



In the Matter of:

RICHARD NELSON,

ARB CASE NO. 13-075

COMPLAINANT,

ALJ CASE NO. 2012-ERA-002

v.

DATE: September 30, 2015

ENERGY NORTHWEST,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John P. Sheridan, Esq.; *MacDonald Hoague & Bayless*; Seattle, Washington

For the Respondent:

William G. Miozzi, Esq.; *Winston & Strawn, LLP*; Washington, District of Columbia; Angel Rains, Esq.; *Energy Northwest*; Richland, Washington

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Royce, concurring, in part, and dissenting, in part.

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA or Act), as amended, and implementing regulations.¹ Richard Nelson filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Energy Northwest (ENW) revoked his unescorted access authorization (UAA) status and badge (which allowed him to work on nuclear facilities) after he and another person engaged in protected activity, in violation of the ERA. OSHA dismissed the complaint because it

¹ 42 U.S.C.A. § 5851 (Thomson Reuters 2012) (ERA); 29 C.F.R. Part 24 (2015).

determined that Nelson was not a covered employee under the ERA as he was the owner of his company and performed services for ENW as a contractor. On June 24, 2013, after an evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) entered a decision and order (D. & O.) dismissing the complaint based upon his finding that Nelson did not engage in protected activity and that there was no causation. We affirm because there is substantial evidence in the record to support the ALJ's causation finding.

BACKGROUND

In 2006, Nelson incorporated Nelson Nuclear Corporation (NNC) to provide personnel to commercial nuclear facilities and Department of Energy sites across the United States.² Through NNC, Nelson contracted with ENW to provide temporary skilled and unskilled labor to assist with various projects at the Columbia Generating Station in Richland, Washington. Starting in March 2010, ENW also employed Nelson as a contractor through NNC.

A. Hayes's employment and per diem

In March 2009, Dave Sanders, an ENW Maintenance Supervisor at the time, told Nelson to have NNC hire Ricky Hayes, Sanders' estranged daughter's (Sharese Sanders) boyfriend, for work with ENW.³ On the night of April 28, 2009, Nelson and Hayes met at Nelson's home to prepare documents to present to ENW, 1) to obtain unescorted access authorization for Hayes, and, 2) to fulfill the requirements so that Hayes could receive wages, travel expenses, and per diem. Nelson testified that he believed that entitlement to per diem at ENW depended on the subjective intent of the person to make his home permanently in the local area. Nelson admitted however, that he understood from the beginning that Hayes's intent was to find work and make the local area his permanent home. To prepare Hayes's documents and obtain travel expenses and per diem for Hayes, Nelson helped draft and format Hayes's resume that included Hayes's employment at a Target in Kennewick, Washington from 2008 to "present," but omitted that Hayes had also been living in Kennewick, Washington during that time. Nelson prepared Hayes's resume by cutting and pasting information that Sharese Sanders had emailed to him. The resume that Sharese Sanders sent to Nelson included Hayes's Kennewick, Washington address, but Nelson "cut" this information from Hayes's resume that would be presented to ENW. Nelson addressed an offer letter to Hayes to an address in South Carolina, although Nelson was in Hayes's presence at the time and handed Hayes the document for Hayes to sign.⁴ The offer letter indicates that Hayes would receive \$90.00 in per diem and meals allowances per day, and travel expenses at the rate of \$.55 per mile from his home address in South Carolina to

² All citations in this paragraph refer to D. & O. at 2, 3.

³ All citations in this paragraph refer to D. & O. at 4, 11, unless otherwise noted.

⁴ *Id.* at 11-12; Respondent's Exhibit (RX) 10.

the Columbia Generating Station upon reporting to work and upon termination of prior employment.⁵ Nelson knew that Hayes was living locally in Kennewick, Washington, for a period of at least nine months at the time he was completing all of these documents.⁶

Hayes reported for work on April 29, 2009, and worked at ENW until the job ended on June 7, 2009.⁷ On May 4, 2009, Hayes completed a Personal History Questionnaire (PHQ).⁸ In this PHQ, under prior residences of at least thirty days in the past five years, Hayes failed to write down any Washington residences and only included addresses in South Carolina. Under past employment however, Hayes indicated that he had been working at Target in Washington since October 2008.

During the approximately five weeks he worked for NNC on the ENW contract, Hayes earned \$7,177.30 in May and June 2009, for round trip travel and per diem (\$90/day for meals and lodging) through the NNC contract with ENW.⁹ On May 7, 2009, NNC submitted an invoice to ENW for \$450.00 in per diem and \$1,555.40 in travel for Hayes.¹⁰ After that date, NNC submitted weekly per diem invoices for Hayes, until the final date of June 15, 2009, when NNC invoiced ENW for \$450.00 in per diem for the prior week and \$1,571.90 in travel expenses.¹¹

After Hayes's employment with NNC/ENW ended in June of 2009, Hayes was registered to vote in South Carolina, had a South Carolina driver's license, his car was registered in South Carolina, and he owned furniture in South Carolina.¹² Approximately one month after the job was over, Hayes returned to South Carolina to sell his car and his furniture because he had made the decision to live in Washington.

Later on, Hayes was hired directly by ENW two times, in 2009 in a temporary position as a janitor, and in the summer of 2010, in a permanent position.¹³ On each of these occasions,

⁵ RX 10.

⁶ D. & O. at 12.

⁷ *Id.* at 4-5.

⁸ RX 6. The remainder of this paragraph refers to RX 6.

⁹ D. & O. at 8; RX 5.

¹⁰ RX 5.

¹¹ *Id.*

¹² All citations in this paragraph refer to D. & O. at 5.

¹³ *Id.* at 5.

Hayes filled out a PHQ. On his PHQ dated August 3, 2009, Hayes included his residence in Washington since 2008 in the section of the form for residences in the past five years.¹⁴

B. Investigation into Hayes's per diem

In October 2010, Dale Atkinson became the Vice President of Employee Development and Corporate Services at ENW.¹⁵ Upon starting the new position, Atkinson undertook to educate himself on the issues and problems under his direction. Around the end of 2010, Bill Penwell, a Maintenance Department employee, told Atkinson that he had learned from his wife that Hayes had been receiving inappropriate per diem payments and travel expenses. Penwell also mentioned Sanders in connection with the issue. Atkinson then asked Pamela Bradley, ENW's Acting General Counsel, to investigate the matter of the improper per diem payments to Hayes when he worked for NNC. Bradley investigated and determined that NNC had invoiced ENW for \$7,177.30 in May and June 2009, for travel and per diem for Hayes, but that Hayes had been living and working locally, in Kennewick, Washington, since mid-2008. The investigation also included the information that Hayes was engaged to be married to Sanders's daughter and had a child with her.

In March 2011, Bradley and Kurt Gosney, ENW's newly appointed Security Compliance Supervisor, "determined that additional review was merited, and it was decided that Security would interview all those who appeared to have knowledge or involvement in this matter," Hayes, Dave Sanders, Sharese Sanders, and Nelson.¹⁶ Kurt Gosney, Jerry Ainsworth, and Bruce Pease conducted the interviews.

