



In the Matter of:

KENNETH PALMER,

ARB CASE NO. 16-035

COMPLAINANT,

ALJ CASE NO. 2014-FRS-154

v.

DATE: September 30, 2016

**CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL
RAILROAD COMPANY,**

REISSUED (with full dissent): Jan. 4, 2017

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

F. Tucker Burge, Esq.; *Burge & Burge, P.C.*; Birmingham, Alabama

For the Respondent:

George H. Ritter, Esq.; *Wise Carter Child & Caraway, P.A.*; Jackson, Mississippi

For the Assistant Secretary of Labor for Occupational Safety and Health:

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther; Esq., and
Mary E. McDonald, Esq. (argued); *U.S. Department of Labor, Office of the Solicitor,*
Washington, District of Columbia**

For the Association of American Railroads:

Ronald Johnson, Esq.; *Jones Day*; Washington, District of Columbia

*For National Employment Lawyers Association, Teamsters for a Democratic Union, Truckers
Justice Center, and General Drivers, Warehousemen & Helpers Local No. 89:*

**Jason Zuckerman, Esq. and Dallas Hammer, Esq.; *Zuckerman Law*; Washington,
District of Columbia**

For the Academy of Rail Labor Attorneys:

Nicholas D. Thompson, Esq.; *Nichols Kaster PLLP*; Minneapolis, Minnesota

For the Rail Labor Division of the Transportation Trades Department, AFL-CIO and Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters:

Michael S. Wolly, Esq.; Zwerdling, Paul, Kahn & Wolly, P.C.; Washington, District of Columbia

For Law Professors Erwin Chemerinsky and Robert F. Williams, together with the Brotherhood of Maintenance Way Employees, Division of the International Brother of Teamsters (BMWED):

Harry W. Zanville, Esq.; Harry W. Zanville Law Office; La Mesa, California

For Senators Charles Grassley and Ron Wyden, and Representative Jackie Speier:

Thomas Devine, Esq.; Government Accountability Project; Washington, District of Columbia

For Kalijarvi, Chuzi, Newman & Fitch P.C.:

Richard Renner, Esq.; Kalijarvi, Chuzi, Newman & Fitch P.C.; Washington, District of Columbia

For the Chamber of Commerce of the United States of America:

James E. Gauch, Esq.; Jones Day; Washington, District of Columbia

For the American Trucking Association, Inc.:

Richard Pianka, Esq.; ATA Litigation Center; Arlington, Virginia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Anuj C. Desai, Administrative Appeals Judge.¹ Judge Corchado concurs. Judge Royce concurs in part and dissents in part. Judge Desai, concurs.

DECISION AND ORDER OF REMAND

Kenneth Palmer (Palmer) brought a complaint against Illinois Central Railroad Company (Illinois Central) alleging that Illinois Central violated the employee protection provision of the Federal Rail Safety Act (FRSA)² when it fired him in July 2013. An Administrative Law Judge (ALJ) agreed and ordered Illinois Central to reinstate Palmer and pay him lost wages, compensatory damages, and punitive damages.³ In doing so, however, the ALJ applied an

¹ Judge E. Cooper Brown took no part in the consideration or decision of this case.

² 49 U.S.C. § 20109 (2014).

³ *Palmer v. Illinois Cent. R.R. Co.*, ALJ No. 2014-FRS-154 (ALJ Jan. 19, 2016) (D. & O.).

interpretation of the FRSA’s burden-of-proof provision set forth in two decisions from this Board, *Fordham v. Fannie Mae*⁴ and *Powers v. Union Pacific Railroad Company*.⁵ Because we vacated the *Powers* decision in May 2016⁶ and we now overturn *Fordham*, we **REVERSE** and **REMAND** this case to the ALJ to reassess the facts in light of the proper burden-of-proof framework.

BACKGROUND

1. Legal Background

A. Statutory Background

The Federal Rail Safety Act (FRSA) has a whistleblower protection provision that prohibits railroad carriers from, among other things, “discharg[ing]” an employee if the discharge is “due, in whole or in part, to” the employee “notify[ing] . . . the railroad carrier . . . of a work-related personal injury.”⁷ At issue in this case is a clause in that provision that establishes the respective burdens of proof between the two parties in an FRSA whistleblower case. Prior to the FRSA’s 2007 amendments, railroad employees who believed they had been retaliated against for whistleblowing were required to seek redress with the National Railroad Adjustment Board under section 3 of the Railway Labor Act.⁸

In 2007, Congress established the Department of Labor procedures under which this case was brought. It did so by incorporating the procedures found in the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as “AIR-21.”⁹

Of crucial importance here, the 2007 FRSA amendment incorporated AIR-21’s burden-of-proof provision. The post-2007 FRSA includes the following language: “any action [under the substantive subsections of the FRSA whistleblower protection provision] shall be governed

⁴ ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014).

⁵ ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 24 (ARB Apr. 21, 2015) (en banc) (reissued with full dissent).

⁶ See *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, Order Vacating the ARB’s Decision and Order of Remand and Returning the Case to the ARB for Decision (May 23, 2016).

⁷ 49 U.S.C. § 20109(a)(4)(2014).

⁸ See 49 U.S.C. § 20109(c) (2006 edition), cross-referencing 45 U.S.C. § 153.

⁹ See 49 U.S.C. § 20109(d)(2)(A) (2014) (“Any [enforcement] action [under the substantive prohibitions on retaliation for whistleblowing] shall be governed under the rules and procedures set forth in [the AIR-21 whistleblower protection provision].”).

by the legal burdens of proof set forth in [the AIR-21 whistleblower protection provision].”¹⁰ It is thus to the legal burdens of proof set forth in the AIR-21 whistleblower protection provision that we must turn.

The AIR-21 legal burdens of proof are codified in four clauses in 49 U.S.C. § 42121(b)(2)(B).¹¹ The first two clauses, clauses (i) and (ii), apply to the investigation stage of the Department of Labor’s procedures, when the Assistant Secretary for Occupational Safety and Health is considering the employee’s complaint; the next two clauses, clauses (iii) and (iv), apply in hearings before ALJs.¹²

¹⁰ *Id.* at § 20109(d)(2)(A)(i) (emphasis added).

¹¹ The full text of the burden-of-proof provision reads as follows:

(B) Requirements.—

(i) Required showing by complainant.—

The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.—

Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by secretary.—

The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.—

Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B).

¹² 29 C.F.R. §§ 1979.104(b), (c), (d), 1979.109(a) (setting forth the procedures for complaints brought under the AIR-21 whistleblower protection provision); *see also* 29 C.F.R. §§ 1982.104(e)(1), (4), 1982.109(a), (b) (same for Federal Rail Safety Act).

Because this case involves an appeal of an ALJ's decision, we must interpret clauses (iii) and (iv). They establish a two-step test: clause (iii) establishes step one of the test, and clause (iv) establishes step two. While the parties and amici generally agree that these clauses contain the statutory language we must interpret, they disagree on what those two steps are and, in particular, what evidence the ALJ can consider at the first step, under clause (iii).

Moreover, as we note below, the language of the AIR-21 burden-of-proof provision is found in at least twelve other DOL-administered whistleblower provisions: sometimes Congress has used a cross-referencing incorporation of the AIR-21 burden-of-proof provision (as in the FRSA) and sometimes it has used the same linguistic formulation or a cross-referencing incorporation of a provision with the same linguistic formulation.¹³ Therefore, our interpretation in this decision applies equally to all those other statutory provisions.

B. Recent Relevant ARB Decisions

In August 2014, in *Bobreski v. J. Givoo Consultants, Inc. (Bobreski II)*, a panel of this Board addressed the question of what evidence an ALJ can consider under the Energy Reorganization Act's whistleblower protection section, which includes a burden-of-proof provision very similar to AIR-21's.¹⁴ In *Bobreski II*, the panel explicitly held that in determining

¹³ See *infra* notes 14 (Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 1992) and 166 (list of eleven other statutes).

¹⁴ The ERA's burden-of-proof provision reads as follows:

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted 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.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

whether protected activity was a contributing factor in an adverse personnel action, an ALJ must consider all relevant, admissible evidence.¹⁵ The panel reviewed all the evidence in the record, including the employer's evidence of its nonretaliatory reasons for the adverse action, and concluded that the ALJ's findings of fact established, as a matter of law, that the complainant had proven that his protected activity was a contributing factor in the adverse action. One member of the Board concurred in the result, agreeing that the complainant had "established causation," but "arriv[ing] at [this conclusion] by a different route than the majority."¹⁶ The concurring member concluded that "[w]hen Congress amended the ERA whistleblower provisions in 1992, it created a statutory two-stage framework for separately weighing the parties' respective evidence pertaining to causation."¹⁷ Because of this, "the [employer's] non-retaliatory reason for its action may not be weighed against the complainant's evidence of causation but instead must be weighed at the second affirmative defense stage under the higher clear and convincing evidence standard."¹⁸

About six weeks later, in *Fordham v. Fannie Mae*, a different Board panel addressed the same issue in a case that arose under the Sarbanes-Oxley Act, another statute that, like the Federal Rail Safety Act, explicitly incorporated the AIR-21 burden-of-proof provision.¹⁹ That panel held that "[a]n employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action";²⁰ and that when determining whether protected activity was a contributing factor in an adverse personnel action, an ALJ must not "weigh" the employer's evidence "of a legitimate, non-retaliatory reason or basis for its decision or action . . . against a complainant's causation evidence."²¹ In essence,

(D) Relief may not be ordered under paragraph (2) 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.

42 U.S.C. § 5851(b). Compare with 49 U.S.C. § 42121(b)(2)(B) quoted above in note 11.

¹⁵ *Bobreski II*, ARB No. 13-001, slip op. at 22-23, 25-30.

¹⁶ *Id.* at 32 (Royce, J., concurring).

¹⁷ *Id.*

¹⁸ *Id.* at 33 (Royce, J., concurring); see also *id.* at 32 (Royce, J., concurring) (stating that the "respondent's evidence of non-retaliatory reasons should not be weighed against the complainant's evidence of causation at [the] first 'contributing factor' stage").

¹⁹ See 18 U.S.C. § 1514A(b)(2)(C).

²⁰ *Fordham*, ARB No. 12-061, slip op. at 24 (ARB Oct. 9, 2014).

²¹ *Id.* at 3; see also *id.* ("The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, *in disregard of any*

then, *Fordham* rejected the approach the panel took in *Bobreski II*. One panel member dissented from this holding, specifically objecting to the majority’s requirement that “the ALJ . . . ultimately decide whether protected activity contributed to [the employer’s] decision to fire [the employee] without considering the reasons [the employer] provides for firing her.”²²

About six months after *Fordham*, the Board, sitting en banc, addressed the question once again in *Powers v. Union Pacific Railroad Company*, a case involving the Federal Rail Safety Act. In *Powers*, the Board stated that it reaffirmed *Fordham*’s holding, but that ALJs could in some circumstances consider employer evidence of its nonretaliatory reasons to determine contributing-factor causation.²³ It was at this point that the ALJ rendered his decision in this case and for that reason understandably cited *Fordham* and *Powers*.²⁴

Several months after the ALJ’s decision, however, the Board vacated its decision in *Powers*.²⁵ The *Powers* case remains pending before this Board.

2. Factual Background

Illinois Central is a railroad carrier and employer under the FRSA.²⁶ Palmer began working as a conductor for Illinois Central on February 20, 2006, and worked there until Illinois Central fired him on July 8, 2013, the adverse action at issue in this case.²⁷

On May 28, 2013, Palmer failed to properly align a switch while he was working in Illinois Central’s railyard in Jackson, Mississippi. Palmer’s mistake resulted in rail equipment

evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only” (emphasis added.); *id.* at 22 (concluding that “the respondent’s evidence in support of its affirmative defense as to why it took the action in question is not to be considered at the initial “contributing factor” causation stage where proof is subject to the ‘preponderance of the evidence’ test”).

²² *Id.* at 43 (Corchado, J., concurring in part and dissenting in part).

²³ *Powers*, ARB No. 13-034, slip op. at 14 (referring to *Fordham* as being “fully adopted herein”); *id.* (“[W]hile the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent’s affirmative defense, the *Fordham* decision should not be read so narrowly.”).

²⁴ *Palmer*, ALJ No. 2014-FRS-154, slip op. at 39-41.

²⁵ *See Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, Order Vacating the ARB’s Decision and Order of Remand and Returning the Case to the ARB for Decision 2 (May 23, 2016).

²⁶ Stipulated Facts, D. & O. at 2, No. 2.

²⁷ Stipulated Facts, D. & O. at 2, No. 4. Palmer returned to work for Illinois Central on January 13, 2015. *Id.*

running through the improperly aligned switch.²⁸ This is known in the industry as a “run-through” or a “switch run-through.” Palmer’s run-through did not cause a derailment or injury.²⁹ Palmer immediately reported the run-through to both Brad McDaniel, the Assistant Superintendent of the Jackson Yard at the time,³⁰ and Brett McCullough, Illinois Central’s Risk Manager;³¹ and when doing so, he admitted that the run-through was his fault.³²

On June 5, 2013, Illinois Central wrote Palmer a letter requiring him to attend a formal investigation hearing about the incident on June 12, 2013.³³ Palmer contacted his local union chairman, J.R. Russum, and asked Russum to seek a “waiver.”³⁴ A waiver is comparable to a plea bargain before a criminal trial or a settlement before a civil trial: It would have allowed Palmer to forgo the formal investigation hearing in exchange for accepting a pre-determined punishment such as a suspension.³⁵ In exchange for a waiver, Palmer would have been willing to accept up to a 60-day suspension.³⁶ Russum asked McDaniel for a waiver, and while no agreement had been reached, a deal for a waiver was “on the table.”³⁷ On June 10, 2013, Illinois Central rescheduled the hearing to June 26, 2013.³⁸

On June 18, 2013, six days after the original hearing was to occur, but eight days before the rescheduled hearing, Palmer injured his left arm while at work in Crystal Springs, Mississippi (about 30 miles from Jackson).³⁹ He reported the injury to McDaniel a little less than an hour later.⁴⁰ When he did, McDaniel expressed hostility towards Palmer and attempted to dissuade

²⁸ Stipulated Facts, D. & O. at 3, No. 8.

²⁹ Stipulated Facts, D. & O. at 3, No. 11; D. & O. at 37.

³⁰ D. & O. at 27.

³¹ *Id.* at 8.

³² Stipulated Facts, D. & O. at 3, No. 10.

³³ Stipulated Facts, D. & O. at 3, No. 12.

³⁴ D. & O. at 7.

³⁵ *Id.*

³⁶ *Id.* at 38.

³⁷ *Id.* at 39, 13.

³⁸ Stipulated Facts, D. & O. at 3, No. 15.

³⁹ Stipulated Facts, D. & O. at 3, No. 16.

⁴⁰ Stipulated Facts, D. & O. at 3, No. 16.

him from reporting his injury, asking Palmer if he was sure that he wanted to report the injury and stating that he had heard that Palmer was “trying to get fired on purpose.”⁴¹

Palmer sought treatment for his injury at the Mississippi Baptist Medical Center in Jackson, where he was evaluated and treated that same night (or, more precisely, since by that point it was after midnight, early the morning of June 19, 2013).⁴² On June 20, 2013, Illinois Central sent Palmer a letter telling him to attend a formal investigation on June 27, 2013, to determine whether he violated any rules when he sustained his injury.⁴³ On June 24, 2013, McDaniel postponed this June 27, 2013 investigation for two weeks.⁴⁴ At some point after Palmer reported his injury, McDaniel told Russum that the deal they had discussed for a waiver was “off the table” due to an alleged new policy that all switch run-throughs had to go to a formal hearing.⁴⁵

On June 26, 2013, Illinois Central held the formal investigation hearing about Palmer’s run-through incident as scheduled.⁴⁶ McDaniel was the conducting officer who presided over the hearing.⁴⁷ Palmer testified on behalf of himself and accepted responsibility for the run-through.⁴⁸ Palmer’s personal work record was introduced into evidence at the hearing.⁴⁹ Palmer’s discipline history with Illinois Central between 2007 and 2013 includes five incidents of discipline in addition to the May 28, 2013 run-through.⁵⁰ Two of these other incidents also involved run-throughs.⁵¹ Palmer testified that, although he had been disciplined for those run-throughs, both had been caused by a fellow crewmember and so he was not personally responsible for either one.⁵²

⁴¹ D. & O. at 41, 44-45, 8.

⁴² Stipulated Facts, D. & O. at 3, No. 17.

⁴³ Stipulated Facts, D. & O. at 3, No. 18.

⁴⁴ Stipulated Facts, D. & O. at 3, No. 19.

⁴⁵ D. & O. at 39.

