In the Matter of:

THOMAS E. CLEMMONS,

COMPLAINANT,

v.

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,

RESPONDENTS.

ARB CASE NO. 12-105

ALJ CASE NO. 2004-AIR-011

DATE: November 25, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Steven K. Hoffman, Esq.; Emilie S. Kraft, Esq.; *James & Hoffman, P.C.*; Washington, District of Columbia

For the Respondent:
Chris E. Howe, Esq.; *Kelly, Hart & Hallman; LLP*, Fort Worth, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, concurring.

FINAL DECISION AND ORDER

Thomas E. Clemmons alleged that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. (Ameristar) violated the employee protection provisions of the Wendell H. Ford Aviation

Investment and Reform Act for the 21st Century (AIR 21 or the Act)[1] when Ameristar terminated his employment after he complained about air safety issues. Following a hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Ameristar violated AIR 21.[2] Ameristar appealed to the Administrative Review Board (ARB). The ARB vacated the ALJ's recommended decision and remanded the case for further consideration.[3]

On remand, the ALJ addressed each of the four legal errors that the ARB had identified and again concluded that Ameristar had violated AIR 21.[4] Ameristar appealed to the ARB, which affirmed the ALJ's decision on the merits and his remedies, including a back pay award of $37,995.09 plus interest.[5] Ameristar then appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit affirmed the ARB's decision on the merits and its decision to award back pay, but remanded the case for the ALJ to determine the proper amount of the award in light of after-acquired evidence of Clemmons's potential wrong-doing that might have led to his termination from employment.[6] The court instructed the ALJ to address the question of whether the period of the back pay award, which ran from January 20, 2003, the date of Clemmons's discharge, through July 30, 2004, the date of the hearing, should have ended as of March 28, 2003, when Ameristar became aware of the new evidence.

Consistent with the Fifth Circuit's decision, the ARB remanded this case to the ALJ for further consideration of the back pay award.[7] On remand, the ALJ concluded that Ameristar

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[1] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2013).

[2] *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (Jan. 14, 2005).

[3] *Clemmons v. Ameristar Airways, Inc.*, Decision and Order of Remand, ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June 29, 2007) (*Clemmons I*).

[4] *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (Feb. 20, 2008).

[5] *Clemmons v. Ameristar Airways, Inc.*, Final Decision and Order, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010) (*Clemmons II*).

[6] *Ameristar Airways v. A.R.B.*, 650 F.3d 562, 570 (5th Cir. 2011).

[7] *Clemmons v. Ameristar Airways, Inc*., Order of Remand, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Apr. 27, 2012) (*Clemmons III*).

must pay Clemmons the entire back pay award as ordered in his initial decision.[8] Ameristar appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm the ALJ's decision.

BACKGROUND

In its previous decisions, the ARB detailed the relevant facts. To reiterate briefly, Ameristar hired Clemmons in September 2002 as Director of Operations in charge of its pilots and their training. Almost immediately Clemmons encountered scheduling problems and operational difficulties as well as pilots' complaints about their pay and concerns about duty-time violations. In a December 17, 2002 e-mail, Clemmons notified Ameristar President Thomas Wachendorfer and Vice President of Operations Lindon Frazer that pilots were being pushed to work beyond the 16-hour restriction in violation of the Part 125 regulations governing a pilot's hours.[9]

At management's instruction to arrange a "two weeks on and one week off" schedule, Clemmons attempted to prepare pilot schedules with 14 days on and 7 days off. Frazer reviewed and approved each of Clemmons's schedules that he sent out to the pilots, but on January 9, 2003, Wachendorfer sent a memo to Clemmons, copying Frazer and stating that the approved schedules were unsatisfactory. Clemmons submitted a revised schedule, which Wachendorfer again rejected. Wachendorfer eventually had Frazer create a substitute schedule with 15 days on and 6 days off.

On January 13, Clemmons sent an e-mail to the pilots explaining that, although he had prepared a schedule with 14 days on and 7 days off as instructed, Wachendorfer overruled him. The e-mail voiced several other complaints about Ameristar's management and referred mockingly to Wachendorfer as "Mr. Wackmeoffendorfer." Clemmons told the pilots that he was hoping to leave the company soon, and offered to support any pilots who wished to quit the company by assisting them with their resignation letters and supporting their unemployment claims.[10]

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[8] *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (Aug. 20, 2012). On remand, the ALJ set a briefing schedule. Both parties filed briefs. No new evidence was introduced. *See* discussion, *infra*.