ENW interviewed Hayes on March 16, 2011.¹⁷ During his interview, Hayes signed a written document "stating that he was not entitled to per diem [in 2009], but he received it anyway." The statement also said that Nelson had offered to help Hayes by paying him per diem when Nelson knew that Hayes used to live in South Carolina. Hayes testified at the hearing and confirmed the accuracy and truthfulness of that statement, testifying that ENW did not force or coerce him into signing it, that he had ample time to consider it, and that he signed it because he agreed that it represented his statement. Hayes also testified however, that he did not know whether his receiving per diem was wrong, that he felt pressured to sign the statement, and that Pease actually drafted the statement. Hayes admitted that he did not write down his Washington address when he filled out his PHQ for this job, even though the form required a listing of any

¹⁴ RX 13.

¹⁵ All citations in this paragraph refer to D. & O. at 5-8.

¹⁶ This paragraph refers to D. & O. at 8.

¹⁷ All citations in this paragraph refer to D. & O. at 9.

address of a month's duration in the preceding five years. Hayes's employment was terminated at the end of his interview after he signed the statement admitting that he received per diem that he was not entitled to receive.

ENW interviewed Sanders on that same day, March 16, 2011.¹⁸ Sanders admitted that he knew that Hayes was living in Kennewick, Washington, for at least eight months before Hayes signed on with NNC to work at ENW and that Hayes did not travel from South Carolina to work at ENW. At the end of Sanders's interview, Pease took Sanders's unescorted access badge. Sanders's employment was terminated on April 22, 2011.

ENW interviewed Nelson on March 17, 2011.¹⁹ Nelson agreed that payment of travel expenses to Hayes was a mistake but he would not concede that the per diem payments were improper. At the end of the interview, Pease took Nelson's UAA badge. Nelson appealed ENW's decision to take his badge, but ENW denied the appeal.

Gosney testified that he was the Reviewing Officer at the time of the security investigation and he made the decision to revoke Nelson's UAA because he determined that Nelson had not been honest in his security interview and had provided false information in connection with per diem payments to Hayes in 2009.²⁰

THE ALJ DECISION

The ALJ first concluded that ENW had sufficient supervision and control over Nelson's work such that he should be considered an employee for the purposes of the ERA-whistleblower provisions.²¹ With respect to an adverse personnel action, the ALJ held that there was no question that ENW revoked Nelson's UAA badge, which was an adverse personnel action under the statute.²²

The ALJ found that Nelson failed to prove that he engaged in protected activity however. The ALJ concluded that Nelson did not come under the purview of the statute as a third party who was discriminated against because of another's protected activity because Nelson did not present him with any "legal precedent for extending the whistleblower protection to 'friends of a

¹⁸ All citations in this paragraph refer to D. & O. at 9, 10.

¹⁹ All citations in this paragraph refer to D. & O. at 10, 11.

²⁰ *Id.* at 12.

²¹ *Id.* at 13-21.

²² *Id.* at 23.

whistleblower.”²³ The ALJ also concluded that Nelson did not engage in protected activity through his participation in the investigation which ultimately led to ENW revoking his UAA status. The ALJ found that Nelson “was not engaged in reporting any security or safety concerns to his superiors or others.

Finally, with respect to causation, the ALJ found that even if Nelson did engage in any protected activity, “the evidence in this matter is overwhelming that Respondent withdrew his UAA privileges based solely on Respondent’s *belief* that Complainant had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes.”²⁴ Nelson appeals.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to issue final agency decisions under the ERA.²⁵ The ARB reviews the ALJ’s factual findings for substantial evidence, and legal conclusions de novo.²⁶

DISCUSSION

1. Statutory and regulatory framework

To prevail on an ERA claim, Nelson must demonstrate that he engaged in protected activity that “was a contributing factor in the unfavorable personnel action alleged”²⁷ “Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.”²⁸

²³ All citations and quotations in this paragraph refer to D. & O. at 23.

²⁴ *Id.* at 24 (emphasis in original).

²⁵ See Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69-380 (Nov. 16, 2012).

²⁶ 29 C.F.R. § 24.110(b); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 8 (ARB Apr. 25, 2014) (citations omitted).

²⁷ 42 U.S.C.A. §§ 5851(a)(1) and 5851(b)(3)(C); 29 C.F.R. § 1979.109(a).

²⁸ 42 U.S.C.A. § 5851(b)(3)(D); 29 C.F.R. § 1979.109(a).

2. Nelson is a covered employee

We affirm the ALJ's holding that Nelson is covered as an "employee" under the Act. While the ALJ applied the factors set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-23 (1992) and found that ENW exercised substantial control over Nelson, this was not strictly necessary given our ruling in *Robinson v. Triconex Corp.*, ARB No. 10-013, ALJ No. 2006-ERA-031 (ARB Mar. 28, 2012). As explained in *Robinson*, the term "employee" within the meaning of the ERA is broader than and distinct from the *Darden* common-law test.²⁹ However, viewing the facts that the ALJ found regarding the nature of Nelson's work at ENW, Nelson is a covered "employee" under both of the standards discussed in *Robinson*—the analysis explained in *Hill and Ottney*,³⁰ and the "control" test.³¹

The ALJ found that ENW's "managers assigned the tasks that [Nelson] worked on, controlled the number of hours he worked during the week, approved his vacation requests, determined his start and end time, oversaw the quality of his work, and determined if he could maintain his UAA."³² The ALJ further found that Nelson was under the direct supervision and control of ENW, that he worked for ENW "for an extensive period of time and was assigned a wide range of responsibilities," that the work he performed was part of ENW's regular business, that he personally performed work for ENW at the power plant, and that he indirectly received compensation for each hour that he worked for ENW.³³ These findings of fact establish that Nelson qualifies for coverage as an "employee" under the ERA as a matter of law.

3. Protected Activity

We first address the issue of protected activity through the status of being an associate of a whistleblower. The ALJ ruled that the ERA does not extend to "friends of whistleblowers" who do not themselves engage in protected activity. Nelson has not provided any ARB case squarely addressing the question of whether the ERA protects workers from being fired where allegedly the termination is connected to a co-worker's protected activity. But the Secretary of Labor has mentioned this theory of liability without resolving the merits of it,³⁴ and we reserve

²⁹ *Robinson*, ARB No. 10-013, slip op. at 8-10.

³⁰ *Hill and Ottney v. TVA*, Case Nos. 1987-ERA-023 and -024, slip op. at 5-6 (Sec'y May 24, 1989); see *Robinson*, ARB No. 10-013, slip op. at 8-9.

³¹ See *Robinson*, ARB No. 10-013, slip op at 8 n.21.

³² D. & O. at 20.

³³ *Id.* at 21.

³⁴ See *Collins v. Fla. Power Corp.*, Case Nos. 1991-ERA-047 and -049, slip op. at 7 (Sec'y May 15, 1995) (in which the Secretary noted that Collins could have had a possibility of recovery because the respondent discharged her co-worker "and discharged Collins at the same time in an

for another day a careful discussion about this theory of liability. We are not persuaded to explore this issue based on Nelson's arguments.