⁴⁶ Stipulated Facts, D. & O. at 4, No. 20.

⁴⁷ *Id.*

⁴⁸ Stipulated Facts, D. & O. at 4, No. 21.

⁴⁹ *Id.*

⁵⁰ RX 6.

⁵¹ D. & O. at 7.

⁵² *Id.*

After the formal investigation hearing, McDaniel followed up with his superiors in a series of e-mails discussing the appropriate discipline for Palmer. On Wednesday, July 3, 2013, (a week after the formal investigation hearing), McDaniel sent an e-mail to Will Noland, Illinois Central's General Superintendent of Transportation for the Gulf Coast Zone.⁵³ In it, McDaniel recommended that Palmer receive "60 days hard or dismissal, whichever you agree is necessary." Four days later (Sunday, July 7, 2013), Noland forwarded McDaniel's e-mail to John Klaus, Illinois Central's General Manager,⁵⁴ (carbon copying McDaniel) and added the following: "Need permission to terminate. Has another investigation coming up for the rules violated which resulted in an injury." Over the next two hours, McDaniel and Klaus e-mailed each other several times about Palmer's upcoming investigation hearing related to the rules Palmer might have violated when he injured himself on June 18th. Finally, Klaus responded, "Dismiss. We won't need to hold the next [investigation hearing.]" Two minutes later, McDaniel replied, "Yes sir," and a minute after that, he e-mailed his administrative assistant, "Write up dismissal for KT Palmer on Monday and send to me. We can cancel the next investigation for his injury after the dismissal."

Starting with McDaniel's original July 3rd e-mail, we reproduce the full correspondence below:⁵⁵

-----Original Message-----

From: Brad McDaniel

Sent: Wednesday, July 03, 2013 2:38 PM

To: William Noland

Subject KT Palmer's Work History.jpg

Will

The attachment below is K.T. Palmer's work/discipline history.

In the investigation Mr. Palmer took full responsibility for running through the switch in

Jackson, MS. His last discipline was 30 days. As you can see Mr. Palmer has progressed from 10 days, to 20 days, then to 30 days before this incident. Mr. Palmer has 2 injuries in the 2 years I have been in Jackson. He has shown an unsafe work pattern.

⁵³ *Id.* at 2, 18.

⁵⁴ *Id.* at 14.

⁵⁵ *Id.* at 32-34.

I recommend 60 days hard or dismissal, whichever you agree is necessary. Mr. Palmer is fortunate, by looking at his work history, that he hasn't hurt himself or someone else more severe than he has due to his poor work habits.

-----Original Message-----

From: William Noland
Sent: Sunday, July 07, 2013 05:21 AM
To: John C. Klaus
Cc: Brad McDaniel
Subject FW: KT Palmer's Work History.jpg

Need permission to terminate. Has another investigation coming up for the rules violated which resulted in an injury.

-----Original Message-----

From: John C. Klaus
Sent: Sunday, July 07, 2013 06:54 AM
To: William Noland
Cc: Brad McDaniel
Subject: Re: KT Palmer's Work History.jpg

When is next investigation scheduled?

-----Original Message-----

From: Brad McDaniel
Sent: Sunday, July 07, 2013 06:58 AM
To: John C. Klaus; William Noland
Subject: Re: KT Palmer's Work History.jpg

This Wednesday July 10th.

-----Original Message-----

From: John C. Klaus
Sent: Sunday, July 07, 2013 07:02 AM
To: Brad McDaniel; William Noland
Subject: Re: KT Palmer's Work History.jpg

Is the next investigation tied to an injury? Is this the Crystal Springs last injury?

-----Original Message-----

From: Brad McDaniel -
Sent: Sunday, July 07, 2013 07:11 AM
To: John C. Klaus; William Noland
Subject Re: KT Palmer's Work History.jpg

Yes and yes

-----Original Message-----

From: John C, Klaus
Sent: Sunday, July 07, 2013 07:16 AM
To: Brad McDaniel; William Noland
Subject: Re: KT Palmer's Work History.jpg

Dismiss. We won't need to hold the next one

-----Original Message-----

From: Brad McDaniel
Sent: Sunday, July 07, 2013 7:18 AM
To: John C. Klaus; William Noland
Subject: Re: KT Palmer's Work History.jpg

Yes sir

-----Original Message-----

From: Brad McDaniel
Sent: Sunday, July 07, 2013 7:19 AM
To: Tracy Phipps
Subject: Re: KT Palmer's Work History.jpg

Tracy

Write up dismissal for KT Palmer on Monday and send to me. We can cancel the next investigation for his injury after the dismissal.

The following day, July 8, 2013, Illinois Central sent Palmer two letters.⁵⁶ The first told him that he was fired. The second said that the investigation hearing about any potential rules violations associated with his June 18, 2013 injury was cancelled.

The record also contained evidence of Illinois Central's treatment of some other employees.⁵⁷ This included evidence that Illinois Central had granted waivers to an employee with the initials P.T., who had fourteen switching mistakes or run-throughs but was granted a waiver in each case and was allowed to retire.⁵⁸ There was also evidence of two employees

⁵⁶ The statements in this paragraph refer to Stipulated Facts, D. & O. at 4, Nos. 22, 23.

⁵⁷ D. & O. at 21-23.

⁵⁸ *Id.* at 41.

with, according to Illinois Central, disciplinary records comparable to Palmer whom Illinois Central had also fired but who had not engaged in any protected activity.⁵⁹

3. Procedural Background

On December 30, 2013, Palmer filed a timely complaint with OSHA alleging that Illinois Central violated the FRSA by firing him at least in part because of his June 18, 2013 injury report.⁶⁰ OSHA issued a decision finding there was no reasonable cause to believe that Illinois Central violated the FRSA, concluding that Illinois Central fired Palmer because of Palmer's run-through mistake.⁶¹ Palmer filed objections to OSHA's findings and requested a hearing.⁶² An Administrative Law Judge (ALJ) held a hearing on February 24, 2015.⁶³

On January 19, 2016, the ALJ issued a Decision and Order finding that Palmer established by a preponderance of the evidence that (1) his injury report was protected activity under the FRSA; (2) his termination was an adverse personnel action; and (3) his injury report was a contributing factor in his termination.⁶⁴ The ALJ further concluded that Illinois Central failed to establish by clear and convincing evidence that it would have taken the same action in the absence of Palmer's protected activity.⁶⁵ The ALJ ordered Illinois Central (1) to ensure that Palmer was reinstated to his same seniority status, without any loss of lawful terms or conditions of his employment; (2) to expunge Palmer's employment records of any wrongdoing associated with his suspension, termination, or waiver; (3) to pay Palmer \$44,216.82 plus interest in back pay; (4) to pay Palmer compensatory damages of \$15,000.00 for the loss of money on the sale of his home; (5) to pay \$10,000.00 to Palmer for his emotional distress; and (6) to pay Palmer \$25,000.00 in punitive damages.⁶⁶

On February 9, 2016, Illinois Central filed a petition for review with the ARB, which the Board accepted.⁶⁷ The parties each filed briefs on appeal.

⁵⁹ *Id.*; RX 18A at 1272-75; Illinois Central's Brief In Support of Petition for Review at 29-30.

⁶⁰ Stipulated Facts, D. & O. at 4, No. 24; OSHA Findings at 1.

⁶¹ Stipulated Facts, D. & O. at 4, No. 25; OSHA Findings at 3.

⁶² Stipulated Facts, D. & O. at 4, No. 26.

⁶³ D. & O. at 2.

⁶⁴ *Id.* at 37-42.

⁶⁵ *Id.* at 42-45.

⁶⁶ *Id.* at 46-48.

⁶⁷ As we noted above, *see supra* note 1, Judge E. Cooper Brown took no part in the consideration or decision of this case. On August 11, 2016, he voluntarily recused himself from this

Then, on June 17, 2016, the Board ordered that this case be heard en banc and requested supplemental briefing on two legal questions:

- 1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a “contributing factor” in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
- 2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

These questions were designed to elicit the parties’ views on the conflict between the Board’s decisions in *Bobreski II*, *Fordham*, and the vacated decision in *Powers*.⁶⁸

On August 3, 2016, the parties and nine amici, including the Assistant Secretary of Labor for OSHA, filed supplemental briefs addressing those questions. The Board held oral argument on August 24, 2016; the parties and seven of the amici chose to participate in that argument.

For reasons we explain below, we conclude that the answer to both questions is “no.” ALJs are *not* required to disregard any of the evidence the respondent might offer to show that the protected activity did not contribute to the adverse action. Moreover, there are *no* limitations on the types of evidence an ALJ may consider when determining whether a complainant has demonstrated that protected activity was a contributing factor in the adverse action (other than limitations found in the rules of evidence).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has authority to hear appeals from ALJ decisions and issue final agency decisions on behalf of the Secretary of Labor in cases arising out of the FRSA whistleblower protection provision.⁶⁹ The ARB reviews questions of law presented

case. *See Palmer v. Canadian Nat’l Ry./Ill. Cent. R.R. Co.*, ARB No. 16-035, Notice of Recusal (Aug. 11, 2016).

⁶⁸ *See supra* Section 1.b, text accompanying notes 14 to 25.

⁶⁹ See Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.⁷⁰

DISCUSSION

We divide our analysis into three sections.

Section 1 concludes that the first step of the AIR-21 whistleblower protection provision's burden-of-proof framework requires the complainant to prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action. It further concludes that there are no limitations on the evidence the factfinder may consider in making that determination. Section 1 contains a comprehensive analysis of AIR-21's burden-of-proof provision and its provenance, and explains in significant detail why this Board's decision in *Fordham v. Fannie Mae* was wrong. Readers who are not interested in the details of the analysis of the statutory text, structure, and background may skip straight to Section 2.

Section 1's bottom line is that *Fordham's* interpretation is wrong, and we hereby overturn *Fordham*: nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

Section 2 lays out the legal standard for cases involving whistleblower protection provisions with the AIR-21 burden-of-proof framework and explains how to apply that standard to this and other cases arising under AIR-21, the FRSA, or any other whistleblower protection provision with the same burden-of-proof framework.⁷¹ It explains that the level of causation that a complainant needs to show is extremely low: the protected activity need only be a "contributing factor" in the adverse action. Because of this low level, ALJs should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. Since in most cases the employer's theory of the facts will be that the protected activity played *no* role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all.

Finally, Section 3 explains why, under the proper legal standard, we remand this case and what the ALJ should do on remand.

⁷⁰ 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, -106, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

⁷¹ One of the statutory provisions is found in the Energy Reorganization Act and is reproduced above in note 14. Eleven others are listed below in note 166.

1. The first step of the AIR-21 two-step burden-of-proof framework requires the employee to prove, as a fact and by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action, and the factfinder may consider any and all relevant, admissible evidence when determining whether the employee has met that burden, including evidence of the employer’s nonretaliatory reasons for the unfavorable action.

A. The text of AIR-21’s two-step burden-of-proof framework requires the employee to prove at step one, as a fact and by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action; and it contains no limitations on the evidence the factfinder may consider in making that determination.

i. Text

We start, as we must, with the text of the statute,⁷² and the text unambiguously requires the employee to “demonstrate” that the protected activity was a contributing factor in the adverse personnel action. The first step of the AIR-21 two-step burden-of-proof framework,⁷³ which is the specific text we must interpret and is found in clause (iii) of 49 U.S.C. § 42121(b)(2)(B), states that “[t]he Secretary may determine that a violation . . . has occurred only if *the complainant demonstrates that [the protected activity] was a contributing factor in the unfavorable personnel action . . .*”⁷⁴ The relevant statutory text says “demonstrate[],” and it

⁷² See, e.g., *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“As with any question of statutory interpretation, our analysis begins with the plain language of the statute.”).

⁷³ The “step[s]” in the framework are simply two different factual questions that the factfinder answers, in order. Therefore, as a procedural matter, the ALJ would not take either “step” until after the hearing and after both parties have introduced all their evidence. These “steps” are thus not “stages” that occur during the course of adjudication. See *Fordham*, ARB No. 12-061, slip op. at 42 (Corchado, J., dissenting) (“[T]his matter comes to the Board after a full evidentiary hearing and raises questions about the ALJ’s decision on the merits, not the order of presentation of evidence during the evidentiary hearing.”). But cf. *Fordham*, ARB No. 12-061, slip op. at 16 (incorrectly concluding that “Congress established bifurcated *two-stage process* for weighing the parties’ respective evidence pertaining to causation”); *id.* at 17 (incorrectly referring to the two “stages”); *id.* at 36 (referring to the decision’s “interpretation of the SOX burdens of proof and *order of presentation*”).

⁷⁴ 49 U.S.C. § 42121(b)(2)(B)(iii) (2012) (emphasis added). We will refer to this as “clause (iii).” Just to be clear, this first “step” also requires the complainant to prove by a preponderance that (1) she engaged in protected activity and (2) her employer took some adverse personnel action. See, e.g., *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2 & n.3 (ARB Feb. 18, 2016). When we refer to the “first step” of the AIR-21 test throughout this decision, however, we are referring only to the requirement that the complainant demonstrate that protected activity was *a contributing factor* in the adverse personnel action. But, as a matter of simple logic, there has to be both protected activity and an adverse personnel action for there to be a causal connection between the two.

does not say, for example, “make a prima facie showing” or “meet a burden of production” or “make an inference.”

The term “demonstrate” in clause (iii) means “to prove by a preponderance of the evidence.” Although the statute has no definition of “demonstrate,” dictionary definitions of the term use phrases like “show that something is true” or “establish the truth of . . . by providing practical proof or evidence” or synonyms like “prove.”⁷⁵ And, of course, in ordinary civil litigation, the standard of proof is “by a preponderance of the evidence.”⁷⁶

Fully supporting this interpretation of the word “demonstrate,” this Board and courts have consistently held that “demonstrate[]” in clause (iii) means “to prove by a preponderance of the evidence.”⁷⁷ This use of “demonstrate” is consistent with its use elsewhere in the law.⁷⁸ Importantly, the word “demonstrate” does not ordinarily mean to “make a prima facie showing” or to “meet a burden of production” or to “make an inference.” It requires the employee to prove *as a fact* that the protected activity was a contributing factor in the adverse personnel action.

⁷⁵ The Cambridge English Dictionary entry for “demonstrate” lists “to show that something is true; prove,” available at <http://dictionary.cambridge.org/us/dictionary/english/demonstrate> (last visited September 16, 2016). The Merriam-Webster Dictionary entry for “demonstrate” lists to prove (something) by showing examples of it: to show evidence of (something),” available at <http://www.merriam-webster.com/dictionary/demonstrate> (last visited September 16, 2016). The Oxford English Dictionary entry for “demonstrate” lists “to prove.” IV OXFORD ENGLISH DICTIONARY 448 (2d ed. 1989). The American Heritage Dictionary entry for “demonstrate” lists “[t]o show to be true by . . . adducing evidence; prove.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 483 (5th ed. 2011); *see also* WEBSTER’S THIRD NEW INT’L DICTIONARY 600 (2002) (listing “prove” and “show” as synonyms of “demonstrate”).

⁷⁶ It is a “[c]onventional rule[] of civil litigation, . . . that parties to civil litigation need only prove their case by a preponderance of the evidence.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989); *Gross v. FBL Fin. Svcs. Inc.*, 557 U.S. 167, 189 (2009).

⁷⁷ *See, e.g., Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) (stating that “[t]he term “demonstrates” means to prove by a preponderance of the evidence” (citing *Dysert v. Sec’y of Labor*, 105 F.3d 607, 610 (11th Cir.1997))); *Feldman v. Law Enf’t Assocs. Corp.*, 752 F.3d 339, 344-45 (4th Cir. 2014); *Bechtel v. Admin. Rev. Bd., U.S. Dep’t of Labor*, 710 F.3d 443, 447, 451 (2d Cir. 2013); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013); *Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 389 (7th Cir. 2010); *Addis v. U.S. Dep’t of Labor*, 575 F.3d 688, 690-91 (7th Cir. 2009); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13-14 (ARB Jan. 31, 2006); *Leak v. Dominion Res. Servs., Inc.*, ARB Nos. 07-043, 07-051; ALJ No. 2006-SOX-012, slip op. at 10 (ARB May 29, 2009).

⁷⁸ *See, e.g., Manebv v. Holder*, 755 F.3d 417, 424-28 (6th Cir. 2014) (equating “demonstrate” with “prove” in a provision of asylum law).

To prove a fact by a preponderance of the evidence means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not.⁷⁹ It is of course possible for Congress to create presumptions, even irrebuttable presumptions, about facts, including facts about causation,⁸⁰ but nothing in the text indicates that Congress was doing any such thing here.