[9] By federal regulation, each flight crewmember and attendant must be relieved from all duty for at least 8 consecutive hours during any 24-hour period. 14 C.F.R. § 125.37 (2013).

[10] Respondent's Appendix at 1. In the e-mail, Clemmons stated:

> Today I submitted a revised schedule to Mr. Wachendorfer as per his demand. It was 14 on and 7 off as promised when you were hired. It was (surprise, surprise) not acceptable. He added days to give you 15 on and 6 off so you may have a weekend off. Really you have only

Clemmons has acknowledged that this e-mail was insubordinate, unprofessional, and grounds for termination, but the record indicates that Ameristar was not aware of the e-mail or its contents until March 28, two months after Clemmons's January 20 termination.[11]

Following his discharge, Clemmons sought unemployment benefits from the Texas Workforce Commission (TWC). Ameristar contested his claim and stated in documents submitted on February 5 and March 31, 2003, that it had fired Clemmons because he failed to produce the most economical work schedules for the pilots. On April 4 Ameristar again cited problems with scheduling and a January 16 freight-loading incident as reasons for discharging Clemmons.

The TWC awarded unemployment benefits, but Ameristar appealed and at a hearing on June 30 raised the insubordinate and insulting e-mail to Wachendorfer as the reason for firing Clemmons. The TWC reversed the award on the basis that Clemmons's insubordination made him ineligible for benefits.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter to the ARB.[12] In cases arising under AIR 21, the ARB reviews the ALJ's findings of fact under the substantial evidence standard and his legal conclusions de novo.[13]

> 5.5 days off and work 15.5 days. I DID NOT MAKE THIS SCHEDULE AND I AM SORRY! It is effective immediately.
>
> I have received a few resignations. If you decide to leave, be very explicit in your letter of resignation. I would expect you to cite your concerns and address each one, i.e. Concerns about safety pay was not as promised, days off and on are not as promised, having to ask permission before log-book write ups, encouragement to violate duty rest time rules, etc….
>
> I will support fully your unemployment claims by sending you a letter, on company letter head, supporting your individual claims. I will furnish each of you a copy of your training records and a letter of recommendation if needed.
>
> Hopefully I will not be here much longer myself. If I can help you in any way, please let me know while I am still the DO. Again I thank you all for your support. Good Luck to us all.

[11] The January 13, 2003 e-mail sent to Ameristar's pilots was forwarded from Wachendorfer to Frazier on March 28, 2003. *Clemmons*, ALJ No. 2004-AIR-011, slip op. at 17 (Jan. 14, 2005).

DISCUSSION

In remanding this case to the ALJ the Board held that the doctrine of after-acquired evidence as explained in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995), is applicable to complaints under AIR 21.[14] In *McKennon*, the Supreme Court instructed that "where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it," back pay should be limited to the period "from the date of the unlawful discharge to the date the new information was discovered."[15]

Accordingly, the Board instructed the ALJ to decide whether the January 13, 2003 e-mail memo that Clemmons sent to Ameristar's pilots prior to his discharge, of which Ameristar's management became aware after Clemmons's discharge, constituted such severe misconduct that Ameristar would have fired him on those grounds alone. The Board also ordered the ALJ to determine what burden of proof applied to this determination[16] and to consider any "extraordinary equitable circumstances" affecting "the legitimate interests of either party."[17]

On remand, the ALJ agreed with the ARB's opinion that Ameristar's burden of proof to show that it would have fired Clemmons because of the after-acquired e-mail was the AIR 21 clear-and-convincing-evidence standard. Under that standard, where a complainant has proven that his or her protected activity was a contributing factor in the adverse personnel action at issue, relief may nevertheless not be ordered if the employer demonstrates by "clear and

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[12] Secretary's Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012); 29 C.F.R. § 1979.110.

[13] 29 C.F.R. § 1979.110(b); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

[14] *Clemmons III*, ARB No. 08-067, slip op. at 4

[15] *McKennon*, 513 U.S. at 362.