The ALJ also dismissed Nelson's argument that being questioned during the security investigation into allegedly improper per diem payments constituted protected activity. The ALJ rejected this claim based upon his determination that Nelson "wasn't the complainer in this situation rather he was the person complained of."³⁵ We appreciate that the relevant statutory language at §5851(a)(1)(F) is very broadly worded and requires only that the employee "assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [AEA]." To secure protection, an employee must reasonably believe that his actions, whether in the form of a complaint, participation in an investigation, or other conduct, are in furtherance of the relevant act.³⁶ The ALJ did not address the question of whether calling Nelson into an investigation about improper per diem payments, where he denied that the per diem payments were improper, qualifies as "participating" in a protected "proceeding" "to carry out the purposes" of the ERA or the AEA. But the ALJ did determine that there was a *sole* reason why Respondent withdrew Nelson's UAA privileges. Specifically, the ALJ concluded that "the evidence in this matter is overwhelming that Respondent withdrew [Nelson's] UAA privileges based solely on" ENW's belief that Nelson was dishonest and untrustworthy regarding the per diem issue.³⁷ Extrapolating from this conclusion and from the ALJ's findings that when Nelson was being investigated, "he was not engaged in reporting any security or safety concerns to his superiors or others" and "he made no complaint relating to nuclear safety," we understand the ALJ to mean that Nelson's participation in the interview was not in furtherance of the ERA or AEA.³⁸ We affirm the ALJ's finding that

effort to obscure its motives," but found that Collins could not recover in that case because her co-worker's protected activity was not causally related to the termination decision). Although not binding, federal courts have applied this theory of liability in other contexts. *See Brock v. Ga. Sw. Coll.*, 765 F.2d 1026, 1037-38 (11th Cir.1985) (in a case under the Equal Pay Act, the Eleventh Circuit affirmed the trial court's finding that an employee was asked to resign in retaliation for his wife's protected complaints); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 402, 411 (3d Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (in a case under the National Labor Relations Act, the Third Circuit held that the National Labor Relations Board could "order the reinstatement of a supervisor who was fired in retaliation for her relatives' participation in a union organizational campaign," because the order was "reasonably calculated to dispel the intimidation caused by her firing.")

³⁵ D. & O. at 24.

³⁶ *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 7, 9-10 (ARB Dec. 28, 2012).

³⁷ ALJ D. & O. at 24.

³⁸ *Id.* at 23, 24.

Nelson failed to prove that he engaged in protected activity by a preponderance of the evidence, as it is supported by substantial evidence.

4. Contributing Factor Causation

The ALJ found that even if Nelson engaged in protected activity, “the evidence in this matter is overwhelming that Respondent withdrew his UAA privileges based solely on Respondent’s *belief* that Complainant had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes.”³⁹ This finding is supported by substantial evidence in the record including evidence that Nelson admitted that when he submitted Hayes’s employment information to ENW, Nelson knew that Hayes had been living locally in Kennewick, Washington, for at least nine months and that Hayes intended to make Washington his permanent home.⁴⁰ Nelson also knew this information when he submitted the documents at RX 5, invoicing ENW for Hayes’s per diem and travel to and from Washington to South Carolina. Further, Nelson testified that he addressed his offer letter to Hayes to an address in South Carolina, even though he physically handed the offer letter to Hayes in Washington, again, with knowledge that Hayes had lived in Washington for the past nine months and intended Washington to be his permanent home.⁴¹

While ENW did not have a written per diem policy, ENW’s purchasing supervisor, Gregory Sponholtz, testified that ENW’s policy restricted payment of per diem and travel costs only to those contract employees who specifically traveled to the Washington area to work at ENW.⁴² The policy required that the responsible ENW technical representative ensure compliance; in this case, that was Dave Sanders.⁴³

³⁹ *Id.* at 24 (emphasis in original).

⁴⁰ *Id.* at 4 (citing Nelson’s testimony, Tr. at 176. Nelson testified that he agreed with the statement that Hayes’s “intent was, his plan was, his hope was to find work and make his home in the Tri-Cities [Washington] area.”), 12 (citing Nelson’s testimony, Tr. at 171-72. Nelson testified that he knew that Hayes was in Washington for almost nine months when they met on April 28, 2009, to put Hayes’s documents together for employment at ENW).

⁴¹ *Id.* at 11-12 (citing Nelson’s testimony, Tr. at 169-72. Nelson testified that he addressed the offer letter to Hayes to a South Carolina address, but did not mail it to him there because he handed the letter directly to Hayes.); RX 10 (the offer letter Nelson drafted addressed to Hayes in South Carolina).

⁴² *Id.* at 8 (citing Sponholtz’s testimony, Tr. at 424).

⁴³ *Id.* at 8 (citing Sanders’s testimony, Tr. at 91, Sponholtz’s testimony, Tr. 424; RX 4).

ENW discovered all of this information about the per diem and Nelson's role in obtaining it for Hayes when it investigated the matter.⁴⁴ Specifically, ENW discovered that NNC had invoiced ENW for \$7,177.30 for Hayes for five weeks in May and June of 2009, when Hayes had been living and working in Kennewick, Washington since 2008—long before he started working at ENW.⁴⁵ The investigation came about because Atkinson became the new Vice President of Employee Development and Corporate Services at ENW, and wanted to educate himself on issues and problems under his purview.⁴⁶ Because the information came to light, ENW determined that additional review was merited and interviewed Nelson and the others involved about the matter.⁴⁷ The interviews substantiated that Hayes received the travel expenses and per diem when he was not entitled to it and that Nelson, Sanders, and Hayes worked together to get Hayes that per diem.⁴⁸ The ALJ's conclusion that ENW took Nelson's unescorted access badge "based solely on" ENW's belief that Nelson showed a lack of honesty and trustworthiness in regard to the Hayes's per diem and travel, is supported by these findings and by the others that are, likewise, supported by the substantial evidence of record.⁴⁹

Contrary to the opinion of the dissent, the explanations and holding in the *Powers*' majority speak against a remand in this case. In *Powers v. Union Pacific Railroad*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 20, 22 (ARB Mar. 20, 2015) (reissued with full dissent Apr. 21, 2015), the majority stated "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*," (emphasis original) and that the ALJ has discretion to determine relevance.⁵⁰ The dissent in *Powers* agreed with these two statements, making the

⁴⁴ *Id.* at 8 (citing Bradley's testimony, Tr. at 316-18, 320; RX 3, RX 4, RX 5, RX 13, RX 14).

⁴⁵ *Id.* at 8 (citing Bradley's testimony, Tr. 318-20; RX 2, RX 3).

⁴⁶ *Id.* at 5-6 (citing Atkinson's testimony, Tr. at 277-80).

⁴⁷ *Id.* at 8 (citing Bradley's testimony, Tr. 319-20, Gosney's testimony, Tr. at 351).

⁴⁸ *Id.* at 9-11 (citing Hayes's testimony, Tr. at 229-34, Gosney's testimony, Tr. at 353-54, RX 3, Sanders's testimony, Tr. 89-90, 91, 94-95, Nelson's testimony, Tr. at 121-24, 131-32).