Clause (iii) thus places on the complainant what is often referred to as the “burden of persuasion.”⁸¹ In other words, the employee must *persuade* the factfinder—here, the ALJ—that the protected activity played some role in the adverse action. The factfinder must thus believe it is more likely than not that the protected activity was a factor in the adverse action.

Moreover, the text of clause (iii) contains no limits on the evidence to be considered. Indeed, the text contains no reference to evidence at all and certainly no reference to the evidence of the employer’s nonretaliatory reasons. Given the text’s complete lack of any reference to, let alone limits on, the introduction of evidence, any such limits would have to be found outside of the text.

In sum, the text of the specific statutory provision at issue—“the complainant demonstrates that [protected activity] was a contributing factor in the unfavorable personnel action”—is best interpreted to require a complainant to prove by a preponderance of the evidence that protected activity played some role in the adverse personnel action and to permit the factfinder to consider any admissible, relevant evidence in making that determination.

⁷⁹ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622, (1993) (“The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.”) (alterations in original and internal quotation marks omitted); *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-001, slip op. at 11 (ARB Apr. 25, 2014) (“[T]he preponderance of the evidence standard requires that the employee’s evidence persuade[] the ALJ that his version of events is more likely true than the employer’s version. Evidence meets the ‘preponderance of the evidence’ standard when it is more likely than not that a certain proposition is true” (alteration in original and internal quotation marks omitted)).

⁸⁰ *See, e.g.*, 30 U.S.C. § 921(c)(3) (under the Black Lung Benefits Act, providing that “there shall be an irrebuttable presumption that [a miner] is totally disabled due to pneumoconiosis” if one of three medical criteria are met); *see also* 20 C.F.R. § 718.304; 20 C.F.R. § 718.205(b)(3); *Pittsburg & Midway Coal Mining Co. v. U.S. Dep’t of Labor*, 508 F.3d 975, 981-82 (11th Cir. 2007).

⁸¹ *See Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 100 n.4 (2011) (“Here we use ‘burden of proof’ interchangeably with ‘burden of persuasion’ to identify the party who must persuade the jury in its favor to prevail.”).

ii. *Statutory Structure*

It is of course a cardinal rule of statutory construction that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”;⁸² and here, the statutory structure only strengthens our conclusion that clause (iii) means exactly what it says. The subparagraph in which Congress placed clause (iii) contains four clauses.⁸³ Clauses (iii) and (iv) establish the AIR-21 two-part test that ALJs must apply after a hearing, while clauses (i) and (ii) describe the burdens of proof at the OSHA investigation stage prior to a hearing.⁸⁴ Looking at the entire subparagraph—both its language and its structure—makes clear that clause (iii) does in fact require the complainant to prove by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action, just as its text clearly states.

The crux of the interpretation that *Fordham* adopted and that some of the amici supporting Palmer urge upon us is based on the two-step AIR-21 structure and the relationship between clauses (iii) and (iv). In particular, *Fordham* concluded that permitting an employer to introduce evidence of its nonretaliatory reasons at step one would render the second step of the test “meaningless.”⁸⁵ But, a careful look at the full AIR-21 burden-of-proof provision shows that the simple, straightforward interpretation of clause (iii)’s text does not render the second step of the test “meaningless” at all. Moreover, it also shows that the statutory context in which clause (iii) is embedded supports, rather than undermines, the view that a factfinder may consider evidence of the employer’s nonretaliatory reasons for the adverse action at step one. By precluding consideration of evidence of the employer’s nonretaliatory reasons at step one, *Fordham* and the amici supporting Palmer would effectively read the word “demonstrates” to mean “makes a prima facie showing,” thereby effectively turning step one of the test into a burden shift after the employee has met a burden of *production*, rather than a burden of *persuasion*. The statute simply does not permit such a reading.

To start, the linguistic distinction between clause (i) and clause (iii) strongly undermines any claim that clause (iii) requires a complainant merely to show a prima facie case or meet a

⁸² *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

⁸³ *See supra* note 11.

⁸⁴ *See supra* note 12.

⁸⁵ *Fordham*, ARB No. 12-061, slip op. at 22-23 (“It would thus seem self-evident from this statutory delineation that the respondent’s evidence in support of its affirmative defense as to why it took the action in question is not to be considered at the initial ‘contributing factor’ causation stage where proof is subject to the ‘preponderance of the evidence’ test. To afford an employer the opportunity of defeating a complainant’s proof of ‘contributing factor’ causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a preponderance of the evidence would render the statutory requirement of proof of the employer’s statutorily prescribed affirmative defense by ‘clear and convincing evidence’ meaningless.”).

burden of production. Clauses (i) and (ii) are structured in a very similar manner to clauses (iii) and (iv), with clause (i) corresponding to clause (iii) and clause (ii) corresponding to clause (iv). Clause (i) directs the Secretary to “dismiss a complaint” and not pursue an investigation “unless the complainant *makes a prima facie showing* that [protected activity] was a contributing factor in the unfavorable personnel action”⁸⁶ In other words, clause (iii) mimics clause (i) except that clause (iii) requires the complainant to “*demonstrate[]*” a causal connection, while clause (i) merely requires the complainant to “make[] a prima facie showing” of that causal connection. The fact that clause (iii) does not have the “make[] a prima facie showing” language was almost certainly intentional and, by negative implication, strongly supports our conclusion that “demonstrates” means “proves.”⁸⁷

⁸⁶ 49 U.S.C. § 42121(b)(2)(B)(i).

⁸⁷ See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (citation and internal alterations omitted)). One of the amici supporting Illinois Central, the Chamber of Commerce of the United States of America and American Trucking Associations, Inc., argues that reading “demonstrate” to mean “make a prima facie showing” would render clause (i) a “nullity.” Amicus Brief in support of the Respondent at 15. This is an overstatement, since clause (i) and clause (iii) involve different stages of the Department of Labor’s procedures: There is no inherent reason why the statute couldn’t be set up to ask the same question at both the investigation stage and the hearing stage of the Department of Labor’s procedures; all that would mean is that the complainant needs to do the same thing twice, once when asking the Assistant Secretary to conduct an investigation and then again, if the case goes to a hearing, a second time before the ALJ. Indeed, clause (ii) and clause (iv) require employers to try to do the same thing twice. 49 U.S.C. § 42121(b)(2)(B)(ii) (no investigation will be made “if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior”); 49 U.S.C. § 42121(b)(2)(B)(iv) (“[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior”). Still, even though such a reading does not render clause (i) a “nullity,” we can still conclude, with a strong negative implication, that clause (iii)’s use of “demonstrate[]” does not mean “make[] a prima facie showing.” See *Gross*, 557 U.S. at 175 (“[N]egative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the language raising the implication was inserted” (internal quotation marks and citation omitted)).

Fordham raises questions about the varying definitions for, and confusion about the meaning of, the phrase “prima facie,” *Fordham*, ARB No. 12-061, slip op. at 18-19, but any such confusion is irrelevant here. To interpret clause (iii), there is simply no need even to ask about the various possible meanings of “prima facie.” Clause (iii) does not use the term “prima facie.” Whatever “prima facie” means, clause (iii) does *not* mean that. The only reason the reference to “prima facie” in clause (i) is relevant is to tell us what “demonstrate” does *not* mean. ALJs should not use the phrase (or the concept of) “prima facie” when analyzing the complainant’s burden under step one of the AIR-21 test.

More than clause (i), though, the structure of the two-part test in clauses (iii) and (iv) makes clear that, under clause (iii), the complainant must in fact prove that the protected activity was a contributing factor in the adverse personnel action and that the factfinder must consider all relevant, admissible evidence in making that determination. Clauses (iii) and (iv) together create a two-step test, but each step of the test asks a different question. Clause (iii)'s question involves what happened: did the protected activity play a role, *any* role whatsoever, in the adverse action? If it did, clause (iv) asks a hypothetical question: if the employee had not engaged in protected activity, would the employer nonetheless still have taken the same adverse action? If the complainant has made merely a prima facie showing that the protected activity played a role, it would make far more sense for the statute to ask the employer to prove not that it *would have* otherwise taken the same adverse action, but rather that it *did* take the adverse action for some other reason. This in fact appears to be what *Fordham* thinks the question at step two is.⁸⁸

One of *Fordham*'s fundamental errors, then, was its failure to recognize that step one of the AIR-21 burden-of-proof provision (clause (iii)) and step two (clause (iv)) are asking different factual questions. *Fordham* effectively treats the question at step two as the same as the question at step one but from the employer's perspective, somewhat like the two sides of the same coin: under this way of thinking, step one is something like, does the employee have evidence of retaliation, and the ALJ then is supposed to evaluate that, all by itself, under the preponderance of the evidence standard of proof;⁸⁹ whereas step two is, does the employer have evidence of a nonretaliatory reason, and the ALJ is supposed to evaluate that (presumably, also, all by itself, although this is where things get fuzzy) under the tougher clear and convincing evidence standard of proof. According to *Fordham*, if the test were not structured this way, there would be no possible reason for step two to be subject to the higher clear and convincing standard of proof.

⁸⁸ *Fordham*, ARB No. 12-061, slip op. at 21 (incorrectly stating that “the respondent must prove, not by a preponderance of the evidence, but by clear and convincing evidence, that its evidence of a non-retaliatory basis or reason for its action *was* the sole basis or reason for its action . . .” (emphasis added)); *id.* (incorrectly stating that “to avoid liability, *the respondent’s evidence of legitimate, nonretaliatory reasons for its action is* subject to a higher burden of proof than the preponderance of the evidence standard” (emphasis added)); *id.* at 22 (incorrectly referring to “the respondent’s evidence in support of its affirmative defense *as to why it took the action in question*”); *cf. id.* at 35 (holding that “when a respondent offers evidence in support [of] its defense that legitimate, non-retaliatory reasons *were the actual basis* for the personnel action at issue, that evidence is not weighed under the preponderance of the evidence standard against the complainant’s evidence of ‘contributing factor’ causation” (emphasis added)).

⁸⁹ We use the term “standard of proof,” as the United States Supreme Court recently has, “to refer to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion.” *Microsoft Corp.*, 564 U.S. at 100 n.4. The “standard of proof” does not affect the underlying question to be asked. Rather, as the Court explained, the term “standard of proof” simply “specifies how difficult it will be for the party bearing the burden of persuasion to convince the [factfinder] of the facts in its favor.” *Id.*

Fordham's mistake, therefore, is not just its misreading of clause (iii), but its misstatement of what clause (iv) is asking as well. *Fordham*'s interpretation stems from a failure to read the text of both clause (iii) and clause (iv) carefully enough (and, as we explain below, to look at the full history and provenance of the two-step test⁹⁰). As the text of clause (iv) makes clear, step two does not ask whether the employer had nonretaliatory reasons for the adverse action; it asks instead whether those nonretaliatory reasons, *by themselves*, would have been enough that the employer would have taken the same adverse action in the absence of the protected activity. And, as we explain in more detail below, Congress had good reasons to require the factfinder to answer that question—namely, to ensure that a whistleblower is treated the same as, not better than, an employee who is not a whistleblower.⁹¹

Some of this confusion may stem from the terminology used to describe the two steps of the test. At times, we, the courts, and ALJs have referred to these two steps in the analysis as the “contributing factor” step and the “clear and convincing” step.⁹² But that formulation mixes apples and oranges. The phrase “contributing factor” describes the substantive factual issue to be decided while the phrase “clear and convincing” only describes the standard of proof, not the factual issue to be decided. The two are thus not analogous monikers.⁹³ It is crucial to understand that the second step involves a factual question that is distinct from the first. We think it may thus help cement this crucial aspect of the two-step test to refer to step two as the “same-action defense,” not as the “clear and convincing” defense.⁹⁴ The phrase “same-action defense” makes clear that step two asks a different factual question from step one—namely, would the employer have taken the *same* adverse *action*?—and is not simply the same question with the heavier “clear and convincing” burden imposed upon the employer.

One other aspect of the text of clauses (iii) and (iv) when viewed together strengthens this argument even further: the presumption of consistent usage as to the exact same verb, “demonstrates,” in the two clauses.⁹⁵ Clause (iv) requires an employer to “demonstrate” that it

⁹⁰ See *infra* Part B.

⁹¹ See *infra* section B.i.

⁹² See, e.g., *Araujo*, 708 F.3d at 160.

⁹³ Cf. *Fordham*, ARB No. 12-061, slip op. at 45 n.110 (Corchado, J., concurring in part and dissenting in part) (noting that the “‘contributory factor’ concept and the ‘preponderance of the evidence’ are entirely different concepts, apples and oranges”).

⁹⁴ See D. & O. at 43.

⁹⁵ See *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (“[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning” (internal quotation marks and citations omitted).); *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006) (“Generally, identical words used in different parts of the same statute are presumed to have the same meaning” (citation and internal alterations and quotation marks omitted).).

otherwise would have taken the same adverse action, just as clause (iii) requires the employee to “demonstrate” that the protected activity was a contributing factor in the adverse action. If “demonstrates” in clause (iii) just means “makes a prima facie showing,” then why wouldn’t it mean the same thing in clause (iv)? Yet, no one disputes that “demonstrates” in clause (iv) means “proves.” It simply defies any sense of reasonable statutory drafting to say, as *Fordham* effectively held, that “demonstrates” in clause (iii) means “makes a prima facie showing” when “demonstrates” in clause (iv) means “proves” and the phrase “makes a prima facie showing” is found elsewhere in the same subparagraph of the statute, in clause (i).

Finally, we address one other aspect of the text and structure of the AIR-21 two-step test because it is in dispute; however, as we explain in more detail below, we need not resolve the dispute because it makes no difference to our conclusion and in no way affects the evidence an ALJ may consider when analyzing the AIR-21 two-step test. The dispute concerns the question whether a complainant who prevails at step one has made out a “violation” of the statute. The Assistant Secretary in particular notes that clause (iii) is written as a “violation clause,” while clause (iv) is written as a “relief clause”: Clause (iii) provides that “[t]he Secretary may determine that *a violation* . . . has occurred only if the complainant demonstrates that . . . ,” whereas clause (iv) states that “[*r*]elief may not be ordered . . . if the respondent demonstrates . . . that”⁹⁶ The Assistant Secretary argues that this means that, if the employee prevails at step one, the employer has *violated* the statute and that step two is merely a determination of the relief to which the employee is entitled.⁹⁷

If this were correct, it would strengthen our conclusion that an ALJ must consider the evidence of the employer’s nonretaliatory reasons at step one: if the ALJ were to analyze step one without considering such evidence, it would obviously be a fundamental infringement of the employer’s due process rights; how, after all, could an adjudicatory body find a statutory violation without considering the putative violator’s relevant, admissible evidence?⁹⁸ The Assistant Secretary notes further that subsection (a) of the Federal Rail Safety Act whistleblower provision, which contains the underlying substantive prohibition at issue here, states that a violation occurs whenever the railroad’s adverse action “is due, in whole *or in part*, to” the employee’s protected activity.⁹⁹ Therefore, at least with respect to that FRSA provision, an

⁹⁶ 49 U.S.C. § 42121(b)(2)(B)(iii), (iv) (emphases added).

⁹⁷ See *Fordham*, ARB No. 12-061, slip op. at 44-45, 47 (Corchado, J., concurring in part and dissenting in part); see also *id.* at 38 (Corchado, J., concurring in part and dissenting in part) (“Proving that protected activity actually contributed to an unfavorable employment action establishes that the employer *violated* the SOX whistleblower law” (emphasis in original)).

⁹⁸ *Id.* at 48 (Corchado, J., concurring in part and dissenting in part) (noting that “[f]undamental fairness requires that the factfinder consider both the employee’s version and the employer’s version of events before deciding that an employer violated [the law]”).

⁹⁹ 49 U.S.C. § 20109(a) (2014) (emphasis added).

employee need only show that the adverse action was due “in part” to the protected activity in order to find a statutory violation; that, the Assistant Secretary argues, is equivalent to showing that the protected activity was “a contributing factor” in the adverse action.¹⁰⁰

The big problem with this argument, though, is that the full text of clause (iii) provides that “[t]he Secretary *may* determine that a violation . . . has occurred *only if* the complainant demonstrates that [the protected activity] was a contributing factor in the unfavorable personnel action”¹⁰¹ In other words, the determination of a “violation” is embedded into the phrase “may . . . only if.” As a linguistic matter, “may . . . only if” denotes a necessary but not necessarily sufficient condition for the Secretary to determine that a violation has occurred, and this is how it is usually used in the law.¹⁰² The Assistant Secretary’s argument is thus, in effect, that the phrase “may . . . only if . . .” means “shall if . . . ,” so that the provision would read, “The Secretary *shall* determine that a violation . . . has occurred *if* the complainant demonstrates that [the protected activity] was a contributing factor in the unfavorable personnel action” But Congress well understands the difference between “may” and “shall” and knows how to say “shall” when it wants to,¹⁰³ and that is not what it said here.