[16] In remanding this question to the ALJ for determination, thereby affording the parties an opportunity to brief the issue, the ARB nevertheless posited that it would "seem[] strange that the burden of proof would change in this case where the after-acquired evidence involved in an incident occurr[ed] before the termination but [was] merely discovered afterwards; that [it] would result in a windfall to the employer solely because it learned of such information later." *Clemmons III*, ARB No. 08-067, slip op. at 5.

[17] *Id*. at 5, citing *McKennon*, 513 U.S. at 362.

convincing evidence" that it would have taken the same unfavorable action absent the complainant's protected activity.[18]

Applying the clear-and-convincing standard, the ALJ held that when an employer seeks to use after-acquired evidence of employee wrongdoing to limit a complainant's damages, the employer must first establish that the wrongdoing was so severe that the employer would have fired the employee on those grounds alone had it known of the wrongdoing at the time of discharge. The ALJ added that it was not enough for the employer to show that it *could* have fired an employee because of the after-acquired evidence but that it *would* have done so.[19]

The ALJ found that Ameristar's managers, Frazier and Wachendorfer, did not see Clemmons's e-mail until March 28, 2003. The ALJ concluded that Ameristar failed to establish by clear and convincing evidence that had it known of the e-mail at the time of his discharge, Ameristar would have fired Clemmons because of the e-mail alone.

Cited in support of the ALJ's conclusion was what the ALJ characterized as "shifting and contradictory responses" by Ameristar in opposition to Clemmons's claim for unemployment benefits filed with the TWC in the immediate aftermath of his employment termination. The ALJ found that on three separate occasions during the initial stage in the proceedings before the TWC, Ameristar never mentioned the offensive e-mail. Rather, Ameristar based its opposition on various other reasons, including that Clemmons failed to produce the most economical pilot work schedules and failed to facilitate the loading of pallets on a plane on January 16, 2003.[20]

Ameristar first raised the e-mail before the TWC as a reason for the termination only after the TWC had ordered an award of benefits and Ameristar had appealed and requested a hearing.[21] The ALJ also cited the fact that in opposition to Clemmons's OSHA complaint, Ameristar cited Clemmons's e-mail as but one of the reasons for firing Clemmons.[22] Accordingly, the ALJ re-affirmed his original award of back pay.

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[18] 49 U.S.C.A. § 42121(b)(2)(B)(iv).

[19] Decision and Order (D. & O.) at 6 (citing *O'Day v. McDonnell-Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996)). Quoting *McKennon* that if "an employer discovers that the plaintiff committed an act of wrongdoing and can establish that the 'wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge,'" the court held that the employer does not have to offer reinstatement or provide front pay, and has to provide back pay only from the date of the unlawful discharge to the date the new information was discovered.

[20] D. & O. at 4.

[21] *Id*. at 4, 6.

[22] *Id*. at 6.

On appeal, Ameristar argues that the ALJ erred in (1) applying the clear-and-convincing burden of proof, (2) ignoring what it contends are undisputed, significant, material facts, and (3) subverting the principles of the after-acquired evidence doctrine.

Initially Ameristar asserts that AIR 21 is silent regarding the burden of proof on after-acquired evidence, and argues that because of this silence the default preponderance-of-the-evidence standard in civil and administrative proceedings applies. In support of its contention, Ameristar argues that AIR 21 "expressly limits" application of the clear and convincing burden of proof standard imposed on an employer "solely to the affirmative defense on the *merits*" of an AIR 21 case, and that the default preponderance-of-the-evidence standard applies to all other damages-related burdens of proof.[23] The default preponderance-of-the-evidence standard, Ameristar argues, applies to the "much different" matter of after-acquired evidence which "solely relates to damages" in the same manner that the failure to mitigate defense relates to the award of damages.[24]

AIR 21 is not, however, silent regarding the burden of proof required of an employer to establish that after-acquired evidence of an employee's prior wrongdoing warrants modification of relief previously awarded. By arguing that the clear-and-convincing burden of proof applies only to the affirmative defense on the merits of an AIR 21 case, Ameristar ignores the express language of 49 U.S.C.A. § 42121(b)(2)(B)(iv), which applies the burden-of-proof standard *not in defense against the merits* of a complainant's claim but to the question of *whether the complainant is entitled to relief*. A violation of AIR 21's whistleblower protection provision and liability on the part of an employer giving rise an employee's entitlement to relief is established if the complainant has demonstrated that his or her protected activity was a contributing factor in the unfavorable personnel action at issue.[25] The actual award of relief is nevertheless dependent on whether the employer is able to prove by clear-and-convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[26]