⁴⁹ Although the ALJ cited *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), he appropriately cited and applied the contributing factor causation standard. D. & O. at 22. Further, while the ALJ's statement of the rules appears to require a complainant to prove pretext and retaliatory motive, the ALJ did not require Nelson to do so in this case. The ALJ's ultimate finding that "Respondent withdrew his UAA privileges based solely on Respondent's *belief* that Complainant had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes," means that there is no contributing factor causation, regardless of any incorrect statement of law.

⁵⁰ The *Powers* majority stated that "the trier-of-fact bears the responsibility to ensure that specific evidence advanced at hearing to rebut an element of complainant's claim be relevant to that

Board unanimous on these two points.⁵¹ This unanimous agreement focusing on relevance overruled the 2-judge majority ruling in *Fordham* which attempted to create a new causation standard that required ALJs to decide contributing factor in “disregard of any evidence submitted by the respondent” explaining the reasons for its own actions.⁵² “[R]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁵³ In discussing contributing factor, the majority in *Powers* expressly reiterates its attempt to move away from *Fordham*’s strict bar against considering employer’s evidence in saying that *Fordham* only “seem[s] to foreclose” considering the employee’s evidence and not to read *Fordham* so “narrowly.”⁵⁴ Ultimately, in explaining the basis for its remand, the majority in *Powers* did not say that a respondent’s proffered reasons were irrelevant but, instead, questioned its weight.⁵⁵ The expressed words repeatedly used by the majority in *Powers*, and the cases it cited approvingly,⁵⁶ lead us to conclude that the *Powers*’ majority opinion contradicted

showing,” “that all of the evidence admitted at the hearing is available to the ALJ in assessing whether the complainant meets his or her burden of proving the requisite elements,” and that “[t]he ALJ . . . has authority to exclude evidence that is ‘irrelevant, immaterial’ [], and where ‘its probative value is substantially outweighed by the danger of confusion of issues.’” *Powers*, ARB No. 13-034, slip op. at 20.

⁵¹ *Id.* at 33-34.

⁵² *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 3 (ARB Oct. 9, 2014). Given the Board precedent, as recognized by the *Powers*’ majority, it is unclear that a 2-judge panel in *Fordham* had delegated authority to establish such a new causation standard. *See, e.g., Zurcher v. S. Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (unanimous three-judge panel affirmed dismissal of claim on contributing factor by considering employer’s reasons); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (unanimous three-judge panel affirmed summary dismissal of a claim while relying on the employer’s reasons). *See also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB Aug. 29, 2014) (thoroughly explained how the employee’s and employer’s evidence on causation must be considered as a whole to decide what did or did not cause the adverse action); *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013) (unanimous three-judge panel that summarily affirmed the dismissal of complainant’s complaint on the question of contributing factor where the ALJ believed the employer’s subjective explanation).

⁵³ 29 C.F.R. § 18.401 (2013).

⁵⁴ *Powers*, ARB No. 13-034, slip op. at 14.

⁵⁵ *Id.* at 27.

⁵⁶ *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (contrary to the rule announced in *Fordham*, the ARB relied on the employer’s decisions in

the *Fordham* majority decision. The ALJ did not abuse his discretion in considering ENW's explanations as relevant in deciding why ENW did what it did, an important consideration on the issue of contributing factor causation. Therefore, we affirm the ALJ's dismissal of this action.

CONCLUSION

The ALJ's Decision and Order is **AFFIRMED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Judge Royce, concurring in part and dissenting in part:

I agree with the majority's decision that Nelson qualifies for coverage as an "employee" under the ERA as a matter of law. However, I disagree with the majority's dismissal of this case for a number of reasons, including their failure to address the element of protected activity and their failure to analyze the ALJ's contributing factor findings under applicable law. The majority declined to rule on the ALJ's findings regarding protected activity because they affirmed the ALJ's finding of no contributing factor. In my view, the ALJ erred regarding both protected activity and contributing factor causation, so I address both elements.

1. Protected activity

A principal question raised in this case is whether an employee who does not himself raise explicit safety or security concerns is entitled to protection under 42 U.S.C.A. § 5851. In at least two circumstances, both relevant in this case, I believe that ERA whistleblower coverage may extend to such employees.

A. Protected Activity based on status as Sanders's friend and associate

The ALJ ruled that ERA does not extend to "friends of whistleblowers" who do not themselves engage in protected activity. I disagree. An employee who does not engage in protected activity may be covered where an unfavorable personnel action is taken against him or her because of his or her close association with someone who engaged in what was reasonably

affirming summary decision on the question of contributing factor); *Zurcher*, ARB No. 11-002 (employer's reasons defeated the claim that protected activity contributed to termination).

believed to be protected activity. Support for this determination is found in the statute, decisions of the Board, as well as case law interpreting other statutes that provide similar protections.

The plain language of the ERA does not limit its protection solely to the employee who engages directly in protected activity. The ERA provides that “[n]o employer may discharge *any* employee or otherwise discriminate against any employee . . . because the employee . . . assisted or participated . . . in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.”⁵⁷ The statute permits “[*a*]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a),” to file a complaint alleging discrimination.⁵⁸ As a matter of statutory construction, repeated use of the term “any” preceding the word “employee” indicates that Congress intended “any employee” to be interpreted broadly to extend the scope of coverage.⁵⁹ Third-party retaliation falls within the ambit of the statutory prohibition.

The principal purposes of the ERA are “to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety.”⁶⁰ The whistleblower provisions of the ERA advance these broad goals by providing protection and encouragement to employees who raise health and safety concerns, and thereby help enforce the Act. As the U.S. Court of Appeals for the Eleventh Circuit reasoned, “Among the people best positioned to [promote nuclear safety] are the workers who tend to nuclear plants. But if fear of retaliation kept workers from speaking out about possible hazards, nuclear safety would be jeopardized.”⁶¹ Retaliation against the friends and relatives of whistleblowers would obviously discourage employees from engaging in protected activity and thus contravene the purpose of the provision. Allowing both the target of retaliation (the whistleblower) as well as the victim (friend or relative of whistleblower) to challenge retaliation is sound enforcement policy; the individual who suffers direct harm has a greater interest in pursuing relief which, in turn, promotes enforcement. Leaving these injured parties without a remedy would ill-serve the purposes of the statute.

The Board has not directly addressed coverage of third-party retaliation.⁶² However,

⁵⁷ 42 U.S.C.A. § 5851 (a)(1)(F) (emphasis added).

⁵⁸ 42 U.S.C.A. § 5851 (b)(1) (emphasis added).

⁵⁹ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (expansive scope of a statute is apparent from broadly worded statutory language); *Cobb v. FedEx Corp. Servs., Inc.*, ARB No. 12-052, ALJ No. 2010-AIR-024, slip op. at 10 (ARB Dec. 13, 2013).

⁶⁰ 42 U.S.C.A. § 5801(a).

⁶¹ *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1569 (11th Cir. 1997).