A second problem with this argument, although not quite as insurmountable as the first, concerns its reliance on the “in whole or in part” language of the substantive subsection of the FRSA whistleblower provision: except for subsection (a) of the FRSA whistleblower provision and subsection (a) of the National Transportation Safety and Security Act whistleblower provision,¹⁰⁴ none of the other statutes with a burden-of-proof provision equivalent to AIR-21’s includes the “in whole or in part” language. Indeed, even AIR-21 doesn’t have such language,

¹⁰⁰ Assistant Secretary’s Brief (Ass’t Sec’y Br.) at 8, 12-13; Oral Argument Transcript (Oral Arg. Tr.) at 22-26, 28.

¹⁰¹ 49 U.S.C. § 42121(b)(2)(B)(i) (emphasis added).

¹⁰² *See, e.g., California v. Hodari D.*, 499 U.S. 621, 628 (1991).

¹⁰³ *Jama v. Immigration & Customs Enf’t*, 543 U.S. 335, 346 (2005) (noting that “the word ‘may’ customarily connotes discretion . . . , particularly . . . where, as here, ‘may’ is used in contraposition to the word ‘shall’”); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981). This is precisely the formulation used in clause (i) of the AIR-21 burden-of-proof provision, see 49 U.S.C. § 42121(b)(2)(B)(i) (“The Secretary of Labor *shall* dismiss a complaint filed under this subsection and *shall not* conduct an investigation otherwise required . . . unless the complainant makes a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action”) (emphasis added), suggesting that the use of the phrase “may . . . only if” in clause (iii) was intentional.

¹⁰⁴ Federal Rail Safety Act, 49 U.S.C. § 20109(a); National Transit Systems Security Act, 6 U.S.C. § 1142(a).

nor do either subsections (b) or (c) of the FRSA.¹⁰⁵ The language denoting causation in the substantive provisions of the other statutes is simply “because,”¹⁰⁶ “because of,”¹⁰⁷ “for,”¹⁰⁸ or “by reason of the fact.”¹⁰⁹ So, under the Assistant Secretary’s interpretation that “may . . . only if” means “shall . . . if,” the words “because,” “because of,” “for,” and “by reason of the fact” in all of the other statutes also mean the same as “due, in whole or in part, to” in the first subsections of the FRSA and NTSSA. Or, put another way, the phrase “in whole or in part” in the first subsections of the FRSA and NTSSA would be superfluous, since the substantive provisions of those statutes could just as well have said “because” rather than “due, in whole or in part, to.”

A third problem with this interpretation is that, as a practical matter, this interpretation of “violation” means that a violation, by itself, would have no legal consequences in the case. As the AIR-21 two-step burden-of-proof structure is set forth, the distinction between “violation” and “relief” is, from the perspective of the adjudicatory process, purely academic. Clause (iv) is an absolute bar on *all* relief, and so whether an employee who prevails at step one has shown a “violation” makes no difference to the outcome of the case. An employee who prevails at step one but not at step two might theoretically be able to call the employer a “violatee,” which some might view as a symbolic victory of sorts, but even then, the *ALJ* couldn’t call the employer a “violatee,” because clause (iv)’s bar on all relief necessarily includes declaratory relief as well.

This contrasts directly with the most closely analogous framework found elsewhere in employment law, the “mixed-motive” case under Title VII. For mixed-motive cases, Title VII has a very similar statutory structure to the AIR-21 two-step test, a structure that also contains a similar distinction between the violation clause and the remedies clause. Under section 703(m) of the Civil Rights Act of 1964 (as amended in 1991), an employee can establish an “unlawful

¹⁰⁵ AIR-21, 49 U.S.C. § 42121(a) (no discrimination against employee “because” the employee engages in protected activity); Federal Rail Safety Act, 49 U.S.C. § 20109(b)(1) (no discrimination against employee “for” engaging in protected activity); Federal Rail Safety Act, 49 U.S.C. § 20109(c)(2) (no disciplining an employee “for requesting medical or first aid treatment or for following orders or a treatment plan of a treating physician . . .”).

¹⁰⁶ Surface Transportation Assistance Act, 49 U.S.C. 31105(a)(1); Energy Reorganization Act, 42 U.S.C. 5851(a)(1); Consumer Product Safety Act, 15 U.S.C. § 2087(a); Affordable Care Act, 29 U.S.C. § 218c(a); Food Safety Modernization Act, 21 U.S.C. § 399d(a); Motor Vehicle and Highway Safety Improvement Act of 2012, Title I of Division C of the Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171(a); Seaman’s Protection Act, 46 U.S.C. § 2114(a)(1); Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a)(1); Patient Protection and Affordable Care Act, 29 U.S.C.A. § 218c(a).

¹⁰⁷ Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a).

¹⁰⁸ Federal Rail Safety Act, 49 U.S.C. §§ 20109(b)(1), (c)(2); National Transit Systems Security Act, 6 U.S.C. § 1142(b)(1).

¹⁰⁹ Consumer Financial Protection Act (Dodd-Frank), 12 U.S.C. § 5567(a).

employment practice” by proving that a prohibited characteristic (e.g., race or sex) was a “motivating” factor in the adverse action, “even though other factors also motivated the practice.”¹¹⁰ That alone establishes the “violation.”¹¹¹ However, under section 706(g)(2)(B), the employer can preclude a prevailing employee from recovering certain remedies if the employer can prove that it “would have taken the same action in the absence of the impermissible motivating factor.”¹¹² Thus, the remedies provision *limits* relief, but does not bar it altogether. In such circumstances, it makes sense to distinguish between the “violation” clause and the “relief” clause, since the “violation” by itself has at least some consequences, even if the prevailing employee may not be entitled to a number of other remedies. If Congress had wanted to create a framework that truly distinguished the “violation” clause from the “relief” clause in AIR-21’s burden-of-proof provision, it thus could easily have followed the model of Title VII’s “mixed motives” structure. That it instead chose a structure whereby the “violation” clause appears to be meaningless without the “relief” clause weakens the claim that a violation is established when an employee prevails at step one, particularly for those statutes that do not have the “due, in whole or in part, to” language found in subsection (a) of the FRSA.¹¹³

¹¹⁰ 42 U.S.C. § 2000e-2(m).

¹¹¹ 42 U.S.C. § 2000e-5(g)(2)(B).

¹¹² 42 U.S.C. § 2000e-5(g)(2)(B). If the employer shows that it would have otherwise taken the same adverse action, the court may still grant declaratory relief, certain types of injunctive relief, and attorneys’ fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i). But the court is prohibited from awarding damages or ordering “any admission, reinstatement, hiring, promotion or payment [of back pay].” 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

¹¹³ Some of the amici raised the question of Title VII’s *McDonnell-Douglas* burden-shifting process in briefs and at oral argument. Br. of Amici Curiae Senators Charles Grassley and Ron Wyden and Representative Jackie Speier at 18 (stating that “[u]ntil the ARB dissent’s objections in *Fordham*, the Board had long recognized that it is an error to replace the AIR21/WPA burdens of proof with those in *McDonnell Douglas*,” incorrectly implying that the *Fordham* dissent would have adopted the *McDonnell Douglas* burden-shifting process); Brief of Law Professors Erwin Chemerinsky and Robert F. Williams Together with the Brotherhood of Maintenance Way [Employees] Div. of Int’l Brotherhood of Teamsters at 3 (referring to “the approach by the ARB prior to enactment of AIR-21,” as “the ‘method’ federal courts use in Title VII cases pursuant to *McDonnell Douglas* . . . and its progeny”); *id.* at 11 (claiming that “those urging the propriety of applying Title VII law and procedure, driven by *McDonnell Douglas* and its progeny, to AIR-21 cases, are essentially demanding that the ARB ignore Congress’ decision to reject *McDonnell Douglas* in cases involving the protection from retaliation against transportation and nuclear workers who are employed in highly safety sensitive positions”); Oral Arg. Tr. at 45-47; *see also Fordham*, ARB No. 12-061, slip op. at 26 & n.52 (discussing Title VII and citing cases that apply Title VII burden-shifting in the context of the ERA). From the discussion in the text, we hope it is clear that the AIR-21 two-step test is **not** *McDonnell-Douglas*, but out of an abundance of caution we take this footnote to state unequivocally that *McDonnell-Douglas* and any cases applying a *McDonnell-Douglas* structured burden-shifting approach, *see, e.g., Peck v. Safe Air Int’l Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9-10 (ARB Jan. 30, 2004); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-6 n.12 (ARB Sept. 30, 2003); *cf.*

A fourth problem is that the Assistant Secretary’s view of the word “violation” in the burden-of-proof provision is in tension with the presumption of consistent usage:¹¹⁴ it appears to conflict with the use of the word “violation” in the very next paragraph of AIR-21’s whistleblower protection provision. That paragraph, entitled “Final Order,” includes a subparagraph entitled “Remedy,” which specifically provides that, if “the Secretary of Labor determines that a *violation* of [AIR-21’s whistleblower provision] has occurred, the Secretary of Labor *shall* order the person who committed such *violation* to—(i) take affirmative action to abate the violation; (ii) reinstate the complainant . . . ; and (iii) provide compensatory damages.”¹¹⁵ Thus, under this use of the word, a “violation” *mandates* the Secretary to order remedies. So, before the Secretary can find a “violation” within the meaning of this paragraph, there necessarily has to be a determination that the employer failed to satisfy its same-action defense. If this is correct, then it would *not* suffice to constitute a “violation” if the employee merely demonstrates that the protected activity was a contributing factor in the adverse action; a “violation” would also require the employer not to prevail on its same-action defense.

The FRSA appears to incorporate this portion of AIR-21 by cross-reference,¹¹⁶ and so the Assistant Secretary has promulgated regulations that use the word “violation” (and “violated”) in

Ameristar Airways, Inc. v. Admin. Review Bd., U.S. Dep’t of Labor, 650 F.3d 562, 566 (5th Cir. 2011) (referring to *McDonnell-Douglas*, but not really applying it), are inapplicable to the burden-of-proof provisions of the ERA or AIR-21 or of any of the other DOL-administered whistleblower statutes incorporating the AIR-21 burden-of-proof provision. *See Beatty v. Inman Trucking Mgmt. Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, -021; slip op. at 11 (ARB May 13, 2014) (“The ALJ’s application of the *McDonnell Douglas* burdens of proof and analytical framework to [a claim involving the AIR-21 burden-of-proof provision] has no basis in law or regulation. It is simply incorrect.”); *White v. Action Expediting Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011, slip. op. at 8 (ARB June 6, 2014) (same). Without providing any citation, *Fordham* states that the “prototypes for the current SOX burdens of proof [which incorporate, and are thus the same as, AIR-21’s] were initially drafted against the backdrop of Supreme Court Title VII jurisprudence, and that jurisprudence necessarily informs our interpretation of the current statutory language.” *Fordham*, ARB No. 12-061, slip op. at 27 n.57. That statement is unsupported by the legislative record of AIR-21 and the 1992 ERA amendments, which contains nary a reference to Title VII. Of course, Congress may have been aware of Title VII jurisprudence, *see Fordham*, ARB No. 12-061, slip op. at 49 n.116 (Corchado, J., concurring in part and dissenting in part), but the legislative history shows that the relevant burden-of-proof provisions were modeled on the two-step *Mt. Healthy* test and not on Title VII. *See generally infra* Section B.i.

¹¹⁴ *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006) (“Generally, identical words used in different parts of the same statute are presumed to have the same meaning” (citation and internal alterations and quotation marks omitted).).

¹¹⁵ *See* 49 U.S.C. § 42121(b)(3)(B) (emphases added).

¹¹⁶ *See* 49 U.S.C. § 20109(d)(2)(A) (“Any action under [the substantive prohibitions in the FRSA whistleblower provision] shall be governed under the rules and procedures set forth in section 42121(b) . . .”).

the same way for FRSA cases.¹¹⁷ Thus, the Assistant Secretary’s use of the term “violation” in the regulations appears to conflict with his use of the term before us. One of the regulatory sections covering FRSA and NTSSA cases states, “If the ALJ concludes that the respondent has *violated* the law, the order *will* direct the respondent to take appropriate affirmative action to make the employee whole, including, where appropriate[,] a requirement that the respondent abate the *violation* [and provide the employee with a host of other remedies such as reinstatement, back pay, compensatory damages, litigation costs and fees].”¹¹⁸ Like the statutory language in AIR-21, this provision appears to mandate an order of remedies “[i]f . . . the respondent has *violated* the law.” Again, before the Secretary can find a “violation” within the meaning of this regulatory provision, there necessarily has to be a determination that the employer failed to satisfy its same-action defense. Yet, under the Assistant Secretary’s argument before us—that a violation is established once the employee prevails at step one—a “violation” is insufficient to entitle the employee to any remedies. Of course, the word “violation” might mean something different in the statute than in this subsection of the regulations. Moreover, if there truly were a conflict between the statute and the regulations, that conflict could easily be resolved by simply concluding that the regulation is incompatible with the statute and thus invalid. But at the very least, the regulations show that there is some discrepancy in the Assistant Secretary’s own view of what constitutes a “violation” of the statute.

Despite these problems with the argument, the counter argument—that “may . . . only if” really does provide only a necessary but not sufficient condition for a violation—isn’t airtight either. In fact, it has one fatal flaw: it appears to give the Secretary discretion to decide if a violation has occurred, even if a complainant wins at *both* steps of the AIR-21 burden-of-proof test, and that certainly can’t be right. Palmer and the amici supporting him would presumably say that the Secretary has no discretion to find that a violation did not occur if an employee wins at both steps. But, read strictly, that’s not what the statute says: linguistically, step two only *prohibits* the ordering of relief if the employer meets its burden; it does not *require* the ordering of relief if the employer does *not* meet its burden—that is, saying, “Relief may not be ordered if . . .,” is not the same as, “Relief shall be ordered unless” The former, which is the language of the statute, *prohibits* relief if the condition is met (here, if the employer demonstrates by clear and convincing evidence that it otherwise would have taken the same adverse action), whereas the latter would *require* relief if the condition were *not* met. Thus, under the literal reading of “may . . . only if,” the Secretary would have the discretion to *not* “determine that a violation has occurred,” even if the employee prevails on both steps. This literal reading of the statute thus cannot possibly be right: we find it implausible, to say the least, to think that Congress gave the Secretary the discretion to deny that a violation occurred even if the employee prevails at both steps of the test. It certainly makes sense to read the two provisions together, but

¹¹⁷ See 75 Fed. Reg. 53,521, 53,532 (Aug. 31, 2010).

¹¹⁸ 29 C.F.R. § 1982.109(d)(1) (emphases added); see also 29 C.F.R. § 1979.109(b) (AIR-21); 29 C.F.R. § 1980.109(d)(1) (SOX); 29 C.F.R. § 1978.109(d)(1) (STAA); 29 C.F.R. § 1983.109(d)(1) (CPSA); 29 C.F.R. § 1984.109(d)(1) (ACA); 29 C.F.R. § 1985.109(d)(1) (Dodd-Frank); 29 C.F.R. § 1986.109(d)(1) (Seaman’s Protection Act); 29 C.F.R. § 1987.109(d)(1) (Food Safety Modernization Act).

the most plausible reading is that clause (iii) is meant to be the equivalent of “*Subject to clause (iv), the Secretary shall determine that a violation has occurred if . . .*”¹¹⁹ or something to that effect.

Fortunately, we need not resolve this conundrum to decide the questions posed by this case. Even if a complainant who prevails at step one has not conclusively shown a “violation” of the statute, this does not change the proper interpretation of what the complainant needs to show at step one nor does it change the evidence the ALJ can consider. It doesn’t matter whether “may . . . only if” in clause (iii) means “shall . . . if” or instead simply creates a necessary but not sufficient condition for the finding of a violation: either way, the question the ALJ must answer at step one is the same—did the protected activity play any role in the adverse action?—and the evidence the ALJ can consider would be the same as well. The argument that “may” in clause (iii) is permissive does not actually support *Fordham’s* reading of the statute; it simply counters one of the arguments against *Fordham’s* reading of the statute—that an employee who prevails at step one has made out a “violation” of the statute. But while that argument strengthens the claim against *Fordham*, it is ultimately unnecessary to understanding the AIR-21 two-step test or to understanding why *Fordham’s* interpretation is wrong.