As the ARB has previously noted, after-acquired evidence of an employee's prior wrongdoing goes to the question of relief. It is not grounds for avoiding liability. After-acquired evidence's only benefit to the employer is to limit the extent of the relief to which the employee is entitled.[27] AIR 21 thus addresses an employer's burden of proof required to avoid an award of

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[23] Respondent's Brief at 3-4 (emphasis in Respondent's Brief).

[24] *Id* at 4.

[25] 49 U.S.C.A. § 42121(b)(2)(B)(iii), (b)(3)(B).

[26] 49 U.S.C.A. § 42121(b)(2)(B)(iv).

[27] *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 8 (ARB Sept. 29, 2006) ("evidence of legitimate grounds for termination of employment, acquired by the employer after termination, is relevant to the issue of damages"), *aff'd sub nom Indiana*

damages or other relief only where liability under the act has been established regardless of when the employer learns of the evidence upon which it relies. Whether the employer seeks to avoid an order awarding damages based on evidence available to the employer at the time of the adverse personnel action or based on after-acquired evidence of an employee's prior wrongdoing, AIR 21 draws no distinction. In both instances the evidence upon which the employer relies goes to the question of whether the complainant is entitled to damages or other relief.

McKennon is silent on the requisite burden of proof where a respondent seeks to rely on after-acquired evidence of a complainant's prior wrongdoing. Nevertheless, the Supreme Court stated that the remedial relief to which the respondent may be entitled in such cases "must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case."[28] Even if AIR 21 was construed as silent regarding the burden of proof required where a respondent seeks to rely on after-acquired evidence, the purposes and policy underlying AIR 21's whistleblower protection provision would lead to the same result. As stated in *Dos Santos v. Delta Airlines*, AIR 21's purposes and policy are most significant:

> [T]he general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system. AIR21 introduced wide-sweeping reforms of the Nation's aviation industry – including modernization of the FAA's air traffic services, restructuring and expansion of the FAA's budget, and extension of the protections afforded to disabled air travelers – and the statute's legislative history makes clear that the primary focus of AIR21 was to initiate "broad, fundamental improvements in aviation safety." Statement of the President of the United States Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 36 Weekly Comp. Pres. Doc. 745-47 (April 6, 2000); *see also*, 146 Cong. Rec. H1002-01, H1009 (daily ed. March 15, 2000) (statement of Rep. Kelly) ("let there be no mistaking that our fundamental purpose here for undertaking this initiative is to ensure the safety of the traveling public.").[29]

Michigan Power Co. v. U.S. Dept. of Labor, 278 Fed. Appx. 597, 606, 2008 WL 2121001 (6th Cir. 2008); *Timmons v. Mattingly Testing Servs.*, No. 1995-ERA-040, slip op. at 8 n.13 (ARB June 21, 1996) ("Evidence of legitimate grounds for termination that is acquired by an employer after the decision to terminate will not defeat a discrimination complaint, although such evidence is relevant to the issue of damages for which an employer is liable.") (citing *McKennon*, 513 U.S. at 357-360).

28 *McKennon*, 513 U.S. at 361.

29 *Dos Santos v. Delta Airlines*, ALJ No. 2012-AIR-020, slip op. at 22 (Jan. 11, 2013).

