTLEBLOWERS AND MAKE IT MORE DIFFICULT FOR EMPLOYERS TO RETALIATE IN WHISTLEBLOWER CASES.

A. Whistleblower Protection Act interpretations apply to corporate whistleblower statutes administered by the Department of Labor.

Although not using identical text, beginning with 1992 Energy Reorganization Act amendments,[12] Congress has applied the same WPA two-part test with identical evidentiary burdens in all sixteen subsequently enacted corporate whistleblower statutes.[13] Whereas the dissent in *Fordham* contended that WPA interpretations are not relevant, because it "is an entirely different statute serving an entirely different purpose," *Fordham.* slip op. at 46-7, this is entirely unsupported. First, the ARB repeatedly has relied on the WPA to interpret the analogous corporate two-part test. *Powers*, slip op. at 17, n. 10.[14] *Amici* have participated in

[12] 42 U.S.C. § 5851, P.L. 102-486, Title XXIX, Sec 2901(a)-(g), October, 24, 1992.
[13] 42 USC 5851 (b)(3) In statutes controlling for *Fordham, Powers* and *Palmer,* the Federal Rail Safety Act contains those burdens of proof at 49 U.S.C. 20109(d)(2)(A)(ii); and the Sarbanes Oxley Act at 18 U.S.C. § 1514A.
[14] DOL regulations long have institutionalized consistency with the WPA/AIR-21 two-part test and associated burdens. *See., e.g.,* FRSA regulations at 29 C.F.R.1982.109(a), (b)). Similarly, while corporate statutes do not

the enactment of many, and in most cases all, statutes governed by the WPA-inspired two-part test. The majority's premise of dual relevance is well-taken.

Second, the statement of purposes, both for government and corporate whistleblower laws, demonstrate complementary objectives distinguished only by context. As the Senate Governmental Affairs Committee explained in 1978 for government workers, the purpose was to better serve the public by making it more difficult to retaliate against whistleblowers who use free speech rights to shine a light on waste, fraud, and abuse, and thus defend the public.

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.[15]

Senator Patrick Leahy (D-VT), a lead sponsor both for civil service and the pioneering SOX whistleblower provisions, explained the latter's purpose:

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general are serious and adverse, and they must be remedied.
>
> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way.[16]

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define "contributing factor," DOL regulations use the same verbatim definition that Congress created for the WPA. 29 C.F.R. § 1982.104.

[15] S. Rep. No. 95-969, at 8 (1978).

[16] 148 *Cong. Rec.* S. 7420 (daily ed. July 26, 2002).

Indeed, he explained that he drafted the whistleblower provisions with Senator Grassley as a critical lesson learned from the Enron financial scandal that threatened the entire economy:

> We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her as a whistleblower because Texas law would allow them to do it. Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower....The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.[17]

Congress reaffirmed analogous purposes in the Federal Railroad Safety Act (FRSA), which originally was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries." 49 U.S.C. § 20101. In *Kelley v. Norfolk and Southern Ry.*, 80 F. Supp. 2d 587, 591 (S.D.W. Va. 1999), the court summarized the congressional reasoning:

> Congress specifically designed § 20109 to protect employees who report safety violations for the purpose of promoting railroad safety. The FRSA recognizes that ... railroad employees play a vital role in accomplishing the safety goals embodied in the Act. Often, a railroad employee may be the only person who has knowledge of a major safety violation [and is] the last line of defense before occurrence of a tragic accident.

In 2007, Congress adopted the two-part test for the FRSA to further "enhance civil and administrative remedies for employees," and "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers."[18]

Courts consistently have understood that Congress intended to achieve this transparency goal by making it more difficult to retaliate. Referencing holdings on the analogous provisions of the Energy Reorganization Act for nuclear whistleblowers, 42 U.S.C. § 5851,[19] in *Araujo v. New*

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[17] *Id.* at S. 7358.

[18] H.R. Rep. No. 11-259, at 38 (2007) (Conf. Rep.).

[19] Numerous circuits have recognized the congressional premise for statutory nuclear whistleblower protections. In *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984), the court noted that the provisions serve a "broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." In

Jersey Transit Rail Operations, Inc., 708 F.3d 152, 159 (3rd Cir. 2013), the Third Circuit summarized the consensus in a range of circuit court interpretations for the purpose behind FRSA whistleblower provisions:

> Congress intended for companies in the nuclear industry to "face a difficult time defending themselves" due to a history of whistleblower harassment and retaliation in the industry. The 2007 FRSA amendments must be similarly construed, due to the history surrounding their enactment. We note, for example, that the House Committee on Transportation and Infrastructure held a hearing to "examine allegations ... suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job-injuries." (*Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads*: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007).