At step one, an ALJ may consider any and all relevant, admissible evidence to determine whether the protected activity did in fact play some role—was in fact a “contributing factor”—in the adverse action; as long as the employer’s theory of the facts is that the protected activity played *no* role whatsoever, the ALJ must consider the employer’s evidence of its nonretaliatory reasons. Whether the ALJ is *permitted* to find a “violation” or is *required* to find a “violation” at that point does not affect, in any way, the ALJ’s determination of the complainant’s burden at step one, since an ALJ who finds for the employee at step one must adjudicate the question in step two before ordering any relief, irrespective of whether we denominate it a “violation” after step one or not.

B. A complete review of the background to the legislation demonstrates that the AIR-21 two-step burden-of-proof test is a modified version of the test first announced by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, and that the statutory changes to the Mt. Healthy test left the basic framework of the test intact and made no changes to the evidence that could be considered at either step of the test.

i. The AIR-21 two-step framework derives from the burden-of-proof provision in the 1992 amendments to the ERA’s whistleblower provision, which in turn derives from the Mt. Healthy two-step test

Congress adopted AIR-21 in 2000, and the language of AIR-21’s burden-of-proof provision derives from the burden-of-proof provision found in the 1992 amendments to the whistleblower protection section of the Energy Reorganization Act (ERA).¹²⁰ The 1992 ERA

¹¹⁹ Cf. 5 U.S.C. § 1221(e)(1) (2015) (“*Subject to the provisions of paragraph (2), . . . the Board shall order such corrective action . . . if the employee . . . has demonstrated that . . . protected activity . . . was a contributing factor in the [adverse] personnel action (emphasis added).*”).

burden-of-proof provision contains four subparagraphs with both the same structure and, with adjustments for statutory cross-references, almost exactly the same statutory language as the four clauses in the AIR-21 burden-of-proof provision.¹²¹

Understanding the background to and the jurisprudence under the 1992 ERA amendments thus helps illuminate the meaning of the AIR-21 burden-of-proof provision. Prior to the 1992 amendments, the ERA's whistleblower provision incorporated what was (and is) known as the two-part *Mt. Healthy* burden-of-proof test, named after the United States Supreme Court's 1977 decision in *Mt. Healthy City School District Board of Education v. Doyle*.¹²² Congress passed the original ERA whistleblower provision in 1978.¹²³ and although the provision contained no references to burdens of proof, the Secretary of Labor and federal courts of appeals consciously adopted and consistently applied the *Mt. Healthy* test when adjudicating ERA whistleblower cases.¹²⁴

The *Mt. Healthy* framework consists of two steps very similar in structure to the AIR-21 burden-of-proof provision: (1) the employee must prove, by a preponderance of the evidence, that the protected activity was a "motivating" or "substantial" factor in the adverse personnel action; and (2) if the employee prevails at the first step, the employer then has an opportunity to prove, also by a preponderance of the evidence, that it would have otherwise taken the adverse personnel action even if the employee had not engaged in the protected activity.¹²⁵

The Court in *Mt. Healthy* created the second step in the test, and it did so specifically for retaliation claims in which an employer argues that it had nonretaliatory reasons for its adverse personnel action. In *Mt. Healthy*, the plaintiff, Doyle, claimed that his employer had effectively

¹²⁰ See *Peck*, ARB No. 02-028, slip op. at 9.

¹²¹ The full text of AIR-21's burden-of-proof provision is found above, in note 11, and the full text of the ERA's is found in note 14.

¹²² 429 U.S. 274 (1977).

¹²³ Congress passed the Energy Reorganization Act in 1974, see Pub. L. No. 93-438, 88 Stat. 1233 (Oct. 11, 1974), but did not include a whistleblower protection provision until 1978, see Pub. L. No. 95-601, sec. 10, 92 Stat. 2947, 2951 (Nov. 6, 1978).

¹²⁴ See *Dartey v. Zack Co. of Chicago*, No. 1982-ERA-002, slip op. at 6 (Sec'y Apr. 25, 1983); see also *Lockert v. Pullman Power Prods. Corp.*, No. 1984-ERA-015, slip op. at 9 (ALJ Oct. 4, 1985), *aff'd Lockert v. Pullman Power Prods. Corp.*, No. 1984-ERA-015 (Sec'y Oct. 22, 1987); *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61, 62-63 (2d Cir. 1982) (adopting the *Mt. Healthy* framework for ERA mixed-motive whistleblower cases); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163-64 (9th Cir. 1984) (affirming the Secretary of Labor's use of the *Mt. Healthy* framework for ERA mixed-motive whistleblower cases).

¹²⁵ *Mt. Healthy*, 429 U.S. at 287.

fired him¹²⁶ for exercising his First Amendment rights (in essence, whistleblowing to the press), and his employer argued that, though that may have been one of the reasons, there was another, nonretaliatory, reason for its action. After a bench trial, the district court judge held for Doyle because he found as a fact that the retaliation was a “substantial” factor in Doyle’s dismissal. The Supreme Court reversed and remanded. In a unanimous decision, the Court held that it was insufficient for an employee to show that retaliation was a substantial factor in the dismissal, and it explained why: any rule that “focuses solely on whether protected conduct played a part, ‘substantial’ or otherwise, in [an adverse personnel action], could place an employee *in a better position* as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.”¹²⁷ The Court went on to say that “[t]he difficulty with [a rule that asks simply whether protected conduct played a role] is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision . . . , and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred.”¹²⁸ Therefore, the Court concluded, to prevent employees who engage in protected conduct from being better off than they otherwise would have been had they not engaged in protected conduct, the factfinder (there, the judge) should have gone on to determine whether the employer “would have reached the same decision as to [Doyle’s] reemployment even in the absence of the protected conduct.” Thus was born the two-part *Mt. Healthy* test.

As the text of the 1992 ERA amendments makes clear, Congress took the *Mt. Healthy* framework, which the Department of Labor and courts had been using in ERA cases for years,¹²⁹ and made things easier for employees on both steps of the test; what Congress did not change, however, was the framework of the test or the nature of the question to be asked at each step. At step one, Congress reduced the level of causation—how great of a role the protected activity had to play¹³⁰—from a “substantial” or “motivating” factor to a “contributing” factor, but did not change anything else, including the fact that the employee must still *prove* that the protected activity was in fact one of the causes of the adverse personnel action. At step two, Congress changed the standard of proof, making the employer’s standard of proof higher—“clear and convincing” rather than “by a preponderance”—but did not change, in any way, the factual question to be asked: the employer still had to prove that, in the absence of the protected activity, it *would have taken* the same adverse action.

¹²⁶ Strictly speaking, his employer had refused to rehire him, but the Court treated this as a legally cognizable adverse personnel action. *Id.* at 283-84.

¹²⁷ *Id.* at 285 (emphasis added).

¹²⁸ *Id.* at 285.

¹²⁹ *See supra* note 124.

¹³⁰ *See Fordham*, ARB No. 12-061, slip op. at 45 n.110 (Corchado, J., concurring in part and dissenting in part) (“The ‘contributory factor’ concept . . . describes how thin the “causation link” can be between protected activity and the unfavorable employment action . . .”).

Though the text is clear, the legislative history does contain some conflicting signals; it thus suggests that, like much legislation, the 1992 ERA whistleblower burden-of-proof provision most likely represents a compromise.¹³¹ Where the statute's text in light of its provenance is clear, as it is here,¹³² we think it best not to “pick[] out [our] friends” from among the various pieces of legislative history;¹³³ we describe that legislative history primarily to show that, even if there were some ambiguity in the statute's text, its legislative history is inconclusive.

On the one hand, the title of the relevant statutory subsection, which is “Avoidance of Frivolous Complaints,”¹³⁴ provides some evidence that, despite making the test easier, Congress may have remained concerned with ensuring that whistleblowing employees not be treated any better than employees who were not whistleblowers. Indeed, the ranking member of the House Committee on Energy and Commerce clearly expressed just this view of the burden-of-proof provision, stating on the floor of the House, “We have sought to strike a balance that ensures that employees are provided adequate relief in any cases where they *would not have* suffered adverse employment action *but for* their protected activity, while at the same time sending a clear message that any attempt to burden the system with frivolous complaints about employment actions that have their origins in legitimate consideration will meet with a swift dismissal and denial.”¹³⁵ This statement clearly embodies the principle embedded in step two of the *Mt. Healthy* test, which prevents a whistleblower from prevailing if the employer can show that it otherwise would have taken the same adverse action.

On the other hand, there is one piece of evidence in the 1992 ERA legislative materials that strongly cuts the other way. On the floor of the House, the Chairman of the House Committee on Interior and Insular Affairs made the following statement when describing the procedures at the hearing stage before an ALJ: “Once the complainant *makes a prima facie showing* that protected activity contributed to the unfavorable personnel action . . . , a violation is

¹³¹ See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 712 (1992); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

¹³² *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent” (internal quotation marks and citation omitted).).

¹³³ Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting former D.C. Circuit judge, Judge Harold Leventhal).

¹³⁴ Pub. L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123 (Oct. 24, 1992).

¹³⁵ See 138 Cong. Rec. H11412 (daily ed. Oct. 5, 1992) (statement of Rep. Lent) (emphases added).

established unless the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.”¹³⁶ This is indeed an explicit statement that, to prevail at step one, the employee need only “make[] a prima facie showing.”¹³⁷ If that were correct, then it might be reasonable to consider only the employee’s evidence: under such a reading, the employee would not need to *prove* that protected activity was a contributing factor in the adverse action, simply make a prima facie showing of that causal connection.

The problem with this statement, though, is that it is flatly contradicted by the text, which says “demonstrates” and not “makes a prima facie showing”;¹³⁸ and of course, “the text of the relevant statute provides the best evidence of congressional intent.”¹³⁹ As Secretary Reich explained more than two decades ago when rejecting this exact same argument about the meaning of this exact same provision, this statement is “at odds with the language of the statute.”¹⁴⁰ The relevant statutory language says “demonstrates”; it does not say “makes a prima facie showing.” In such circumstances, the text must prevail.¹⁴¹

In sum, therefore, the 1992 ERA burden-of-proof provision is the *Mt. Healthy* framework with two changes, a reduction in how much of a role in the adverse action the protected activity needs to have played at step one and a change in the standard of proof for the employer’s same-action defense at step two. The 2000 AIR-21 burden-of-proof provision contains the identical structure and almost the exact same relevant language as the 1992 ERA.¹⁴² It, too, is thus the *Mt. Healthy* test with a reduction in the amount of causation an employee needs to show at step one and an increase in the standard of proof for an employer’s same-action defense at step two.

¹³⁶ 138 Cong. Rec. H11409 (daily ed. Oct. 5, 1992) (Rep. Miller); *see also* 138 Cong. Rec. H11444-45 (daily ed. Oct. 5, 1992) (precisely the same quotation, verbatim, from Representative Ford).

¹³⁷ *Fordham*, ARB No. 12-061, slip op. at 29; Brief of Amicus Curiae Academy of Rail Labor Attorneys at 12-13. *But see* Amicus Curiae Brief of the Assoc. of Am. Railroads at 9-10.

¹³⁸ *See supra* text accompanying note 86 to 88.

¹³⁹ *Greenlaw v. United States*, 554 U.S. 237, 258 (2008); *see also CTS Corp. v. Waldburger*, ___ U.S. ___, ___, 134 S. Ct. 2175, 2185 (2014) (“Congressional intent is discerned primarily from the statutory text.”).

¹⁴⁰ *Dysert v. Fla. Power Corp.*, No. 1993-ERA-021, slip op. at 4 (Sec’y Aug. 7, 1995), *aff’d sub nom.*, *Dysert v. U.S. Sec’y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997).

¹⁴¹ *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (“Where [a statute] contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”).

¹⁴² *See supra* notes 11 and 14.

Nothing in AIR-21 permits a limitation on relevant, admissible evidence at either step of the analysis.

This conclusion is strengthened by the fact that the 1992 ERA had been interpreted in just this way in the years before 2000, when Congress passed AIR-21. In 1995, in *Dysert v. Florida Power*, the Secretary of Labor (acting prior to establishing this Board) interpreted step one of the 1992 ERA burden-of-proof provision to require the employee to *prove*, by a preponderance of the evidence, that the employee’s protected activity was in fact a “contributing factor” in the adverse personnel action.¹⁴³ The Secretary rejected the argument that the employee need only put forth a prima facie case to meet his burden under step one.¹⁴⁴ The United States Court of Appeals for the Eleventh Circuit affirmed the Secretary’s decision in 1997.¹⁴⁵ This Board, established in 1996, the year after *Dysert*, consistently applied step one of the 1992 ERA burden-of-proof provision in just this way,¹⁴⁶ and this was thus how the 1992 ERA burden-of-proof provision was understood when Congress passed AIR-21 in 2000.¹⁴⁷

In sum, the legislative background to AIR-21’s burden-of-proof provision fully supports the most natural interpretation of the text, that the provision establishes a two-step framework for factfinders: first, the factfinder must determine whether the employee has *proven*, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action (the “contributing factor” step); and, if the employee prevails at step one, the factfinder

¹⁴³ *Dysert*, No. 1993-ERA-021, slip op. at 3-4.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Dysert*, 105 F.3d at 610. The court affirmed the Secretary’s interpretation under a deferential standard of review, concluding only that the Secretary’s interpretation was “reasonable,” but that was because that was all it needed to do under *Chevron*. *Id.* at 609-10 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Importantly, not only did it affirm the Secretary’s interpretation, but at no point did it say that the employee’s interpretation was reasonable.

¹⁴⁶ *Miller v. Tenn. Valley Auth.*, ARB No. 98-006, ALJ No. 1997-ERA-002, slip op. at 5-6 (ARB Sept. 29, 1998); *Jarvis v. Battelle Pac. Nw. Lab.*, ARB No. 97-112, ALJ No. 1997-ERA-015, slip op. at 7-11 (ARB Aug. 27, 1998); *Hasan v. Commonwealth Edison*, ARB No. 00-043, ALJ No. 1999-ERA-017, slip op. at 3-4 (ARB Dec. 28, 2000).

¹⁴⁷ Although the Secretary’s decision in *Dysert* does not explicitly state that the ALJ was correct to consider the evidence of the employer’s nonretaliatory reason at step one, *see Fordham*, ARB No. 12-061, slip op. at 28 (concluding that “*Dysert* did not . . . address this question”), the Secretary did state that the ALJ “properly applied” the ERA burdens of proof in a case in which the ALJ not only considered the evidence of the employer’s nonretaliatory reason—that it had “terminated [*Dysert*’s] employment . . . as part of a ‘budget cut,’” *Dysert*, No. 1993-ERA-021, slip op. at 1—at step one, but specifically held that that reason was dispositive as to why *Dysert* failed to demonstrate that protected activity was a contributing factor in the termination. That the ALJ may consider the evidence of the employer’s nonretaliatory reasons at step one was thus necessary for the case’s holding.

must determine whether the employer has proven, by clear and convincing evidence, that, even if the employee had *not* engaged in protected activity, the employer nonetheless *would have taken* the same adverse action (the “same-action” defense). The statute does not contain, nor does the legislative background suggest, any limitation on the factfinder’s consideration of relevant, admissible evidence at either step of the analysis.

ii. The fact that the text of the AIR-21 burden-of-proof provision also bears similarities to the language of the 1989 Whistleblower Protection Act does not change AIR-21’s Mt. Healthy framework or the questions to be asked or evidence that may be considered at each step.

The principal statutory argument in favor of *Fordham* stems from the legislative history of the 1989 Whistleblower Protection Act’s (WPA) burden-of-proof provision.¹⁴⁸ In contrast to the ERA, AIR-21, the FRSA, and other statutes that incorporate the AIR-21 burden-of-proof provision, the Whistleblower Protection Act only protects federal government employees and is administered through a special agency, the Merit Systems Protection Board (MSPB), whose jurisdiction is limited to federal employees. Nonetheless, the 1989 WPA burden-of-proof provision does have language similar to that found in the ERA and AIR-21, and the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit (which had exclusive jurisdiction over WPA appeals for decades) have interpreted the WPA in a way that *Fordham* viewed as supporting its interpretation of the ERA and AIR-21. Therefore, to understand why *Fordham*’s reliance on current interpretations of the WPA was misplaced requires a fuller understanding of the background to that Act, as well as the 1994 amendments to that Act.

Prior to the 1989 Whistleblower Protection Act, the *Mt. Healthy* test applied to whistleblower cases brought by federal employees, and the changes instituted by the 1989 Whistleblower Protection Act left the *Mt. Healthy* framework intact. The 1978 Civil Service Reform Act contained a whistleblower protection provision for federal employees, and that Act established the Merit Systems Protection Board to, among other things, adjudicate those whistleblower claims. Just like the Department of Labor and courts of appeals interpreting the 1978 ERA,¹⁴⁹ the Merit Systems Protection Board had consistently interpreted the whistleblower protection provision under the 1978 Civil Service Reform Act as having incorporated the two-part *Mt. Healthy* burden-of-proof test. Although that 1978 statute had no burden-of-proof provision, the Merit Systems Protection Board and Federal Circuit consciously adopted the *Mt. Healthy* framework.¹⁵⁰ In doing so, they understood that Congress wanted to ensure that

¹⁴⁸ *Fordham*, ARB No. 12-061, slip op. at 29-35.