Given the important role that Congress intended whistleblowers to play in achieving AIR 21's underlying purposes, we find the rationale articulated by various courts for adhering to the higher clear-and-convincing, burden-of-proof standard for after-acquired evidence particularly compelling for application in whistleblower cases such as this one. As the D.C. Circuit Court of Appeals has stated, the reason for imposing the higher burden of proof "is straightforward. 'Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude.' Such a showing is impossible precisely because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem."[30]

Ameristar's liability for violating AIR 21's whistleblower protection provisions has been established. The only question is whether Clemmons is entitled to a continuation of the relief initially awarded in light of the after-acquired evidence of his pre-discharge "insubordinate" activity. Whether Ameristar seeks to avoid an award of damages or other relief based on information available at the time of Clemmons's discharge or seeks an order discontinuing previously-ordered relief based on subsequently-acquired information of pre-discharge wrongdoing, the burden of proof imposed on Ameristar remains the same. Ameristar must prove by clear-and-convincing evidence[31] that the after-acquired evidence of Clemmons's wrongdoing was so severe that Ameristar would have fired him "on those grounds alone if the employer had known of it at the time of the discharge."[32]

In further challenge to the ALJ's decision, Ameristar argues that substantial evidence does not support the ALJ's finding that Ameristar would not have fired Clemmons when it

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[30] *Day v. Mathews*, 530 F.2d 1083, 1086 (quoting *Johnson v. Goodyear Tire*, 491 F.2d 1364, 1379 (5th Cir. 1974)). *See also League v. City of Salinas Fire Dept*., 654 F.2d 557, 559 (9th Cir. 1981) ("The burden of showing that proven discrimination did not cause a plaintiff's rejection is properly placed on the defendant-employer because its unlawful acts have made it difficult to determine what would have transpired if all parties had acted properly.").

[31] 49 U.S.C.A. § 42121(b)(2)(B)(iv). For the same reasons, the issue of an employer's burden of proof required to demonstrate that an employee has not met his or her obligation to mitigate damages is distinguishable from whether an employer that has violated a whistleblower's statutory protection and then subsequently becomes aware of the employee's wrongdoing that could serve as an independent basis for the adverse personnel action must produce clear and convincing evidence to mitigate the statutory remedies.

[32] *McKennon*, 513 U.S. at 362-63. We note that even if a preponderance-of-the-evidence standard is applicable, the absence of any evidence in the record showing that Ameristar would have fired Clemmons solely because of his earlier e-mail precludes Ameristar from meeting the lesser standard of proof. Frazier testified that he and Wachendorfer had seen the e-mail prior to Clemmons's January 20, 2003 discharge, and the ALJ discounted this evidence as incredible. But whenever they saw the e-mail, the record contains no evidence that it alone would have caused Clemmons's firing.

learned of his e-mail to the pilots.[33] Ameristar asserts that the ALJ downplayed the e-mail's "outrageous contents" and ignored its "obvious intent" to "sabotage the legitimate authority of Ameristar's president." The ALJ erred, according to Ameristar, in relying instead on "isolated fragments of communications" to the TWC and OSHA to conclude that Ameristar had not met its burden of proof.[34]

The central fallacy in this argument is that Ameristar offered no additional proof beyond the contents of the e-mail to establish that it would have fired Clemmons because of the e-mail alone. To the contrary, in appealing the unemployment award and opposing Clemmons's complaint, Ameristar proffered to the TWC and OSHA at least six bases supporting its discharge of Clemmons, only including Clemmons's "insubordinate" e-mail as another reason in its May 9, 2003 submission to OSHA and on its June 30, 2003 response to the TWC.[35] Ameristar relies instead on its bald assertion that it would have fired Clemmons based on the "context, substance, and intent" of the e-mail alone.

Substantial evidence supports the ALJ's conclusion that Ameristar's "shifting and contradictory" responses regarding its reasons for firing Clemmons were insufficient to show that the e-mail would have been the sole reason for his discharge. The fact that in opposing Clemmons's unemployment claim Ameristar did not see fit to include the e-mail in its March 31, April 4, and June 26, 2003 responses to the TWC undermines its claim that the e-mail alone would have caused his firing, especially as the ALJ had previously found that Frazier and Wachendorfer were not credible in testifying about when they became aware of the e-mail.[36] While the TWC reversed Clemmons's unemployment benefits based on the insubordinate e-mail, that fact does not prove that Ameristar would have fired him solely because of the e-mail.

Finally, Ameristar argues that the ALJ's decision subverts the fundamental principle of the after-acquired evidence doctrine, asserting that an employee's wrongdoing must be taken into account "lest the employer's legitimate concerns be ignored." Ameristar claims that because "everyone's common-sense acknowledgement" that Clemmons's e-mail constituted "unpardonable wrongdoing," Clemmons should not "escape any consequence for transmitting perhaps the most disloyal and destructive e-mail in the annals of American business."[37]

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[33] In remanding the case, the Fifth Circuit stated that the e-mail "*could* provide unassailable grounds for termination," but made plain that whether Ameristar *would* have fired Clemmons on the basis of the e-mail alone was a question of fact. *Ameristar*, 650 F.3d at 568 (emphasis added).