⁶² A decision tending to support protection of third parties is *Collins v. Florida Power Corp.*, Case Nos. 1991-ERA-047 and -049, slip op. at 7 (Sec’y May 15, 1995), where the Secretary noted that Collins could possibly recover under a theory that the employer illegally retaliated against her

providing such protection is consistent with related precedent, including Title VII cases, which have extended anti-discrimination protection to employees who have not themselves engaged in protected activity but were closely associated with another employee who did engage in protected activity.

In *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), the U.S. Supreme Court recently ruled unanimously that the Title VII retaliation provision granted a cause of action to an employee who was terminated in retaliation for his fiancée’s participation in protected activity. Both Thompson and his fiancée worked for North American Stainless (NAS). His fiancée filed a charge against NAS alleging sex discrimination. Thompson was fired three weeks later. The Court had “little difficulty concluding” that Title VII prohibits an employer from terminating an employee because his fiancée, also an employee, filed a sex discrimination charge. Citing the test for adverse action contained in *Burlington Northern v. White*, 548 U.S. 53 (2006), the Court ruled that “[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”⁶³ As the Seventh Circuit has noted “[t]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.”⁶⁴ The Supreme Court, however, acknowledged an even broader scope of third-party protection by declining to identify a “fixed class of relationships for which third-party reprisals are unlawful.”⁶⁵ The Court explained that it adopted a broad standard for what constituted prohibited employer action in *Burlington Northern* “because Title VII’s antiretaliation provision is worded broadly.”⁶⁶ As demonstrated above, the ERA whistleblower provision is similarly broadly worded.

In *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1188-89 (1st Cir. 1994), a case decided under the Occupational Safety and Health Act, the First Circuit found that there was no reversible error in the lower court’s finding that the complaining employee’s employment was terminated because of his connection with another employee who had made protected

co-worker “and discharged Collins at the same time in an effort to obscure its motives.” The Secretary found that Collins could not recover in this case however, because her co-worker’s complaint that he was retaliated against for engaging in protected activity failed.

⁶³ *Thompson*, 562 U.S. at 174.

⁶⁴ *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir.1987); *see also Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-569 (3d Cir. 2002) (“There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate antidiscrimination proceedings will deter employees from exercising their protected rights.”), *cert. denied*.537 U.S. 824 (2002).

⁶⁵ *Thompson*, 562 U.S. at 175.

⁶⁶ *Id.*

complaints.⁶⁷ The First Circuit noted that the record had evidence that the two men “were particularly close friends and that management was aware of this,” that there was temporal proximity for the termination, and that the district court did not believe the employer’s reasons for the discharge.⁶⁸

Likewise, in *Duda v. Dept. of Veterans Affairs*, 51 M.S.P.R. 444 (1991), a case decided under the Whistleblower Protection Act (WPA), the Merit Systems Protection Board (MSPB) held that under the WPA, the employer was prohibited from taking personnel action against an employee because of his relationship with another employee who had made a protected report.⁶⁹ The MSPB declined to apply a literal reading of the regulations stating that prohibited personnel actions must have been taken “because of the appellant’s whistleblowing activities” because the MSPB found “that retaliation against one employee because of another employee’s whistleblowing f[ell] within the plain language of the statutory prohibition, and because [it found] that a contrary construction would be inconsistent with legislative intent and the construction of similar statutes.”⁷⁰

Finally, providing coverage to third party victims of retaliation conforms to our previous holdings recognizing the utility of the Supreme Court’s analysis of adverse action announced in *Burlington Northern* for Title VII cases, that an employer’s challenged actions “might have dissuaded a reasonable worker from [engaging in the protected activity].”⁷¹ When the victim of reprisal is a spouse or close associate, third party reprisal will likely meet the *Burlington Northern* standard since it would serve to deter a reasonable employee from engaging in protected activity just as much as if the employee were himself retaliated against. I would remand for the ALJ to first determine whether Sanders engaged in protected activity and if so, to next determine if Nelson’s relationship with Sanders under the circumstances of this case permit him to claim protected status under the ERA.

B. Nelson’s participation in a “proceeding . . . to carry out the purposes” of the ERA was protected activity

The ALJ rejected complainant’s argument that his participation in the Security

⁶⁷ *Reich*, 26 F.3d at 1189.

⁶⁸ *Id.*

⁶⁹ *Duda*, 51 M.S.P.R. at 446.

⁷⁰ *Id.* at 447.

⁷¹ *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 13 (ARB Dec. 29, 2010) (quoting *Burlington Northern*, 548 U.S. at 68).

Investigation⁷² into allegedly improper per diem payments constituted protected activity. The ALJ determined that Nelson “wasn’t the complainer in this situation rather he was the person complained of.”⁷³ The relevant statutory language, however, is very broadly worded and does not distinguish between an employee called as a witness and one called as a target of an investigation. Rather §5851(a)(1)(F) requires only that the employee “*assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.*” In the context of the Security Investigation,⁷⁴ Nelson declined to confirm the version of facts and law espoused by Pease.⁷⁵ His participation in that investigation, in particular his stated opposition to Pease’s version of events, constituted protected activity under the plain language of the statute.⁷⁶

I am unaware of an ARB case on point, but a case brought under §704 (the anti-retaliation provisions) of Title VII is instructive. In *Smith v. Columbus Metropolitan Housing Authority*, 443 F.Supp. 61 (S.D. Ohio 1977), the plaintiff alleged that she was demoted because of her refusal to make a sworn statement for use in an investigation of a complaint of employment discrimination filed by a co-worker. The court held that the broad prohibition contained in §704(a) includes retaliation directed toward either an employee who decides to assist the charging party or one who refuses to assist the employer. The court reasoned that to permit employers to accumulate dubious evidence during a pre-hearing “investigation” by wielding the control they exercise over employees’ job security violates the spirit of Title VII.

⁷² Claimant’s Exhibit (CX) 6 states Nelson was fired “based on disqualifying factors discovered while conducting a Security Investigation involving your payment of travel and per diem to an employee. The basis for this action is in accordance with 10 C.F.R. Part 26” 10 C.F.R. § 26 is an Nuclear Regulatory Commission (NRC) regulation containing standards for the “Fitness for Duty (FFD) Programs” regulating persons granted unescorted access to nuclear power reactors by licensees.

⁷³ D. & O. at 24.

⁷⁵ Nelson “would not concede that the per diem to Hayes was improperly paid.” D. & O. at 11. Further, the ALJ noted that Nelson testified that Pease was irate during the course of the interview, threatened to pull his badge if he was not honest, asked confusing questions, and would not show him documentation supporting the charges against him. *Id.*

⁷⁶ The ERA whistleblower provision’s legislative history underscores the broad interpretation protected activity warrants. On the Senate Floor, Senator Gary Hart urged adoption of the ERA whistleblower provision, stating that: “Section 7 adds a new section 210 to the Energy Reorganization Act of 1974 to protect employees who assist or participate in any proceeding to administer or enforce the requirements of the Energy Reorganization Act or the Atomic Energy Act of 1954. Let me point out that the protection afforded is intended to apply, even if no formal proceeding is actually instituted as a result of the employee’s assistance or participation.” 124 Cong. Rec. Part 22 (Senate) at 29,771 (Sept. 18, 1978).