¹⁴⁹ *See supra* text accompanying note 124.

¹⁵⁰ *See Gerlach v. Fed. Trade Comm’n*, 8 M.S.P.B. 599, 604-05, 9 M.S.P.R. 268, 276 (Dec. 15, 1981); *Carsello v. Dep’t of Treasury*, 833 F.2d 1023 (Table), 1987 WL 38740, at *1 (Fed. Cir. 1987) (unpublished) (“This court has already accepted the *Mt. Healthy* doctrine” (citing *Warren v. Dep’t of the Army*, 804 F.2d 654, 657-58 (Fed.Cir.1986)).).

whistleblowing employees be treated the same as, but not any better than, if they had not engaged in protected activity.¹⁵¹

In 1989, Congress adopted the Whistleblower Protection Act, and in so doing, retained the basic *Mt. Healthy* framework, but made a change to each step of the test to make things easier for employees. The text of the 1989 WPA modified the *Mt. Healthy* test in exactly the same way as the 1992 ERA modified the 1978 ERA whistleblower protection jurisprudence:¹⁵² first, it changed the level of causation an employee needs to show at step one from a “substantial” or “motivating” factor to a “contributing” factor;¹⁵³ and second, it changed the standard of proof for the employer’s same-action defense at step two from a preponderance to “clear and convincing.”¹⁵⁴ Thus, the text of the 1989 WPA is very similar to the 1992 ERA amendments and was written on a similar jurisprudential background. The text of the 1989 WPA thus clearly embraced a modified *Mt. Healthy* test; it left the framework of the test as is and

¹⁵¹ See S. REP. NO. 95-969, at 22 (1978) reprinted in 1978 U.S.C.C.A.N. 2723, 2744 (“The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in an action which would constitute grounds for dismissal for cause, the fact that the employee ‘blows the whistle’ on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action.”); see *Warren*, 804 F.2d at 658 (noting “the intent of Congress that unsatisfactory employees should not be allowed to use ‘protected disclosures’ to shield themselves against adverse actions that would otherwise result from their derelictions”); see also *In re: Frazier*, 1 M.S.P.B. 159, 159 n.1, 1 M.S.P.R. 163, 165 n.1 (Dec. 17, 1979), *aff’d sub nom., Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150 (D.C. Cir. 1982) (“The protection of whistleblowers is a primary purpose of the Act. At the same time, the restrictions on managerial abuses and protection of employees established by Title I must be construed in light of the Act’s legislative history, which reveals a complementary, but sometimes countervailing, purpose to improve the efficiency of the civil service by facilitating removal of the employees who fail to perform their duties. Thus an employee’s claim to be a whistleblower must be carefully scrutinized to insure that whistleblowing protection is not being misused in an attempt to thwart needed disciplinary action.”).

¹⁵² See *supra* text accompanying note 129.

¹⁵³ Pub. L. No. 101-12, § 3(a)(13), 103 Stat. 16, 30 (Apr. 10, 1989) (“Subject to the provisions of paragraph (2), . . . the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that [protected activity] was a *contributing factor* in the personnel action which was taken or is to be taken against such employee, former employee, or applicant” (emphasis added).); see also 5 U.S.C. § 1221(e)(1) (1992) (same).

¹⁵⁴ Pub. L. No. 101-12, § 3(a)(13), 103 Stat. 16, 30 (Apr. 10, 1989) (“Corrective action under paragraph (1) may not be ordered if the agency demonstrates *by clear and convincing evidence* that it would have taken the same personnel action in the absence of such disclosure” (emphasis added).); see also 5 U.S.C. § 1221(e)(2) (1992) (same).

placed no limitations on the evidence that the factfinder could consider under either step of the test.

Five years later, in 1994, Congress amended the WPA burden-of-proof provision by adding the following language at the end of the “contributing factor” paragraph:

The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.^[155]

Despite the fact that the text indicates only that the evidence described in subparagraphs (A) and (B) is just one way in which the employee “may” satisfy the “contributing factor” test, the Senate Committee on Government Affairs stated that it intended the language to embody a per se knowledge/timing rule—that is, an employee who could show that both (1) “the official taking the personnel action *knew of*” the employee’s protected activity (“knowledge”) and (2) the employer took the adverse personnel action sufficiently soon after the protected activity (“timing” or “temporal proximity”), would *automatically* prevail at step one of the two-part test as a matter of law.¹⁵⁶ Put another way, the Senate Government Affairs Committee viewed this language as creating an irrebuttable presumption that an employee who satisfied the knowledge/timing test would prevail at step one. In 1998, the Federal Circuit, which had exclusive jurisdiction over whistleblower claims under the WPA at the time,¹⁵⁷ interpreted the statute in just this way,¹⁵⁸ and it has consistently adhered to that interpretation since then.¹⁵⁹

¹⁵⁵ Pub. L. No. 103-424, § 4(b), 108 Stat. 4361, 4363 (Oct. 29, 1994); *see also* 5 U.S.C. § 1221(e)(1) (2014).

¹⁵⁶ S. Rep 103-358, at 7, *reprinted in* 1994 U.S.C.C.A.N. 3549, 3556 (“This provision reverses the holding of *Clark v. Department of Army*, . . . [which] held that the Whistleblower Protection Act did not incorporate a per se knowledge/timing test.”).

¹⁵⁷ 5 U.S.C. § 7703(b)(1) (1998) (“a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit”). *But cf.* 5 U.S.C. § 7703(b)(1)(B), (b)(2) (2015) (providing that “[d]uring the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012,” appeals from MSPB federal employee whistleblower cases may be taken to either the Federal Circuit “or any court of appeals of competent jurisdiction”); *Aviles v. Merit Sys. Prot. Bd.*, 799 F.3d 457, 459-60, 461 (5th Cir. 2015) (exercising jurisdiction over federal employee whistleblower case on appeal from the Merit Systems Protection Board).

¹⁵⁸ *Kewley v. Dep’t of Health & Human Servs.*, 153 F.3d 1357, 1361-63 (Fed. Cir. 1998).

Though Congress thus added this knowledge/timing language to the WPA in 1994, it did not add any such language to the whistleblower protection provision of the ERA in 1994, nor has it done so at any time since.¹⁶⁰ Indeed, the ERA’s burden-of-proof provision has not changed at all since 1992, and there is no evidence that Congress even thought about the ERA’s whistleblower protection provision when it added the knowledge/timing language to the WPA. Thus, starting in 1994, the United States Code had two different sets of statutory language for the burdens of proof in whistleblower cases, one with the knowledge/timing language—found in the 1994 amendments to the WPA—and one without—found in the 1992 amendments to the ERA.

So, in 2000, when Congress used the very similar language from the 1992 ERA in AIR-21’s burden-of-proof provision, but did not include the knowledge/timing language from the 1994 amendments to the WPA, Congress implicitly decided *not* to incorporate any putative per se knowledge/timing rule from the WPA.¹⁶¹ Congress clearly had a choice in 2000, and it chose the ERA language, which contained no per se knowledge/timing rule, over the post-1994 WPA language, which did.¹⁶² Although the parties do not cite and we have been unable to find evidence of any specific intent of the drafters of AIR-21’s burden-of-proof provision, the text clearly mimics the language found in the ERA and lacks the crucial knowledge/timing language found in the post-1994 WPA.

Indeed, even as to minor textual differences between the ERA and the WPA, AIR-21 seems to have copied the former, not the latter: for example, step one of the WPA says, “*Subject*

¹⁵⁹ See, e.g., *Strader v. Dep’t of Agric.*, 475 F. App’x 316, 321 (Fed. Cir. 2012) (“Satisfaction of the “knowledge/timing” test—i.e., whether the official taking the personnel action knew of the disclosures and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action—establishes as a prima facie matter that the disclosure is a contributing factor to the personnel action.”).

¹⁶⁰ See *Fordham*, ARB No. 12-061, slip op. at 49 (Corchado, J., concurring in part and dissenting in part).

¹⁶¹ *Kirchner v. Chattanooga Choo Choo*, 10 F.3d 737, 738-39 (10th Cir. 1993) (noting that if “a legislature models an act on another statute but does not include a specific provision in the original, a strong presumption exists that the legislature intended to omit that provision”); cf. *Jama*, 543 U.S. at 341-42 (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . .”); cf. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute” (internal citations omitted)).

¹⁶² Or, more accurately, “which *the Federal Circuit and Merit Systems Protection Board had ruled did.*”

to the provisions of paragraph (2), . . . the Board shall order such corrective action if”¹⁶³, whereas both the ERA and AIR-21 say instead, “the Secretary of Labor may determine that a violation . . . has occurred *only if*”¹⁶⁴ While this distinction may or may not be substantively important,¹⁶⁵ it is noteworthy because it provides clues about AIR-21’s provenance; it shows that it is even more likely that the 2000 Congress copied from the ERA and not from the WPA. It is also of some note that of the two burden-of-proof provisions from which Congress could draw in 2000, one was found in a whistleblower protection *statute* covering federal employees and administered by the Merit Systems Protection Board, an agency whose jurisdiction is limited to regulating federal employees, whereas the other was found in a whistleblower *provision* in a statute regulating private industry, a provision administered by the Department of Labor, which has historically administered statutes regulating employment relations in the private sector. Since AIR-21, like the ERA and unlike the WPA, regulates private employment relations, it may not have been surprising that Congress chose both to delegate authority to the Department of Labor and copy from the ERA, not the WPA.

Our conclusion that AIR-21 copied not from the WPA, but instead from the ERA, is strengthened by the fact that Congress knows how to adopt the WPA burden-of-proof language when it wants to. Starting in 2002, with the Sarbanes-Oxley Act, Congress has used the same linguistic formulation as the AIR-21 burden-of-proof provision (or directly cross-referenced AIR-21 or another provision with the same language) at least eleven times,¹⁶⁶ including of

¹⁶³ 5 U.S.C. § 1221(e)(1) (2000).

¹⁶⁴ 42 U.S.C. § 5851(b)(3)(C); 49 U.S.C. § 42121(b)(2)(B)(iii). One other way in which the ERA and AIR-21 are similar to each other and different from the WPA is that both the ERA and AIR-21 refer to “*unfavorable* personnel action[s],” whereas the WPA doesn’t use the word “unfavorable,” instead referring to “*alleged prohibited* personnel *practice[s]*” and just plain “personnel action[s].” Compare 42 U.S.C. § 5851(b)(3) and 49 U.S.C. § 42121(b)(2)(B) with 5 U.S.C. § 1221(e)(1) (WPA hearing stage) and 5 U.S.C. § 1214(b)(4)(B) (WPA investigation stage). Although we have no reason to think this distinction is substantively meaningful, it does provide another clue about the provenance of AIR-21’s burden-of-proof provision.

¹⁶⁵ See *supra* text accompanying notes 96 through 119.

¹⁶⁶ In three of those statutes, Congress incorporated AIR-21 by cross-referencing it: (1) Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A(b)(2)(C)) (SOX); (2) Federal Rail Safety Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (2007) (codified as amended at 49 U.S.C. § 20109(d)(2)(A)(i)) (FRSA); (3) Surface Transportation Assistance Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464 (2007) (codified as amended at 49 U.S.C. § 31105(b)(1)) (STAA). In six of them, Congress used the same linguistic formulation as the AIR-21 burden-of-proof provision: (1) Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 6, 116 Stat. 2985, 2989 (2002) (codified at 49 U.S.C. § 60129(b)(2)(B)) (PSI); (2) National Transit Systems Security Act of 2007, Title XIV of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (2007) (codified at 6 U.S.C. § 1142(c)(2)(B)) (NTS); (3) Consumer Product Safety Act, as

course in the 2007 Federal Rail Safety Act provision at issue in this case.¹⁶⁷ In each of these whistleblower protection provisions, Congress has delegated adjudicatory authority to the Department of Labor, and not once has Congress included the knowledge/timing language from the 1994 WPA amendments.

Yet, Congress has also adopted the language of the post-1994 WPA burden-of-proof provision, with its knowledge/timing language, in other whistleblower protection provisions that are *not* administered by the Department of Labor: once, Congress seems to have copied the WPA’s language and once, it incorporated the language through a cross-reference. In 2009, in the multi-billion dollar stimulus package known as the American Reinvestment and Recovery Act (“Recovery Act”), Congress included a whistleblower protection provision for employees working for contractors receiving federal stimulus funds. That provision included burden-of-proof language similar to that found in the 1994 WPA and specifically included the knowledge/timing language found in the 1994 WPA amendment, but not found in AIR-21 or the ERA or any DOL-administered provision.¹⁶⁸ Then, in 2013, in another statute involving the

amended by Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 219(a), 122 Stat. 3016, 3062, 3063-64 (2008) (codified at 15 U.S.C. § 2087(b)(2)(B)) (CPS); (4) Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1057(c)(3)(C), 124 Stat. 1376, 2031 (2010) (codified at 12 U.S.C. § 5567(c)(3)(C)) (CFP); (5) FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968, 3969 (2011) (codified at 21 U.S.C. § 399d(b)(2)(C)) (FDA); and (6) MAP-21, Pub. L. No. 112-141, § 31307(a), 126 Stat. 405, 765, 767 (2012) (codified at 49 U.S.C. § 30171(b)(2)(B)). In two statutes, Congress cross-referenced another provision with similar language. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (2010) (codified as amended at 29 U.S.C.A. § 218c(b)(1)) (incorporating by reference the burdens of proof in the Consumer Product Safety Improvement Act of 2008); Seaman’s Protection Act, as amended by the Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 611(a), 124 Stat. 2905, 2969-70 (2010) (codified as amended at 46 U.S.C. § 2114(b)) (incorporating by reference the burdens of proof in the Surface Transportation Assistance Act).

¹⁶⁷ 49 U.S.C. § 20109(d)(2)(A)(i).

¹⁶⁸ The relevant provision reads as follows:

(c) REMEDY AND ENFORCEMENT AUTHORITY.—

(1) BURDEN OF PROOF.—

(A) DISCLOSURE AS CONTRIBUTING FACTOR
IN REPRISAL.—

(i) IN GENERAL.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

(ii) *USE OF CIRCUMSTANTIAL EVIDENCE.*—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this

appropriation of federal funds, the National Defense Authorization Act of 2013 (“2013 NDAA”), Congress again included whistleblower protection provisions that seemed to incorporate the WPA’s per se knowledge/timing rule, this time by specifically incorporating the burden-of-proof provision of the WPA.¹⁶⁹ Neither the Recovery Act’s whistleblower protection provision nor the 2013 NDAA whistleblower protection provisions make any mention of *AIR-21*’s burden-of-proof provision.

In other words, since 2000, Congress has passed numerous whistleblower protection provisions, and in some, Congress has incorporated the burdens of proof from AIR-21 and in others, the burdens of proof from the WPA. We should certainly be cautious about inferring any *specific* intent, one way or the other, without evidence of explicit discussion of this issue in the public record. But at the same time, it is not unreasonable to infer that when Congress chose to copy from the ERA in AIR-21 and when it then chose to adopt that language either directly or by incorporation in the many DOL-administered whistleblower provisions it has passed since 2000, Congress was *not* incorporating the WPA’s putative per se knowledge/timing rule: Congress knows well how to include the knowledge/timing language from the 1994 WPA when it wants to; and it chose not to do so in AIR-21, the FRSA, or any of the laws that used AIR-21’s language (either directly or by incorporation).

Fordham concluded, and some of the amici supporting Palmer argue, that the ERA and AIR-21 burden-of-proof provisions should be interpreted the same way as the WPA’s burden-of-proof provision despite the fact that the post-1994 WPA specifically contains the knowledge/timing language and the ERA and AIR-21 don’t.¹⁷⁰ The crux of the argument goes

paragraph by circumstantial evidence, including—(I) evidence that the official undertaking the reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

Pub. L. No. 111-5, § 1553(c)(1)(A)(ii), 123 Stat. 115, 299 (Feb. 17, 2009) (emphasis added). The text seems to make this not a “knowledge *plus* timing” per se rule, but rather a “knowledge *or* timing” per se rule. We suspect that must be a mistake.

¹⁶⁹ Pub. L. No. 112-239, §§ 827, 126 Stat. 1632, 1835 (Jan. 2, 2013) (codified at 10 U.S.C. § 2409(c)(6) (2015)) (“The legal burdens of proof specified in *section 1221(e) of title 5* shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred” (emphasis added)); *id.* § 828, 126 Stat. at 1840 (codified at 41 U.S.C. § 4712(c)(6) (2015)) (same).