[34] Respondent's Brief at 4-8.

[35] In concluding that Ameristar violated AIR 21 by firing Clemmons, the ALJ found, and the ARB and Fifth Circuit affirmed, that all of Ameristar's reasons constituted pretext. *Ameristar*, 650 F.3d at 568-69.

[36] *Clemmons*, ALJ No. 2004-AIR-011, slip op. at 55-56 (Jan. 14, 2005).

[37] Respondent's Brief at 8-12.

Ameristar's hyperbolic description of the e-mail as "blatant wrongdoing" does not in fact establish that it would have fired Clemmons on that basis alone. As the Supreme Court stated in *Price Waterhouse v. Hopkins*, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."[38] Furthermore, the ALJ previously found that the actions of Frazier and Wachendorfer provoked Clemmons to send his e-mail because Wachendorfer had adopted a policy that had pilots flying excess hours with unsafe aircraft that needed maintenance and had engaged in non-authorized common carriage on 112 separate occasions, all in violation of Federal Aviation Administration (FAA) regulations.[39]

Clemmons proved that his complaints to Frazier and Wachendorfer about FAA violations contributed to his discharge, thus violating AIR 21. Under the facts of this case, we will not limit a whistleblower complainant's monetary damages for merely trying to convince his employer to abide by safety regulations.

CONCLUSION

To terminate or otherwise modify the relief awarded to Clemmons based on after-acquired evidence of pre-discharge employment misconduct, Ameristar was required to prove by clear and convincing evidence that Clemmons's wrongdoing was so severe that Ameristar would have fired him on those grounds alone if it had known of his action when it terminated his employment. For the reasons stated by the ALJ, as further explained by this decision, Ameristar has failed to meet that burden of proof. Accordingly, we affirm the ALJ's decision on remand.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado concurring:

I concur with the majority's decision to affirm the ALJ's decision. Ameristar's fundamentally inconsistent positions easily justify the ALJ's rejection of the January 13 e-mail as credible after-acquired evidence that Ameristar would have fired Clemmons on March 28, 2003. In the evidentiary hearing before the ALJ, an Ameristar manager (Frazer) testified under

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[38] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1982).

[39] *Clemmons*, ALJ No. 2004-AIR-011, slip op. at 7 (Feb. 20, 2008).

oath that Ameristar relied on the January 13 e-mail as one reason for firing Clemmons. But the ALJ found no contemporaneous or credible evidence of Ameristar's outrage[40] over the allegedly "seditious," "subversive," and "most disloyal and destructive email ever written in the annals of American business," and so the ALJ rejected this testimony.

Ultimately, the ALJ found incredible that Ameristar relied on the January 13 e-mail to fire Clemmons, a finding that the ARB and the 5th Circuit Court of Appeals affirmed.[41] Then, on remand from the circuit court, Ameristar failed to persuade the ALJ that it would have fired Clemmons by March 28, 2003, because of the January 13 e-mail. Ameristar devotes a lot of energy hyping up the seriousness of the e-mail, but fails to appreciate that its own lack of credibility prevented it from proving to the ALJ what it "would have done." The majority opinion aptly detailed how the record supports the ALJ's ruling on this point.

Apart from Ameristar's credibility problem, it seems unconscionable to allow Ameristar to rely on the January 13 e-mail both as pre-termination evidence to block Clemmons's unemployment benefits as well as post-termination evidence to reduce Clemmons's damages in this case. In its reply brief, Ameristar stated that it "listed Clemmons'[s] contumacious e-mail as *a prime reason* for his discharge [January 2003]" in the TWC appeal process.[42] Yet, in the same brief, Ameristar also said the ALJ erred in finding that it "would not have discharged Clemmons on March 28, 2003, *when it learned* of Clemmons' destructive e-mail."[43] The doctrines of judicial admissions and judicial estoppel exist to prevent parties from manipulating the judicial process in such manner, and Ameristar should be similarly barred.[44]

More importantly, the fundamental differences between AIR 21 and Title VII's anti-retaliation provision[45] make Title VII jurisprudence an improper source for guidance for AIR 21 retaliation cases, especially in determining the AIR 21 burden of proof.[46]

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40 In its nine-page reply brief, at least 31 times Ameristar used various pejorative terms (subversive, seditious, disloyal, etc.) to refer to the January 13 e-mail, displaying an outrage that was deafeningly missing when Clemmons was fired.