The court observed that the broad protection provided by the law does not preclude employers from seeking witnesses in enforcement investigation or disciplining employees for refusing to participate in enforcement proceedings. Employers may not, however, retaliate against an employee because the employee fails to participate or testify in an investigation in the manner that the employer desired.⁷⁷

The same reasoning applies in this case. ENW has every right to expect employees to participate in investigations into wrongdoing. However, ENW is statutorily prohibited from retaliating against an employee who testifies against the company's interests. The "Security Investigation" was ostensibly undertaken by ENW in order to determine whether a PHQ filled out and submitted by Hayes (not Nelson) had been falsified.⁷⁸ PHQs are required to obtain information necessary to grant employees access badges for security purposes.⁷⁹ The Security Investigation was therefore an "action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." The Board has interpreted this language broadly.⁸⁰ By participating in the Security Investigation and refusing to confirm ENW's accusations, Nelson engaged in protected activity.

2. Contributing factor causation

As explained above, the ALJ erred by failing to broadly construe "protected activity" under the statute and apply it to the facts of this case.⁸¹ The ALJ ruled in the alternative that

⁷⁷ 443 F. Supp. at 65.

⁷⁸ After Bradley learned about the local address discrepancy on Hayes' first PHQ, she had a "meeting with Kurt [Gosney] and with Bruce [Pease] and with Jerry [Ainsworth] And then at the end of it there was a decision that Access would go forward to conduct an investigation because the PHQ and whether or not people are falsifying information on the PHQ is a responsibility of Access Authorization." Tr. 319-20. As a result of the investigation, Gosney testified that he determined that Nelson "was not trustworthy and reliable and therefore not qualified under NRC regulations to retain his UAA at Energy Northwest." D. & O. at 12.

⁷⁹ "The NRC requires that the information collected be used in determining that an individual is trustworthy, reliable, and fit for duty prior to granting and while maintaining UAA/UA." D. & O. at 5 (citing RX 6 at 1).

⁸⁰ See *Pensyl. v. Catalytic, Inc.*, Case No. 1983-ERA-002 (Sec'y Jan. 13, 1984); *Hobby v. Ga. Power Co.*, Case No. 1990-ERA-030 (Sec'y Aug. 4, 1995); *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 5 (ARB Feb. 29, 2012); *Tyndall v. U.S. Emtl. Prot. Agency*, Case Nos. 1993-CAA-006 and 1995-CAA-005 (ARB June 14, 1996); *Jenkins v. U.S. Emtl. Prot. Agency*, Case No. 1992-CAA-006 (Sec'y May 18, 1994); see also *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993).

even if there *were* protected activity, Complainant failed to establish that any protected activity was a contributing factor to the adverse action suffered.⁸² However, in addressing the question of whether protected activity was a contributing factor in the adverse action taken against Nelson, the ALJ erroneously integrated elements of the inapplicable “*McDonnell Douglas*” causation test into the proof required of Nelson in order to establish “contributing factor” causation. The ALJ’s analysis begins with citation to several cases, including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for the proposition that resolution of whistleblower cases follows the “burden shifting” approach articulated by these decisions.⁸³ The Energy Reorganization Act, as amended, does prescribe a “burden shifting” framework. However, as the ARB and courts have noted, the “two-part burden shifting” test adopted in the 1992 amendments to the ERA, at 42 U.S.C.A. § 5851, is distinct from the Title VII employment-discrimination burden-shifting framework first established in *McDonnell Douglas*.⁸⁴ Once a complainant proves by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue, the burden shifts to the respondent to prove by clear and convincing evidence that it would have taken the action at issue in the absence of the protected activity.

Nor are certain elements of proof required under *McDonnell Douglas* and its progeny, which the ALJ applied in rejecting Nelson’s proof of causation, applicable to the present case. Citing *Speegle v. Stone & Webster*, ARB No 06-041, ALJ No. 2005-ERA-006, slip op. at 9 (ARB Sept. 24, 2009), the ALJ states, “Complainant can prove this element [contributing factor] by offering either direct or indirect proof of contribution.” This much is correct. However, the ALJ goes on to state that, “[i]f direct evidence is unavailable, complainant may proceed by indirect evidence that demonstrates by a preponderance of the evidence that the respondent’s proffered reasons are merely pretext for retaliation.”⁸⁵ The requirement the ALJ imposes, namely, that in the absence of direct evidence of causation the complainant must prove that the respondent’s proffered reasons for its action are pretextual, is an aspect of the *McDonnell*

⁸² It is not at all clear which facts the ALJ relied upon to support his finding of no causation. See D. & O. at 24. The material findings of fact regarding contributing factor appear to be contained in a single paragraph at page 24 of the ALJ’s decision. Furthermore, since the ALJ found no protected activity, he did not address the close temporal proximity of the protected activity to the adverse action—a potentially key finding in a causation analysis.

⁸³ D. & O. at 22.

⁸⁴ *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006 (ARB Nov. 17, 2011); *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir.1999); see Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), (i), 106 Stat. 2776, 3123-25 (amending 42 U.S.C.A. § 5851(b)). See also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013) (referring to AIR 21’s “two-part burden-shifting test”).

⁸⁵ D. & O. at 22 (citing *Jenkins v. U.S. E.P.A.*, ARB No 98-146, ALJ No. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003)).

Douglas Title VII burden of proof requirements.⁸⁶ ARB precedent clearly and unequivocally holds that a complainant is not required to prove pretext in order to carry his or her burden of proving “contributing factor” causation.⁸⁷

In addition to requiring Nelson to prove that Respondent’s reasons were pretext for retaliation, the ALJ erroneously imported proof of Respondent’s motive into the “contributing factor” standard. The ALJ required that Nelson “prove that the respondent’s true reasons for imposing an adverse employment action are retaliation.”⁸⁸ In order to meet this proof requirement, the ALJ stated that “temporal proximity or ‘closeness in time’ between the *employer forming his retaliatory motive* and the employer imposing the adverse action, and additional proof when needed to establish the existence of *employer’s retaliatory motive*” may be considered.⁸⁹ Based on his assessment of the evidence, the ALJ concluded “that Complainant’s termination likely was not the result of any *retaliatory motive* on the part of his employer.”⁹⁰ However, it is well established under the whistleblower statutes containing the “contributing factor” causation standard that a complainant is not required to demonstrate retaliatory motive or animus to prove causation.⁹¹

⁸⁶ “In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ *Id.* at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.* at 804.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

⁸⁷ See e.g., *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12-13 (ARB Mar. 28, 2012); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011).

⁸⁸ D. & O. at 24.

⁸⁹ *Id.* (emphasis added). The ALJ completely misstated the “temporal proximity” requirement. It is not, as the ALJ stated, that there must exist temporal proximity “between the employer forming his retaliatory motive and the employer imposing the adverse action,” but that there exist temporal proximity *between the protected activity and the adverse action*.