B. Congress acted to achieve its purpose through the two-part statutory test that replaces both the legal standards for burdens of proof in Title VII discrimination and First Amendment retaliation cases.

1. *The adoption of those burdens of proof in the corporate whistleblower statutes superseded the role of Title VII burdens.*

In *McDonnell Douglas*, the Supreme Court created a three-part test for cases of alleged race, sex or religious discrimination – the employee's burden to establish a *prima facie* case, followed by the employer's burden to articulate legitimate, non-discriminatory reasons, and concluding with the employee's burden to prove the independent justifications were pretexts. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003). Contrary to the statutory structure of the whistleblower statutes, the employer does not have to prove that its independent justification trumped illegal factors by clear and convincing evidence under Title VII. Rather, the employee

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Bechtel v. Sec'y of Labor, 50 F.3d 926, 932-33 (11th Cir. 1995), the 11th Circuit reinforced that whistleblower protection promotes the "remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency."

has to prove that the stated reason was a pretext by a preponderance of the evidence. *See Board of Trustees of Keane College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978).

In the whistleblower statutes, Congress acted to achieve its objectives to better protect the public by making it "much easier" for employees and much "tough[er]" for employers in corporate whistleblower cases. *Araujo,* 708 F.3d at 15. The court noted that the statutory burdens of proof were incorporated by reference from AIR21, which has the two-part WPA test, and added, "It is worth emphasizing that the AIR21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard." *Id.*

Until the ARB dissent's objections in *Fordham*, the Board long had recognized that it is an error to replace the AIR21/WPA burdens of proof with those in *McDonnell Douglas. See, e.g., Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, 2013 WL 2450037, at *5 (ARB May 31, 2013) (FRSA retaliation claims); *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, 2012 WL 1102507, at *6 (ARB Mar. 28, 2012) (SOX retaliation claims).

2. *Congress' adoption of the two-part statutory burdens of proof also superseded the role of First Amendment burdens of proof in whistleblower statutes.*

While the FRSA initially was governed by the 1973 *McDonnell Douglas* test, later statutory whistleblower rights such as those in the Civil Service Reform Act of 1978 were controlled by the Supreme Court's 1977 *Mt. Healthy* decision. *Warren v. Department of Army*, 804 F.2d 654 (Fed. Cir. 1986). *Mt. Healthy* created a two-part test with the final burden of proof on the employer. However, compared to WPA/AIR-21, the bars are significantly higher for the employee and much lower for the employer. Under *Mt. Healthy*, to establish a *prima facie* case the employee must demonstrate that protected speech was a "substantial," "motivating" factor. *Mt.*

Healthy, 429 U.S. at 287. Over time, the employee's burden evolved from "substantial" to a "significant" or "predominant" motivating factor.[20] In effect, this meant that the employee's preliminary burden was to prove the ultimate bottom line: retaliation was the dispositive factor. If the employee succeeds, the employer may still prevail by proving its independent justification with a preponderance of the evidence. *Id.* For corporate whistleblower laws passed prior to 1992, DOL regulations institutionalized the *Mt. Healthy* test. 29 C.F.R. 109.24.109(b)(2).

While maintaining the two-part test, the 1989 WPA modifications created a significantly easier burden for employees to establish a *prima facie* case. Instead of "substantial" to "predominant," the "contributing factor" test only requires protected activity to be relevant for a final action.[21]

The bar also was set correspondingly higher for employers. Instead of a preponderance of the evidence, to prevail the employer must prove its non-retaliatory reasons by clear and convincing evidence. "Preponderance of the evidence" means "more likely than not," or more than 50%.[22] By contrast, "clear and convincing evidence" means the matter to be proven is "highly

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[20] *See, e.g. Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); H.R. Rep. No. 100 – 274, at 27 (1987); S. Rep. No. 100 – 413, at 13 – 14 (1988); 135 Cong. Rec. 4509 (1989) (statement of Sen. Levin); 135 Cong. Rec. 5035 (1989) (Joint Explanatory Statement, item 7) In the House and Senate Joint Explanatory Statement on the legislation, Congress emphasized unequivocally that it —specifically intended to overrule existing case law, which requires a whistleblower to prove his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action. 135 *Cong. Rec.* 5033 (1989).