¹⁷⁰ See *Fordham*, ARB No. 12-061, slip op. at 30 (stating that “the expressed intended supplanting of the burdens of proof articulated in *Mt. Healthy* ties the 1992 ERA amendments (and thus, the AIR 21 whistleblower provisions) to the virtually identical provisions of the Whistleblower Protection Act, at 5 U.S.C.A. § 1221(e), as originally adopted, where the legislative history similarly

something like this: (1) in 1989, when Congress passed the WPA, it incorporated a per se knowledge/timing rule into step one of the WPA's burden-of-proof provision; (2) in 1992, when it amended the ERA, it copied the language of the 1989 WPA and thus necessarily also incorporated a per se knowledge/timing rule into step one of the ERA's burden-of-proof provision; (3) although Congress did amend the WPA in 1994 to add the specific knowledge/timing language, the addition of that language merely *clarified* what the WPA's burden-of proof provision had meant back in 1989 and did not change the meaning of the 1989 language at all; (4) therefore, in 2000, when Congress copied the ERA language into AIR-21, it incorporated the per se knowledge/timing rule into step one of the AIR-21 burden-of-proof provision; and (5) the per se knowledge/timing rule is effectively the same as *Fordham's* rule that the employer's evidence of its nonretaliatory reasons may not be considered at step one.

There are several problems with this argument. First, nothing in the text of the original 1989 WPA even remotely suggests that the WPA incorporated a per se knowledge/timing rule back in 1989. Second, given the lack of a per se knowledge/timing rule in the 1989 WPA's statutory text, the evidence that Congress intended to adopt such a rule, including the so-called "post-enactment legislative history" on which *Fordham* relied, is too equivocal and conflicting to establish that Congress incorporated such a rule. Third, even if the evidence of congressional intent sufficed to warrant inserting a per se knowledge/timing rule into the 1989 WPA, that evidence does not affect the interpretation of either the 1992 ERA amendments or the 2000 AIR-21 burden-of-proof provision. Finally, even if we assume the 1989 WPA adopted the per se knowledge/timing rule, neither the 1989 WPA nor even the 1994 amendment to the WPA changed the basic structure of the *Mt. Healthy* two-step framework or, in general, the evidence that could be considered at either step of the test.

First, as we noted above,¹⁷¹ the 1989 WPA burden-of-proof language was based on the *Mt. Healthy* test, with two—and only two—changes: a reduction in the amount of causation at step one and an increase in the standard of proof for the same-action defense at step two. The text contains no mention of any putative per se knowledge/timing rule or any limitation on the evidence a factfinder could consider, and it would take a seer to find any such rule or limitation in that text.

refers to the intended purpose of supplanting *Mt. Healthy's* burdens of proof.”). At oral argument, counsel for three members of Congress (Senators Grassley and Wyden and Representative Speier) stated that he didn't know of “a single decision which has been issued which has said that there's a material difference between” the standard under the WPA on the one hand and the ERA and AIR-21 on the other. Yet, federal courts of appeal have been treating these standards differently for more than two decades. The Federal Circuit has held that the WPA burden-of-proof provision contains a per se knowledge/timing rule, *see supra* text accompanying 158, while numerous other federal courts of appeal have decided cases under the ERA and AIR-21 burden-of-proof provisions, without ever once adopting such a rule, *see supra* note 77 (collecting cases). Just to be clear, that is precisely what we hold here: The Federal Circuit and Merit Systems Protection Board's interpretation of the WPA does *not* apply to the ERA, AIR-21, the whistleblower provisions that incorporate AIR-21's burden-of-proof provision or any other provision that lacks specific knowledge/timing language in its text.

¹⁷¹ *See supra* text accompanying notes 153 to 154.

Second, most of the evidence of congressional intent supports this natural reading of the text. The legislative history of the 1989 WPA shows that Congress intended the word “demonstrate” in the first step to mean “prove.”¹⁷² Moreover, there was a consistent understanding that Congress was adopting a “modified *Mt. Healthy* test.”¹⁷³ When discussing the second step of the test, for example, the Joint Explanatory Statement explicitly states that “it is [the Committees’] intention to codify the test set out by the Supreme Court in the case of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).”¹⁷⁴

Relevantly, Congress clearly also understood that the second step of the test was, just like in *Mt. Healthy*, asking a different question from the first. As the Senate Committee Report put it, “Under this subsection, the burden then shifts to the agency to show that an employee’s protected disclosure was not a ‘material factor’ in the personnel action; the agency must show this by ‘clear and convincing’ evidence.”¹⁷⁵ In other words, the inquiry at the second step, the same-

¹⁷² For example, the Senate Government Affairs Committee Report clearly equates the statutory use of the word “demonstrate” with “prove”: “S. 508 would establish in law a reasonable standard for *proving* the nexus by requiring *proof* only that retaliation was ‘a factor’ in a personnel action, rather than a ‘significant’ or a ‘predominant’ factor. An employee would have to *prove* this by a ‘preponderance of the evidence’ which is the same standard as under current law.” S. REP. NO. 100-413, at 13-14 (1988) (emphases added); see also *id.* at 33 (“Under current case law, alleged whistleblowers have to prove that a disclosure was a ‘significant’ or ‘predominant’ factor in a personnel action; this subsection lessens this burden by requiring that they *prove* only that the disclosure was ‘a factor’” (emphasis added)); 135 CONG. REC. S2779, S2792 (Mar. 16, 1989) (on the Senate floor, the relevant Subcommittee’s Chairperson, Senator Pryor, referring to the burden-of-proof provision as the “bill’s so-called Mount Healthy provision” and explicitly stating that “an employee would prevail if he could *prove* that his whistleblowing was a factor in the personnel action taken against him if the agency could not demonstrate by clear and convincing evidence that it would have taken the personnel action without any disclosure by the employees” (emphasis added)); 135 CONG. REC. at S2786 (on the Senate floor, Senator Cohen recognizing the provenance of the burden-of-proof provision as the “so-called mount healthy standard” and stating that it “provide[s] that an employee would have to *prove* only that whistleblowing was a factor in the personnel action” (emphasis added)).

¹⁷³ S. REP. NO. 100-413, at 15 (1988).

¹⁷⁴ 135 CONG. REC. S2779, S2784 (Mar. 16, 1989) (emphasis added). The relevant Senate Committee Report makes this equally clear. See S. REP. NO. 100-413, at 15 (1988) (referring to a “modified *Mt. Healthy* test”). Although this Senate Committee Report discusses a bill that the President pocket vetoed during the 100th Congress, see S. Rep No. 103-358, at 7 (1994), 1994 U.S.C.C.A.N. 3549, 3555-56 (“S. 508, the Whistleblower Protection Act of 1987, . . . was pocket vetoed by President Reagan and was never enacted”), there were no material changes to the bill before it became law the following year.

¹⁷⁵ S. REP. NO. 100-413, at 33; see also *id.* at 15 (“Under this modified *Mt. Healthy* test, if whistleblowing was a *material factor* in the personnel action, the agency would lose its defense.”); 135 CONG. REC. at S2786 (on the Senate floor, Senator Cohen stating that the burden-of-proof

action defense, is to determine whether the protected activity was a *material* factor—i.e., a factor that was necessary or essential to the decision to take the adverse personnel action—not whether it was a contributing factor. Thus, at the second step, if the employer can show that the protected activity was not material—i.e., just as in *Mt. Healthy*, if the employer can show that the employer would have taken the same adverse action in any event, even in the absence of the protected activity—the employer prevails.¹⁷⁶

On the other hand, there is some evidence in the congressional materials alluding to what eventually became the per se knowledge/timing rule. The Joint Explanatory Statement notes that “[o]ne of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”¹⁷⁷ The Senate Committee Report makes the same point using very similar language: “[O]ne of the ways an employee . . . would be able to establish a nexus would be by showing that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.”¹⁷⁸ *Fordham* concluded that this single sentence provides evidence that the 1989 Congress intended to adopt a per se knowledge/timing rule at step one.¹⁷⁹ Yet, the language does not appear on its face to establish a per se knowledge/timing rule at all.¹⁸⁰ Moreover, given all the other evidence indicating that the only two changes to the *Mt. Healthy* test were to lower how much of a causal connection the employee needs to show at step one and to increase the standard of proof for the

provision “provide[s] that an employee would have to prove only that whistleblowing was a factor in the personnel action and that the agency would have to prove by clear and convincing evidence that whistleblowing was not a *material factor*” (emphasis added)).

¹⁷⁶ See also 135 CONG. REC. at S2784 (noting that the “*only change* made by this bill as to [the *Mt. Healthy* same-action] defense is to increase the level of proof which an agency must offer from ‘preponderance of the evidence’ to ‘clear and convincing evidence’” (emphasis added)).

¹⁷⁷ 135 CONG. REC. at S2784.

¹⁷⁸ S. REP. NO. 100-413, at 14 (1988); see also *id.* at 30 (“One of the ways in which the Special Counsel may demonstrate that an individual’s disclosure was a factor in a personnel action is by showing that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a time period such that a reasonable person could conclude that the disclosure was a factor in the personnel action.”).

¹⁷⁹ *Fordham*, ARB No. 12-061, slip op. at 33.

¹⁸⁰ The language obviously bears similarities to the language Congress eventually put into the actual statute a few years later, when it amended the WPA in 1994. See *supra* text accompanying notes 155 to 156.

employer at step two,¹⁸¹ this one sentence in the congressional materials, by itself, is simply not enough to insert a per se knowledge/timing rule into statutory language when the statutory text contains nothing even alluding to any such rule.

The real complication arises, however, *after* passage of the 1989 WPA. In 1993, the Federal Circuit held that the statute did not have a per se knowledge/timing rule,¹⁸² but Congress quickly expressed its disapproval: it inserted language similar to the one sentence from the 1989 Senate Committee Report into the statutory text. The Federal Circuit then interpreted this text, as we noted above, to create a per se knowledge/timing rule, despite the fact that it merely says that knowledge/timing was just one way in which the employee “may” satisfy the contributing-factor test.¹⁸³

The argument in favor of *Fordham* depends, however, not just on the fact of the 1994 amendment, but also on the discussion of that amendment in the 1994 Senate Government Affairs Committee Report. That Report makes two important points: (1) the Committee intended the new statutory language to encompass a per se knowledge/timing rule (notwithstanding the fact that the text does not appear to say that); and (2) even more importantly, the Committee viewed the amendment as a clarifying amendment, designed simply to reflect the original intent of the language in the 1989 Whistleblower Protection Act’s burden-of-proof provision.¹⁸⁴ Indeed, the Committee Report goes even further: “The Committee amendment reaffirms that Congress intends for [an] agency’s evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.”¹⁸⁵ This statement from the Senate Government Affairs Committee in 1994 is indeed the strongest statement anywhere supporting *Fordham*’s reading of the 2000 AIR-21 burden-of-proof provision. To be sure, it doesn’t explicitly say that the employer’s evidence of its nonretaliatory reasons cannot be considered at step one—referring as

¹⁸¹ 135 CONG. REC. at S2786 (Senator Cohen on the floor of the Senate stating that “S.20, as introduced, eased this standard in *two* ways” (emphasis added)).

¹⁸² *Clark v. Dep’t of Army*, 997 F.2d 1466, 1471-72 (Fed. Cir. 1993).

¹⁸³ *See supra* text accompanying notes 155 to 158.

¹⁸⁴ S. REP NO. 103-358, at 8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3556 (“[T]he amendment [to the burden-of-proof provision] *would restore the balance intended in the Whistleblower Protection Act*, by permitting a whistleblower to prove his/her prima facie case by showing that the ‘official taking that action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.’”); *id.* at 7; 1994 U.S.C.C.A.N. at 3556 (“The joint explanatory statement that accompanied [the bill that became the 1989 WPA] expressly stated that the managers intended the per se test to apply to that bill.”).

¹⁸⁵ *Id.* at 8, 1994 U.S.C.C.A.N. at 3556.

it does only to the evidence that should be considered at step two—but the statement could fairly be read to imply negatively that such reasons are not to be considered at step one.¹⁸⁶

Nonetheless, these statements are insufficient to affect the interpretation of either the ERA’s burden-of-proof provision or AIR-21’s. Besides the fact that the knowledge/timing language is not found in the text of either the ERA or AIR-21,¹⁸⁷ the problem with relying on this statement from the 1994 Senate Committee Report as conclusive evidence of the meaning of either the 1992 ERA amendments or the 2000 AIR-21 is two-fold: first, it constitutes post-enactment evidence as to the language found in the 1989 WPA (as opposed to its import for the 1994 amendments); and second, even if we assumed it provides evidence of congressional intent as to the 1989 WPA, there is no evidence that the 1992 ERA amendments or the 2000 AIR-21 copied that *intent*; if there was any copying, all those provisions copied was the 1989 *text*, and the 1989 text by itself simply does not contain either a per se knowledge/timing rule or any limitation on the evidence the factfinder may consider.

First, as evidence of Congress’s intent about the 1989 WPA, the 1994 Senate Committee Report is particularly weak because it comes after the fact. The 1994 Senate Committee Report is what courts refer to as “post-enactment legislative history,” and in the hierarchy of “legislative history,” “post-enactment legislative history” is generally deemed to be the most unreliable evidence of congressional intent.¹⁸⁸ It has the obvious potential to be manipulated,¹⁸⁹ and that is one reason that courts have consistently noted that “the views of a subsequent Congress form a

¹⁸⁶ See generally *Fordham*, ARB No. 12-061, slip op. at 34.

¹⁸⁷ Or, for that matter, in the text of any DOL-administered whistleblower provision.

¹⁸⁸ *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition could have had no effect on the congressional vote.” (internal citations and quotation marks omitted).); *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984) (rejecting the suggestion that statutory interpretation can be informed by “the committee reports that accompany subsequent legislation”); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170 n.5 (2001) (“[E]ven when it would be otherwise useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment” (citation and internal quotation marks omitted)).

¹⁸⁹ See, e.g., Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L. J. 621, 655 n.124 (1994) (“Reliance on post-enactment legislative history is especially controversial, given the increased dangers of manipulation.”); ESKRIDGE, *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 253 (2016) (“If courts routinely considered committee reports and legislator floor statements made after a statute is enacted, then such statements would proliferate, with a big risk of strategic manipulation by legislators and their staffs.”).

hazardous basis for inferring the intent of an earlier one.”¹⁹⁰ Indeed, the very term “post-enactment legislative *history*” is “oxymoronic”¹⁹¹ and “a contradiction in terms.”¹⁹²

Still, if the statute were ambiguous,¹⁹³ we wouldn’t necessarily view that as an absolute bar on considering these statements. To the extent that congressional intent beyond the text matters, post-enactment evidence can sometimes be probative,¹⁹⁴ and there is at least some reason to think that it might be here. The 1994 Senate Committee Report accompanied an amendment to the very statute being interpreted, the 1989 WPA.¹⁹⁵ The post-enactment statements came, moreover, from the exact same Senate committee as the 1987-88 bill that became the original 1989 WPA, the Senate Government Affairs Committee, and only a few years later, with a majority of the same members (8 of 14) as well as the same Committee Chairperson (Senator Glenn), ranking member (Senator Roth) and Subcommittee Chairperson (Senator Pryor).¹⁹⁶ Of course, the Committee could still be rewriting history after the fact, but there is at least some reason to think those statements were made by people who were likely to

¹⁹⁰ *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960).

¹⁹¹ *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (emphasis added).

¹⁹² *Bruesewitz*, 562 U.S. at 242; cf. also *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (noting that “[p]ost-enactment legislative history [is] perhaps better referred to as ‘legislative future’”).

¹⁹³ As noted above, we do not view the text as ambiguous on the fundamental question at issue in this case. The text simply does not contain either a per se knowledge/timing rule or any limitations on the evidence that can be considered at step one. See *supra* note 171.

¹⁹⁴ See, e.g., *Andrus v. Shell Oil*, 446 U.S. 657, 666 n.8 (1980) (“[W]hile arguments predicated upon subsequent congressional actions may be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.”); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (“[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight” (citations omitted)).

¹⁹⁵ Cf. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (stating that “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction” (emphasis added)); but see *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984) (“reject[ing] the argument that the *Red Lion* rule should be applicable to the *committee reports* that accompany subsequent legislation” (emphasis added)).