⁹⁰ *Id.* (emphasis added).

⁹¹ *Powers v. Union Pac. R.R., Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 26 (ARB Apr. 21, 2015) (en banc); *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013); *Menendez v. Halliburton, Inc.*, ARB No. 12-

Because of these significant errors in application of the “contributing factor” standard, I would reverse the ALJ’s ruling on causation and remand the case for a proper assessment consistent with ARB precedent and applicable case law. In this regard, the Board’s recent decisions in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014), as reaffirmed and clarified en banc in *Powers v. Union Pacific Railroad*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015) are particularly germane. Under those cases, it is generally impermissible to weigh a respondent’s affirmative defense evidence (supporting a non-retaliatory reason for the adverse action at issue) against a complainant’s causation evidence at the “contributing factor” stage because the respondent’s affirmative defense evidence must be weighed under the heightened “clear and convincing evidence” burden of proof standard.

Properly applied, *Fordham* and *Powers* require reversal of the ALJ’s causation finding in this case because the ALJ incorrectly weighed ENW’s affirmative defense evidence at the contributing factor stage.⁹² Nevertheless, the majority contrives to misinterpret the holding in *Powers* in such a way as to uphold the ALJ’s finding on causation. In furtherance of its misconceived rendering of the *Powers* holding, the majority makes the baffling statement that *Powers* overruled the holding in *Fordham*. On the contrary, *Powers* explicitly affirmed the holding in *Fordham* that a respondent’s evidence of legitimate business reasons may not be weighed at the contributing factor stage; “[T]he ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant’s showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at 20-37. *That holding as set forth in Fordham is fully adopted herein.*”⁹³

In *Fordham*, the ARB addressed the question of what evidence “is appropriately 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 evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant’s causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue?”⁹⁴

In reaching its holding, *Fordham* examined the relevant statutory language, legislative history, and pertinent federal court and agency precedent. Of note is *Fordham*’s examination of

026, ALJ No. 2007-SOX-005, slip op. at 13-14 (ARB Mar. 20, 2013). *Accord Araujo*, 708 F.3d at 158.

⁹² D. & O. at 24.

⁹³ *Powers*, ARB No. 13-034, slip op. at 14 (emphasis added).

⁹⁴ *Fordham*, ARB No. 12-061, slip op. at 20.

the statutory provisions pertaining to the parties' respective burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), found at 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv) (Thomson Reuters Supp. 2015), which is virtually identical to that under the ERA, at 42 U.S.C.A. § 5851(b)(3)(C) and (D). *Fordham* noted that the statutory provisions distinguish “between the showing required of a whistleblower in order to establish that protected activity was a contributing factor in the adverse personnel action at issue, and the respondent’s burden of proving by ‘clear and convincing evidence’ that it would have taken the personnel action for legitimate, non-retaliatory reasons had there been no protected activity.”⁹⁵ From this statutory delineation, the Board concluded that a respondent’s evidence in support of its affirmative defense should not be considered at the initial ‘contributing factor’ causation stage where proof is subject to the ‘preponderance of the evidence’ test.⁹⁶ “To afford an employer the opportunity of defeating a complainant’s proof of ‘contributing factor’ causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a preponderance of the evidence,” the Board reasoned, “would render the statutory requirement of proof of the employer’s statutorily prescribed affirmative defense by ‘clear and convincing evidence’ meaningless.”⁹⁷ “It is an elementary canon of statutory construction,” the Board recognized, “that a statute should be interpreted so as not to render any word or part meaningless. Principles of statutory construction direct that a statute be construed such that no word is rendered superfluous, and that all language in a statute be given operative effect.”⁹⁸

Powers “fully adopted” and “reaffirm[ed]” the *Fordham* holding.⁹⁹ Observing that some clarification of *Fordham* was nevertheless necessary, *Powers* sought to demonstrate *Fordham*’s consistency with Office of Administrative Law Judges rules governing evidentiary relevancy. However, passages within the explanatory discussion in *Powers*, if quoted out of context, can easily be misconstrued. Thus, when considering, for example, the quotation from *Powers* cited by the majority that “there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation,” the emphasized concluding passage of that statement, “*as long as the evidence is relevant to that element of proof,*”¹⁰⁰ is of critical import, and can only be properly understood within the following overall discussion of evidentiary relevancy in which this statement appears:

⁹⁵ *Id.* at 22.

⁹⁶ *Id.*

⁹⁷ *Id.* at 22-23.

⁹⁸ *Id.* at 23, n.40 (citations omitted).

⁹⁹ *Powers*, ARB No. 13-034, slip op. at 14. The ARB buttressed its conclusion as to the correctness of *Fordham*’s holding by explaining the legislative and regulatory history underlying the statutory language requiring proof of “contributing factor” causation. *See Powers*, at 14-18.

¹⁰⁰ *Id.* at 22 (emphasis in original).

For purposes of assessing whether the complainant has met his or her burden of proof, the evidence must be *relevant* to the element that is sought to be proven. . . . In the context of assessing whether a complainant has met his or her burden of proof, the trier of fact must assess the evidence in the context of the legal elements that complainant is required to prove, *e.g.*, protected activity, adverse action, and contribution. . . .

Contrary to the dissent's assertion in *Fordham* that the majority's holding in that case precluded consideration by an ALJ of all relevant evidence in deciding the question of contributing factor causation (see *Fordham*, slip op. at 37), the majority in *Fordham* only addressed the question of what evidence could properly be weighed under the "preponderance of the evidence" standard in analyzing complainant's proof of contributing factor causation. *Fordham* specifically addressed the question as to evidence that may be weighed to demonstrate the contributing factor element under the preponderance of evidence standard. . . . The distinction should not, however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. *It merely recognizes that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence.*¹⁰¹

In response to concerns about the implications of *Fordham* in close cases where the complainant's causation evidence and the respondent's affirmative defense evidence are inextricably intertwined, *Powers* referred to several past ARB decisions¹⁰² to demonstrate by example that the *Fordham* evidentiary distinction can, in certain circumstances, prove relatively inconsequential.¹⁰³ Ignoring this context may result in misinterpreting the cited examples of ARB decisions as standing in opposition to *Fordham*. For example, in *Abbs v. Con-Way Freight*, the ARB held that the intervening event upon which the employer relied in terminating the complainant's employment was sufficiently compelling to break any inference of causation due to temporal proximity, while at the same time expressly noting that the employer's evidence would also constitute "clear and convincing evidence that [the employer] would have taken the

¹⁰¹ *Id.* at 21-22 (emphasis added).

¹⁰² *Zurcher v. S. Air, Inc.*, ARB No. 11-002; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012).

¹⁰³ *Powers*, ARB No. 13-034, slip op. at 22-26.

same adverse action in the absence of the protected activity.”¹⁰⁴ The cited decisions should be understood for what they represent, and nothing more: *dicta* cited for the purpose of addressing the outer bounds of the applicability of *Fordham’s* holding.