[21] In the House and Senate Joint Explanatory Statement on the legislation, Congress emphasized unequivocally that it "specifically intended to overrule existing case law, which requires a whistleblower to prove his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." 135 *Cong. Rec.* 5033 (1989) The Explanatory Statement further explained the public policy rationale.

> By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action. 135 Cong. Rec. 5033 (1989).

[22] *Brown v. Bowen*, 847 F 2d 342, 345-46 (7th Cir. 1988).

probable or reasonably certain."[23] Indeed, since 1989, the standard as articulated by the California Supreme Court is evidence "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind."[24] Both for corporate and civil service law, its composite definition requires "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'"[25] A survey of judges revealed that in practice the standard requires a 70-80% quantum of evidence.[26]

There were two specific reasons why Congress attempted to create this far more difficult evidentiary standard. First, as a matter of accountability, there should be heightened scrutiny for an action already established as taken for partially illegal reasons. Second, a government agency has a large advantage in access to evidence and records to create the appearance of a decision on grounds independent of whistleblowing.[27]

On balance, the new burdens of proof put whistleblowers on a legal high ground. The "clear and convincing standard" is understood to be "reserved to protect particularly important interests

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[23] *Ragbir v. Holder*, 389 Fed. Appx. 80, 2010 U.S. App. LEXIS 16860, quoting *Black's Law Dictionary* 636 (9th Ed. 2009).

[24] *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543 (1899).

[25] *Price v. Symsek*, 988 1187, 1191 Fed. Cir. 1993), quoting *Buildex, Inc. v. Kason Indus., Inc.*, 861 F.2d 1461, 1463 (Fed. Cir. 1988)

[26] McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 Van L Rev. 1293, 1328-29 (1982) (presenting survey of 170 federal judges in which 112 assessed CCE as requiring a 70-80% quantum of proof, 26 requiring more and 31 requiring less); *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053, (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1018 (1980).

[27] As Senator Levin explained, "Clear and convincing evidence‖ is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof 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—in other words, that the agency action was —tainted.‖ Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions."

135 *Cong. Rec.* S2780 (Mar. 16, 1989). *See also* 135 *Cong. Rec.* H747 – 48 (daily ed., March 21, 1989) (explanatory statement on Senate Amendment to S. 20); *Gergick v. General Services Administration,* 43 M.S.P.R 651, 663 n.14 (1990).

in a limited number of civil cases." *California ex rel. Cooper v. Mitchell Bros' Santa Ana Theater*, 454 U.S. 90, 92-3 (1981).

In 1992 amendments to the Energy Reorganization Act, Congress instructed that nuclear whistleblowers should have the same enhanced rights as civil service employees, and has applied that principle in every DOL-administered whistleblower law since. As the 11th Circuit recognized in *Stone and Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997), consistent with safety goals the purpose was to assist whistleblowers and discourage retaliation:

> For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves. Recent accounts of whistleblower harassment at both NRC licensee ... and [Department of Energy] nuclear facilities ... suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. H. Rep. No. 102-474(VIII), at 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2297. "These reforms," the House Report continues, "are intended to address those remaining pockets of resistance."

III. THE SCOPE OF EVIDENCE RELEVANT FOR THE CONTRIBUTING FACTOR TEST IS CONTROLLED BY THE COMPLAINANT'S CASE.

A. The complainant's evidence of alleged retaliation defines the scope of relevance to assess his prima facie case.

The ARB order suggests that any evidence demonstrating non-retaliatory motives is relevant for assessing evidence of retaliation, and therefore to prove retaliation was a contributing factor the complainant also must defeat any non-retaliatory motives advanced by the respondent to prove retaliation was a contributing factor. *Dietz, supra*, slip op. at 24. However, that is not how Congress structured the two-part test. As explained in the Senate report for the 1994 WPA amendments,[28] consideration of retaliatory and non-retaliatory factors is purposely compartmentalized.

[28] S. Rep. No. 103-358 (1994), at 6.

> The Committee also notes that the 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 Committee amendment reaffirms that Congress intends for an 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.