41 *Ameristar Airways*, 650 F.3d at 567-572.

42 Reply Brief at 6 (emphasis added).

43 *Id*. at 7 (emphasis added).

44 *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (judicial estoppel prevents parties from benefitting from inconsistent positions in different legal proceedings); *Christian Legal Soc. v. Martinez*, 130 S. Ct. 2971, 3005 (2010) (a party's admissions in a joint stipulation of facts were binding on the parties); *Kanj Viejas Band of Kumeyaay Indians* ARB No. 09-065, ALJ No. 2006-WPC-001, slip op. at 6 (ARB Dec. 17, 2010).

45 42 U.S.C.A. § 2000e-3(a).

To begin with, Congress established express burdens of proof in AIR 21, but did not expressly include a burden-of-proof standard in the anti-retaliation provision of Title VII. In AIR 21, Congress requires an employee to prove that protected activity "contributed"[47] to an unfavorable employment action. Under Title VII, the courts require employees to prove that unlawful retaliation was the "but for" factor (the "determinative factor"), a much higher standard than AIR 21's.[48] Because of this difference, the *McDonnell Douglas*[49] burden-shifting framework does not apply to AIR 21 whistleblower cases.[50]

In further contrast to the Title VII anti-retaliation provision, Congress expressly included an affirmative defense in AIR 21 for employers on the issue of damages and expressly set the burden of proof as a clear-and-convincing" standard.[51] The Title VII anti-retaliation provision contains no expressed affirmative defense, not to mention a clear-and-convincing standard. Consequently, on its face, AIR 21 deliberately contains burden-of-proof allocations that stand apart from the Title VII anti-retaliation provision.

Beyond the patently different statutory provisions, an additional and significant contrast lies in the harms that AIR 21 and Title VII seek to eradicate. Title VII seeks to eliminate "wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor,"[52]

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46 The United States Supreme Court expressly warned against applying "rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

47 49 U.S.C.A. § 42121(b)(2)(B)(i).

48 *See Univ. of Texas Southwestern v. Nassar*, 133 S. Ct. 2517 (2013). The "but for" standard is higher than the "motivating factor" standard which, in turn, is higher than the "contributing factor" standard. *See, e.g., Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011)("contributing factor" replaced proof requirement that protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action).

49 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

50 For a discussion of the AIR 21 burden of proof framework and how it differs from *McDonnell Douglas*, see *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 9-10 (ARB July 25, 2012). *See also Araujo v. N.J. Transit Rail Ops.*, 708 F.3d 152, 157-58 (3d Cir. 2012) (in deciding a railroad retaliation claim under the Federal Railroad Safety Act, an act relying on AIR 21 burdens of proof, the court recognized the inapplicability of *McDonnell Douglas*).

51 49 U.S.C.A. § 42121(b)(2)(B)(ii).

52 *Nassar*, 133 S. Ct. at 2522.

an undoubtedly significant evil. AIR 21 goes beyond the workplace and seeks to promote air safety and eradicate harm to the general public as well, specifically, the public that flies in the skies and the citizens that dwell on the ground where a crash might occur.[53] Congress obviously recognized that the potential threat and harm to the public requires substantial deterrence against whistleblower retaliation and substantial protection for whistleblowers.

We must be careful to respect this congressional mandate or risk neutralizing it by eroding the burdens of proof that Congress deliberately established. I cannot ignore the expressed burden of proof in the statute without clearer direction from Congress to do so.

LUIS A. CORCHADO
Administrative Appeals Judge

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[53] The breadth of AIR 21 can be appreciated by looking at the table of contents of the congressional bill signed by the President. *See* Pub. L. 106-181, Title V, § 519(a) (Apr. 5, 2000).