Ultimately, *Fordham* was applied to the facts in *Powers* without reservation: “[t]he two-stage analysis mandated by FRSA’s incorporation of the AIR 21 employee protection statute distinguishes the elements of proof required of each party and their respective burdens of proof.”¹⁰⁵ Under the facts of this case, the ALJ erred in ruling that Nelson failed to prove the contributing factor element of his claim, because that ruling is based on the subjective testimony of ENW managers regarding their alleged legitimate business reasons for Nelson’s termination – “evidence that is of highly questionable relevance to contribution.”¹⁰⁶ I would remand this case to the ALJ for reconsideration of whether Nelson’s protected activity was a contributing factor in the adverse personnel action taken against him.

3. Fact Issues

Finally, the ALJ’s determinative conclusion of fact—that Nelson’s UAA was revoked “based solely on Respondent’s *belief* that Complainant had shown a lack of honesty”—is not supported by substantial evidence. The only evidence cited by the ALJ for this critical finding of fact is Gosney’s self-serving testimony that Nelson “knowingly and willfully submitted falsified documentation with the intent to support payment of travel/per diem to Richard Hayes.”¹⁰⁷ The ALJ fails to adequately explain why he credited this testimony as opposed to other contradictory evidence supplied by other witnesses.

Further, the ALJ’s finding that ENW believed Nelson provided false information in connection with the per diem policy is contradicted by the ALJ’s finding that “[Nelson] may have thought there was some justification for Mr. Hayes to receive per diem.”¹⁰⁸ It is undisputed that there was no written ENW policy on per diem payments. Nevertheless, the ALJ assumed that “ENW policy restricts payment of per diem and travel costs only to those contract employees who specifically travel into the Tri-Cities, Washington area to perform work at ENW; persons already living in the area when assigned contract work at ENW are not eligible for travel costs or per diem payments.”¹⁰⁹ The ALJ does not provide substantial evidence in support of

¹⁰⁴ *Abbs*, ARB No. 12-016, slip op. at 6, n.5.

¹⁰⁵ *Powers*, ARB No. 13-034, slip op. at 28 (citing *Fordham*, ARB No. 12-061, slip op. at 9-10).

¹⁰⁶ *Id.* at 28.

¹⁰⁷ D. & O. at 12 (citing Gosney testimony at Tr. 350, 358, 363-364).

¹⁰⁸ *Id.* at 24.

¹⁰⁹ *Id.* at 8.

this finding or explain why he disbelieved contrary evidence that other employees had received per diem under circumstances similar to Hayes's.¹¹⁰

The ALJ held that Nelson's "actions in preparing the various documents to make it appear that Hayes was coming in from South Carolina for the job are not consistent with the actual facts."¹¹¹ This finding is not supported by reference to any evidence; the ALJ does not state what information was false, much less which documents contain false information.¹¹² Nor does the ALJ reconcile substantial evidence that contradicts his finding that Nelson prepared false documentation. For example Hayes's resume (at RX 9, p. 2) which Nelson helped draft, states clearly that Hayes was currently employed at a Target in Washington State.

The ALJ also failed to identify, if not consider, other circumstantial evidence favorable to Nelson. For example, Nelson had worked in the nuclear industry for 30 years during which time he had always maintained UAA status. The ALJ does not even mention the glaring fact that the "security investigation" occurred nearly two years after the events at issue but only a couple of weeks following Sanders's alleged protected activity. In *James v. Ketchikan Pulp Co.*, Case No. 1994-WPC-004 (Sec'y Mar. 15, 1996), the Secretary found that a similar factual anomaly was enough to prove mixed motive causation.¹¹³ Nor does the ALJ address the undisputed evidence that there was no written policy regarding per diem payments. In *Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-011, slip op. at 7 (ARB July 27, 2011), we noted that the employee had no prior notice of a particular employer requirement, and we therefore upheld the ALJ's finding that the employer was unable to prove its affirmative defense

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.* at 24.

¹¹² CX 5 at page 1 is a document drafted by Nelson offering Hayes a job, addressed to Hayes's permanent address in South Carolina—the same South Carolina address indicated on Hayes's Form W-4 (CX 5 at p. 4). CX 5 at pages 2-3 is the "I-9" filled out by Nelson which states Hayes's address as the same one on the copy of Hayes's driver's license which is attached to the "I-9" document. The information on these documents accurately reflects the information on Hayes's drivers' license and information submitted to the IRS. The ALJ does not explain how this information is "not consistent with the actual facts." D. & O. at 24. The only document that appears false on its face is Hayes's first PHQ (RX 6, pp. 8-9) in which he fails to list his Washington residence since he had lived there for over 30 days. Hayes—not Nelson—filled this form out on May, 4, 2009, a week after he met with Nelson on April 28, 2009 to prepare the other documentation.

¹¹³ "Concerning the discharge, KPC introduced convincing evidence that James falsified the lodging expenses he claimed for his 1989-90 plastic surgery and recovery. The falsification was a legitimate reason for firing James. KPC, however, did not investigate the truth of the claimed expenses until after the raid, which occurred two years after James submitted the claimed expenses. I therefore find that KPC also had an unlawful motivation for discharging James." *James*, Case No. 1994-WPC-004, slip op. at 4.

based upon the employee's violation of the requirement. In the case before us, given the undisputed fact that no written per diem policy existed, the ALJ does not sufficiently explain why he credited ENW's testimony that Nelson violated the policy.

The ALJ emphasizes that the determinative fact which resolves the case (ultimately in Respondent's favor) is not whether "[Nelson] actually violated the per diem policy, but whether his superiors *believed* that he had violated the policy."¹¹⁴ Without explaining his rationale, the ALJ apparently reckoned that ENW's good faith *belief* that Nelson was lying was tantamount to a lack of retaliatory motive and therefore sufficient to find that Nelson's protected activity did not contribute to the revocation of his UAA. But under the ERA burdens of proof, a complainant is no longer required to demonstrate retaliatory motive or animus. So even a finding that ENW lacked retaliatory motive because they subjectively believed that Nelson lied, would not conclusively end the case at the causation stage.¹¹⁵ I would reverse the ALJ's findings with respect to protected activity and contributing factor and remand for findings of law and fact consistent with this opinion.

JOANNE ROYCE
Administrative Appeals Judge

¹¹⁴ D. & O. at 24.

¹¹⁵ See *Powers*, ARB No. 13-034, slip op. at 25-27 ("In relying on that subjective testimony by Company managers to rebut Powers' evidence of contribution, the ALJ improperly applied the preponderance of evidence standard to evidence of non-retaliatory motive."). The ALJ failed to make the necessary factual finding that ENW *reasonably* believed that Nelson was lying. In order to prove its affirmative defense—a purposely high standard—ENW must clearly and convincingly show that its belief that Nelson was lying was both subjectively reasonable and objectively reasonable. And contrary to the ALJ's ruling, proof that Nelson did not violate the per diem policy is clearly relevant to whether ENW reasonably believed he was lying. Even if ENW subjectively believed Nelson was lying, proof that Nelson did not violate the per diem policy would make it difficult for ENW to meet its burden of showing that that belief was objectively reasonable.