In *Kewley v. Dep't of Health and Human Services*, 153 F.3d 1357, 1362-64 (Fed. Cir. 1998), the Federal Circuit Court of Appeals properly applied congressional intent in holding that merging the two parts of the test is reversible error. If the complainant establishes a retaliatory factor (the knowledge-timing factor in that case)—

> no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing. The burden of persuasion thus shifts to the agency to prove by clear and convincing evidence, a higher standard, that it would have taken the action even in the absence of the protected disclosure. ... 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 petitioner's *prima facie* case under section 1221(e)(1)(A) and (B).... [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 statute as correctly construed.[29]

Because the second half of the two-part test is not superfluous, complainants can and frequently do lose after successfully establishing a *prima facie* case to win the opening test. *See, e.g., Armstrong v. Dep't of Justice*, 107 MSPR 375, 386 (2007); *Carey v. Dep't of Veterans Affairs*, 93 MSPR 676, 681 (2003).

It is an error for an Administrative Judge to merge the two factors, because that deviates from the congressional structure and prevents a clean determination of relevant factors for each

[29] Congress enacted the WPEA to clarify and restore the law's original mandate on a dies-ranging series of precedents. *See, e.g.*, 5 USC 2302(f) overturning a series of precedents on the scope of protected activity. But on the issue in this proceeding, there was no need for any legislation. The Federal Circuit properly interpreted clear statutory language and congressional intent for the placement of issues and evidentiary burdens in whistleblower cases. Legislative corrective action would be far more cumbersome and difficult, however, if the ARB restructures statutory burdens of proof. The thirteen DOL-administered statutes encompass numerous committees of jurisdiction which would have to restore the congressional mandate for thirteen laws, not one.

half of the test. As *Dietz*, slip op. at 20, properly held, however, because it will not affect the outcome, misplacing the analysis is "harmless error[,]" unless the evidentiary burdens are improperly applied.[30]

B. The complainant has discretion to advance many possible retaliatory factors, some which may overlap with the respondent's affirmative defense.

To establish a *prima facie* case, a complainant only needs to prove one factor establishing that protected activity contributed to the outcome. There is a wide menu from which to choose. In the absence of direct evidence, circumstantial evidence can be based on factors independent of retaliatory motive, such as temporal proximity, inconsistent application of policies, shifting explanations, disparate treatment before and after protected activity and disparate treatment compared to those who did not engage in protected activity. *Sylvester v. Parexel Int'l LLC*, ARB. 07-123, ALJ. Nos. 2007-SOX-39 and 42 (May 25, 2011); *Valerino v. Department of Health and Human Services*, 7 MSPR 487 (1981).

While not mandatory, a complainant may choose to advance factors that overlap with the respondent's affirmative defense, such as attacking the employer's motives. Improper motive, however, is only one of many ways to pass the contributing factor test, not a prerequisite. A complainant may still past the test without advancing this factor, or after failing to prove it. *Araujo*, 708 F.3d at 158; *Timmons CRST Dedicated Services, Inc.*, ARB No. 14-051, ALJ No. 2014-STA-9 (Sept. 29, 2014). That is because Congress did not specify or require retaliatory animus to prove

[30] The dissent contends that the majority seeks to disrupt longstanding precedent. *Dietz*, slop op. at 35.n3. A review of cited authority, however, reveals a consistent interpretation: improperly analyzing or merging the factors is error, but to be reversible it must affect the outcome. *See Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37 (Oct. 17, 2012). Although the AJ approved the respondent's legitimate reasons without considering retaliatory motive, it did "not constitute reversible error because, as we discuss below, applying the appropriate standard results in the same outcome since the evidence fails to establish *any* causal link between Abbs's protected safety break and his discharge. Slip op. at 4-5 (emphasis added) *See also Benninger v. Flight Safety International*, ARB No. 11-064, ALJ No. 2009-AIR-022 Feb. 26, 2003) (misapplication of intervening factors to prima facie case was not reversible, because there was no causal link between protected activity and adverse actions).

retaliation. If protected activity contributes to a causal link, it is sufficient. In *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993), the court explained,

> [T]hough evidence of a retaliatory motive would still suffice to establish a violation of his rights under the WPA, *cf. Hathaway v. Merit Sys. Protection Bd.*, 981 F.2d 1237, 1238 (Fed. Cir. 1992), a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508) (emphasis added).

Similarly, a complainant may choose to attack the respondent's stated reasons as so pretextual that they prove retaliation. The Department's regulatory history for the FRSA burdens of proof properly puts the issue in perspective: Even if the complainant fails to prove pretext, he may still pass the contributing factor test by proving a different factor. 75 Fed. Reg. 53, 522-25 (August 30, 2010).

C. The respondent may rebut any evidence presented by complainant to prove a contributing factor, but solely to defeat the plaintiff's arguments relevant for the *prima facie* case.

Contrary to the ARB dissent in *Dietz*, slip op. at 5,[31] the statutory two-part test does not prevent respondents from presenting evidence on non-retaliatory factors, if it is relevant to the *prima facie* case. For example, it is undisputed that a respondent may present evidence of non-retaliatory motives that is relevant for assessing credibility. Similarly, the ARB decision in *Dietz* does not disagree that if the complainant opens the door by attacking stated reasons as pre-textual, the respondent may present rebuttal evidence defending them. *Dietz*, slip. op. at 19-21.

[31] Again, the *Fordham* dissent's numerous supporting references disprove its concern. A review of case law relied on by the majority demonstrates the restrictions were on consideration of non-retaliatory reasons advanced by respondents to prove their cases, not rebuttals of factors raised by complainants. *See, e.g., Abbs, supra* (harmless error because did not affect outcome); *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS- 025 (April 30, 2013) (no finding that protected activity contributed in any way).

In short, there are no restrictions on the respondent from rebutting the complainant's case with evidence of non-retaliatory motives. As demonstrated above, the restriction is that the respondent's rebuttal evidence only may be applied to defeat the complainant's *prima facie* case, not to advance or prove its affirmative defense.

IV. ANY EVIDENCE ADVANCED BY RESPONDENT TO PROVE IT ACTED FOR LEGITIMATE, INDEPENDENT REASONS MUST BE PROVEN BY CLEAR AND AND CONVINCING EVIDENCE.

A. Evidence relevant to overlapping factors may be considered in both halves of the two-part test.

The key issue is not what evidence a respondent may present, but under what evidentiary burden it is considered. As discussed above, after a finding that protected activity affected the outcome in any way, to impose accountability and even the odds a respondent then must prove non-retaliatory reasons by clear and convincing evidence. There is no statutory authority or legislative history that the complainant must disprove the respondent's affirmative defense to prove her own case.

If a complainant succeeds initially, any issues of overlapping relevance then will be considered under both burdens of proof when applying the same evidence in the proper context – the complainant's burden by a preponderance of evidence for the *prima facie* case, and the respondent's burden by clear and convincing evidence for its affirmative defense. This is precisely what happened in *Speegle v. Stone and Webster Construction, Inc.*, ARB Case. No. 029-A, ALJ No. 2005-ERA-006 (Jan. 31, 2013). The Board held that the complainant proved a profane protected disclosure and established a *prima facie* case of retaliation based on the evidence of misconduct. But it held that the respondent established by clear and convincing evidence that its anti-profanity policy would have caused the same result.

Since clear and convincing evidence must be determined on a case-by-case basis, the Federal Circuit applied the same formula but with a different result in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). In *Whitmore* the whistleblower also proved that an otherwise-protected, profane disclosure contributed to his dismissal. However, the court held that the employer failed to prove it would have terminated him for profanity if whistleblowing were not involved.

B. The two-part test properly applies the substantial evidence rule.

The ARB properly has concluded that the outcome must be based on substantial evidence from the record as a whole. But the whole record need not be applied to each element, which need be satisfied only by evidence relevant to it. As the dissent previously explained in *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003 (Aug. 28, 2014), slip op. at 16-17:

> 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 protected activity did or did not "contribute." By "all the evidence," we mean all the evidence that is relevant to the issue of causation .... Because contributory factor permits lawful reasons to co-exist with unlawful reasons, a complainant does not need to prove that lawful reasons were pretext.[32]

The two-part test inherently includes an ultimate finding based on the whole record. The issue is what evidentiary burdens apply, not the scope of the record. The first part of the test considers the evidence relevant to retaliation under the plaintiff's preponderance of the evidence standard; the second part considers all other evidence relevant to non-retaliatory reasons under the respondent's clear and convincing evidence burden. Indeed, the clear and convincing evidence

[32] Ironically, the *Fordham* dissent cites *Bobreski's* reaffirmation of that a whole record must support the outcome, slip op. at 13-14, for the proposition that the whole record must be applied to the contributing factor test.

burden is based on consideration of the whole record. As the Federal Circuit explained in *Whitmore*, 380 F.3d at 1368,

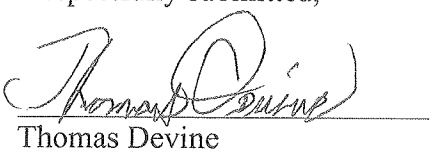
> Whether evidence is sufficiently clear and convincing to carry this burden of proof cannot be evaluated by looking only at the evidence that supports the conclusion reached. Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.

The two-part test is grounded in substantial evidence and based on the record as a whole. This test and the WPA-based burdens of proof that Congress repeatedly has enacted are controlling.

CONCLUSION

The ARB responsibly has resolved this issue twice, consistent with statutory language and all interpretations of the Whistleblower Protection Act. For the above reasons, those rulings should not be disturbed.

Respectfully submitted,



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United States Senate

WASHINGTON, DC 20510

April 14, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Thomas Perez
Secretary of Labor

U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Perez:

We write in support of the Department of Labor Administrative Review Board's (ARB) recent decisions in *Fordham v. Fannie Mae*, ARB No. 12-061 (Oct. 9, 2014) and *Powers v. Union Pacific Railroad*, ARB No. 13-034 (Mar. 20, 2105), clarifying the statutory burdens of proof for parties in whistleblower cases.

As the ARB recognized in *Fordham* and reaffirmed in *Powers*, whistleblower statutes and their implementing regulations establish unique burdens for whistleblowers claiming retaliation and their respondent employers. This distinction has important implications for the types of evidence that may be offered and considered at each stage of proof.[1]

A whistleblower claiming retaliation first must show, under a preponderance of the evidence standard, that any protected activities in which they engaged played a role in the retaliation they experienced. A respondent *then* has a heavier "burden of proving by '*clear and convincing evidence*' that it would have taken [adverse] personnel action for legitimate, non-retaliatory reasons had there been no protected activity."[2] It makes no sense to weigh a respondent employer's evidence of non-retaliatory reasons for an adverse action in the first stage under a lower burden than that intended by Congress. As the ARB in *Fordham* correctly noted,

> To afford an employer the opportunity of defeating a complainant's proof of a '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

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[1] *Fordham*, ARB. No. at 20-23; *Powers*, ARB. No. 13-034 at 13 ("fully adopt[ing] the *Fordham* holding on contributory factor analysis).

[2] *Fordham*, ARB No. 12-061 at 21 (citing 49 U.S.C.A. § 42121(b)(2)(B) and 29 C.F.R. § 1980.109).

prescribed affirmative defense by 'clear and convincing evidence' meaningless.[3]

As the ARB further notes, this clear distinction also appears in the ERA and Whistleblower Protection Act, which serve as a model for the standards of proof at issue in *Fordham* and *Powers*.[4] A thorough and careful reading of the relevant legislative history amply demonstrates that Congress intended this bifurcated analysis in whistleblower cases to address patterns of retaliation in various industries and agencies and ultimately to "facilitate relief" for whistleblowers.[5]

Historically, whistleblowers who pursue claims of retaliation for disclosing waste, fraud, and abuse are severely disadvantaged. Whistleblowers frequently lack access to employer information that would elucidate employer motivations and decision making processes in cases of adverse personnel actions. Courts and the ARB have long recognized that whistleblowers' burden to demonstrate their protected activities contributed to such an action does not include an obligation to offer evidence that their employer had a "retaliatory motive."[6] Neither should it include an obligation to refute a "subjective non-retaliatory motive."[7] The ARB's recent decisions are thus in line with congressional intent to level the playing field for whistleblowers in bringing retaliation claims.

We commend the ARB for its commitment to a fair and accurate interpretation of the federal whistleblower provisions.

Sincerely,

Charles E. Grassley
United States Senator

Ron Wyden
United States Senator

Thom Tillis
United States Senator

Tammy Baldwin
United States Senator

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[3] *Id.* at 22.
[4] *Fordham*, ARB No. 12-061 at 28-29, 31-33; *Powers*, ARB No. 13-034 at 14-18; 5 U.S.C. § 1221(e); 42 U.S.C. § 5851.
[5] *Fordham*, ARB No. 12-061 at 28 (quoting 138 Cong. Rec. H11, 409; H11, 444 (daily ed. Oct. 5, 1992)).
[6] *Powers*, at 25.
[7] *Id.*

Mark Kirk
United States Senator

Claire McCaskill
United States Senator

cc: Paul M. Igasaki
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UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,

Complainant,

v.

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL
RAILROAD COMPANY,

Respondent.

ARB CASE NO. 16-035

ALJ CASE NO. 2014-FRS-154

CERTIFICATE OF SERVICE

I, Tom Devine, certify that:

On the **3rd Day of August, 2016**, I served the above AMICUS BRIEF in this proceeding by

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August 3, 2016

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