¹⁹⁶ Compare S. REP. NO. 100-413 at II (1988) with S. REP. NO. 103-358 at II (1994). But see *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (refusing to accord weight to Committee Report from subsequent committee); *Consumer Prod. Safety Comm’n*, 447 U.S. at 117-19 (refusing to consider remarks from legislation’s sponsor from a subsequent Congress); *Pittston Coal Grp. v. Sebbon*, 488 U.S. 105, 118-19 (1988) (same).

have known their own intent, particularly since the text added to the statute in 1994 is so similar to that found in the Senate Committee Report accompanying the 1989 WPA.¹⁹⁷

But the more significant problem with relying on these post-enactment statements leads directly to the third problem with *Fordham*'s reliance on the WPA here: our task is to interpret AIR-21, not the WPA, and there is no evidence that the drafters of AIR-21 intended to adopt any of the WPA's legislative history into AIR-21 as law.¹⁹⁸ To be sure, AIR-21's *text* is similar to the 1989 WPA. But the text of the 1989 WPA makes no mention of a per se knowledge/timing rule or limitations on employer evidence. Moreover, as we noted earlier, the language of AIR-21, passed after the 1994 WPA amendment, lacks the knowledge/timing language from the 1994 WPA amendment, thereby suggesting that Congress specifically rejected any putative per se knowledge/timing rule when it passed AIR-21.¹⁹⁹

So, even if we were to treat the 1994 Senate Committee Report as sufficient evidence that some members of one chamber of Congress "intended," in 1989, to embed a per se knowledge/timing rule or a limitation on employer evidence into the *1989 Whistleblower Protection Act*, that does not mean that the WPA's "intent" follows the text wherever else the text might find itself in the Statutes at Large. When neither the text nor any longstanding interpretation of that text contains even the slightest hint of the putative Congressional "intent," intent simply cannot follow text as *Fordham* would have it do.

To the extent that we ought to seek the Congressional intent of AIR-21 outside of its text, the evidence suggests that neither the 2000 Congress that adopted AIR-21 nor the 1992 Congress that adopted the ERA amendments had any awareness of the extra-textual per se knowledge/timing rule purportedly found in the 1989 WPA. While we need not delve into all the details of Congressional procedures and we certainly cannot begin to claim to have been "in the room where it happened,"²⁰⁰ it is clear that the WPA took a very different path through Congress than the ERA and AIR-21. There is no evidence, for example, that the Committees through which the 1992 ERA amendments passed knew anything about the supposed per se knowledge/timing rule mentioned in the Senate Committee Report accompanying the 1989 WPA. Indeed, neither *Fordham* nor any of the parties or amici point to any evidence that those involved in adopting the 1992 ERA even knew about the text of the 1989 WPA.²⁰¹ To be sure,

¹⁹⁷ *But cf. Consumer Prod. Safety Comm'n*, 447 U.S. at 118 n.13 (1980) (noting that post-enactment statements do "not bear strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change.").

¹⁹⁸ *Cf. Fordham*, ARB No. 12-061, slip op. at 29 (noting that "there is nothing in AIR 21's legislative history that addresses" the issue).

¹⁹⁹ *See supra* text accompanying note 161.

²⁰⁰ LIN-MANUAL MIRANDA, *THE ROOM WHERE IT HAPPENS* (Atlantic Records 2015).

²⁰¹ This Board and members of the Board have speculated that, in adopting the ERA's burden-of-proof provision in 1992, "Congress may have been recalling that in 1989 it enacted the

Congress did make the same changes to the ERA whistleblower jurisprudence in 1992 as it had to the federal employee whistleblower jurisprudence in 1989, but the changes the 1992 ERA amendments made were simply the same two changes to the *Mt. Healthy* test, leaving the *Mt. Healthy* framework intact.²⁰² Moreover, the 1992 Energy Policy Act that amended the ERA was a massive piece of legislation, with thirty Titles and more than 350 pages in the Statutes at Large, that made its way through more than a half-dozen different committees in both chambers of Congress, none of which was the Senate Government Affairs Committee that purportedly “intended” to adopt a per se knowledge/timing rule in the 1989 WPA or the House Committee on Post Office and Civil Service, the House committee through which the Whistleblower Protection Act passed. Similarly, while not quite as long, AIR-21 contains ten Titles and more than a hundred pages in the Statutes at Large and passed through several committees as well, again, none of which were the Senate Government Affairs Committee or House Committee on Post Office and Civil Service.

Given this, we simply cannot presume that either the 1992 ERA or the 2000 AIR-21 incorporated any per se knowledge/timing rule that might have been latent in the 1989 WPA. Certainly we expect Congress to understand the *words* used in statutes, including terms of art and/or meanings developed over time from the common law or jurisprudence from elsewhere in the U.S. Code.²⁰³ But it would be absurd to expect the 1992 or 2000 Congresses to have known the supposed legislative “intent” of the 1989 WPA burden-of-proof provision when that intent itself does not clearly articulate a per se knowledge/timing rule and was found solely in a sentence or two in a Joint Explanatory Statement buried in the Congressional Record and a Senate Committee Report from a committee that played no role in the 1992 ERA amendments or the 2000 AIR-21. Doing so would be especially inappropriate since that “intent” was not only undermined by the text itself but was also in tension with numerous other statements in the same Committee Report and Joint Explanatory Statement, as well as elsewhere in the Congressional Record.²⁰⁴

Whistleblower Protection Act,” *Kester*, ARB No. 02-007, slip op. at 7 n.15, but never with any evidence to support its speculation. *See also Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 24 n.124 (ARB Sept. 30, 2011) (Brown, J., dissenting) (claiming without support that “the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act . . . were modeled after the . . . Whistleblower Protection Act”); *Fordham*, ARB No. 12-061, slip op. at 30 (citing *Kester* and *Bechtel* for the claim that “the AIR 21 and ERA burden of proof provisions are ultimately modeled after the burden of proof provisions of the whistleblower Protection Act . . . as originally adopted”).

²⁰² *See supra* text accompanying notes 129 to 130.

²⁰³ *See Lorillard*, 434 U.S. at 580-81 (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute” (internal citations omitted).).

²⁰⁴ *See supra* text accompanying notes 172 to 176.

This is particularly true for AIR-21, given that (1) AIR-21 did not include the very language from the 1994 amendments that represents the putative per se knowledge/timing rule, language that it could have included if it had wanted;²⁰⁵ and (2) prior to 2000 when Congress adopted AIR-21, the consistent interpretation of the 1992 ERA burden-of-proof provision (which, like AIR-21, did not contain the 1994 WPA knowledge/timing language) was that the ERA contained neither a per se knowledge/timing rule nor any limitation on evidence.²⁰⁶

Finally, even if we assume the 1989 WPA adopted the per se knowledge/timing rule, neither the 1989 WPA nor the 1994 amendment to the WPA changed the basic structure of the *Mt. Healthy* two-step framework. Rather, the Merit Systems Protection Board and Federal Circuit's interpretation of the post-1994 WPA has simply created what is in effect an irrebuttable presumption at step one for any employee who satisfies the per se knowledge/timing rule.²⁰⁷ True, in those circumstances, this would amount to the factfinder ignoring the employer's evidence of its nonretaliatory reasons;²⁰⁸ but in those WPA cases in which the employee does not satisfy the per se knowledge/timing rule, the factfinder must still consider all of the evidence in determining whether the protected activity was a contributing factor in the adverse action,

²⁰⁵ See *supra* text accompanying note 161.

²⁰⁶ See *supra* text accompanying notes 143 to 147.

²⁰⁷ *Kewley*, 153 F.3d at 1362-63 (“As Congress has made clear, section 1221(e)(1)’s knowledge/timing test must be taken as a whole, but no other factor may be taken into account. If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown, and no countervailing evidence may negate the petitioner’s showing.”); *Strader v. Dep’t of Agric.*, 475 F. App’x 316, 321 (Fed. Cir. 2012) (“Satisfaction of the “knowledge/timing” test—i.e., whether the official taking the personnel action knew of the disclosures and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action—establishes as a prima facie matter that the disclosure is a contributing factor to the personnel action.”); *Wadhwa v. Dep’t of Veterans Admin.*, 110 M.S.P.R. 615, 621 (2009 M.S.P.B. 33 at ¶ 12 (“Once an appellant has satisfied the knowledge/timing test, he has demonstrated that a protected disclosure was a contributing factor in a personnel action.”) (internal quotation marks and citation omitted). This irrebuttable presumption does force the MSPB into linguistic gymnastics at times. In one case, for example, the MSPB had to say, “Once the knowledge/timing test has been met, an AJ must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable factfinder could *not* conclude that the appellant’s whistleblowing was a contributing factor in the personnel action.” *Schnell v. Dep’t of the Army*, 114 M.S.P.R. 83, 93 (2010 M.S.P.B. 67 at ¶ 21) (citation omitted) (emphasis added).

²⁰⁸ *Wadhwa*, 110 M.S.P.R. at 622 (2009 M.S.P.B. 33 at ¶ 13) (“Because the appellant satisfied the knowledge/timing test, *the AJ should not have considered any further evidence on the issue.*”).

including the employer's nonretaliatory reasons.²⁰⁹ Thus, even as *Fordham* claimed to be relying on the WPA, it failed to follow the way in which the Merit Systems Protection Board and Federal Circuit have interpreted the WPA. We of course don't view the distinctions between the MSPB/Federal Circuit interpretation of the WPA and *Fordham's* interpretation of AIR-21 as particularly important to our decision, since we conclude that the ERA and AIR-21 have neither a per se knowledge/timing rule nor any limitations on evidence. Still, we note this discrepancy to make clear that, despite its reliance on the WPA's legislative history, *Fordham* did not even follow the WPA jurisprudence, but instead created its own rule.

C. *More than two decades of precedent, both within the Department of Labor and in federal courts of appeals support this interpretation*

Our interpretation is backed up by at least two decades of consistent jurisprudence in this Board and the federal courts of appeal. Prior to our decision in *Fordham*, this Board and federal courts of appeal had consistently permitted factfinders to consider all evidence, including evidence of the employer's nonretaliatory reasons, when determining whether the employee had established that protected activity was a contributing factor in an adverse personnel action. Moreover, other than post-1994 WPA cases, which of course involved a statute with specific knowledge/timing language, neither this Board nor any court has ever interpreted step one to incorporate a per se knowledge/timing rule. The cases are legion, and they date to at least as far back as 1995.²¹⁰ and continued until just weeks before *Fordham*.²¹¹ In many of those cases, not only did the factfinder consider the employer's evidence of its nonretaliatory reasons, but that evidence was also dispositive in ruling against the employee at step one.²¹² *Fordham*

²⁰⁹ *Powers v. Dep't of Navy*, 69 M.S.P.R. 150, 156 n.7 (1995) (noting that although "Congress overruled the holding in *Clark* that the knowledge/timing test was insufficient to satisfy the contributing factor standard . . . , Congress has not disturbed the other holdings in *Clark*, such as that *any and all relevant evidence, including the reason for the agency's action, may be considered in determining the contributing factor issue*" (emphasis added) (internal quotation marks and citations omitted); *Powers v. Dep't of Navy*, 97 M.S.P.R. 554, 562 (2004) (stating that "[t]he Board will consider *any relevant evidence* on the contributing factor question, *including* the strength or weakness of *the agency's reasons for taking the personnel action*, whether the whistleblowing was personally directed at the proposing or deciding official, and whether those individuals had a desire or motive to retaliate against the appellant" (emphases added)); *Dorney v. Dep't of Army*, 117 M.S.P.R. 480, 486 (2012) (same).

²¹⁰ *Dysert v. Fla. Power Corp.*, No. 1993-ERA-021, slip op. at 4 (Sec'y Aug. 7, 1995), *aff'd sub nom*, *Dysert v. United States Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997); *see also supra* text accompanying notes 143 to 147.

²¹¹ *Bobreski II*, ARB No. 13-001 (ARB Aug. 29, 2014).

²¹² *See, e.g., Peck*, ARB No. 02-028, slip op. at 9; *Warren v. Custom Organics*, ARB No. 13-004, ALJ No. 2009-STA-030, slip op. at 3 (ARB May 23, 2013); *Feldman v. Law Enft Assocs. Corp.*, 752 F.3d 339, 349-50 (4th Cir. 2014); *Bechtel*, ARB No. 09-052, slip op. at 12-18, *aff'd sub nom*, *Bechtel v. Admin. Rev. Bd., U.S. Dep't of Labor*, 710 F.3d 443, 449 (2d Cir. 2013); *Harp v.*

characterized the question as one of first impression,²¹³ and some of the amici supporting Palmer characterize *Fordham* as embodying longstanding law, implying that overturning *Fordham* would change the law.²¹⁴ Yet, neither *Fordham* nor any of the amici supporting Palmer have cited to a single case prior to *Fordham* in which this Board or a court of appeals held it was error for a factfinder to consider evidence of an employer’s nonretaliatory reasons for the adverse action, when the employer’s theory of the case is that the protected activity played no role at all. It is *Fordham* that attempted to “change” the law, not only by reading into the statute what isn’t there, but also by overturning decades of precedent from this Board and the federal courts of appeals.

2. Applying the AIR-21 burden-of-proof provision.

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee’s protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance.²¹⁵ For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable

Charter Commc’ns, Inc., 558 F.3d 722, 726-28 (7th Cir. 2009); *Graves v. MV Transp., Inc.*, ARB No. 14-045 ALJ No. 2013-NTS-002, slip op. at 2-3 (ARB July 23, 2015).

²¹³ *Fordham*, ARB No. 12-061, slip op. at 21.

²¹⁴ See Brief of Amici Curiae Rail Labor Div. of Trans. Trades Dep’t and Brotherhood of Locomotive Engineers and Trainmen at 17 (“*Were the Board to adopt what up to now has been the minority view*, complainants would be required to rebut management’s defense/motive evidence as part of proving the elements of a prima facie case This would eviscerate the burden that AIR 21 imposes on respondents.”); Br. of Amici Curiae Senators Charles Grassley and Ron Wyden and Representative Jackie Speier at 6 (“The Board is *now* considering whether to substitute its own judicially-created burdens of proof for the structure that Congress has enacted in 17 different laws” (emphasis added).); *id.* at 12 (“The immediate, devastating effect of such a *restructuring* for all 13 DOL-administered statutes would be to reduce protection by rolling back free speech rights more than forty years to 1973” (emphasis added).).

²¹⁵ The complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him. See *supra* note 74.

that the employer would have taken the same adverse action in the absence of the protected activity.

- A. The ALJ must determine whether it is more likely than not that protected activity was a contributing factor in the adverse personnel action, and to do so, the ALJ must consider all relevant, admissible evidence.

We have said it many a time before, but we cannot say it enough: “A contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’”²¹⁶ We want to reemphasize how low the standard is for the employee to meet, how “broad and forgiving”²¹⁷ it is. “Any” factor really means any factor. It need not be “significant, motivating, substantial or predominant”—it just needs to be a factor.²¹⁸ The protected activity need only play some role, and even an “[in]significant” or “[in]substantial” role suffices.

Importantly, if the ALJ believes that the protected activity and the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.²¹⁹ Thus, consideration of the employer’s nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the only reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.

This is why we have often said that the employee does not need to disprove the employer’s stated reasons or show that those reasons were pretext.²²⁰ Showing that an

²¹⁶ See, e.g., *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015) (quotation marks and citations omitted); *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011).

²¹⁷ *Lockheed Martin Corp. v. Admin. Rev. Bd, U.S. Dep’t of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013).

²¹⁸ *Araujo*, 708 F.3d at 158 (“This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.”) (citation omitted).

²¹⁹ See *Bechtel*, ARB No. 09-052, slip op. at 12 (noting that “a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity” (citation and internal quotations marks omitted) (alteration in original)).

²²⁰ *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12 (ARB Mar. 28, 2012). (“The ALJ also erred to the extent he required that [the employee] show “pretext” to refute [the employer’s] showing of nondiscriminatory reasons for the actions taken

employer's reasons are pretext can of course be enough for the employee to show protected activity was a "contributing factor" in the adverse personnel action.²²¹ Indeed, at times, the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason.²²² That is why a categorical rule prohibiting consideration of the evidence of the employer's nonretaliatory reasons for its adverse action might actually in some circumstances *undermine* a complainant's ability to establish that protected activity was a contributing factor.

Fordham appears to have expressed the worry that permitting consideration of the employer's nonretaliatory reasons at step one would amount to requiring the employee to disprove the employer's nonretaliatory reasons.²²³ But because "unlawful retaliatory reasons

against her."); *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006) ("Because, in examining causation, the 'ultimate question' is whether the complainant has proven that protected activity was a contributing factor in his termination, a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail. Of course, most complainants will likely attempt to prove pretext, because successfully doing so provides a highly useful piece of circumstantial evidence. But a complainant is not required to prove pretext, because a complainant alternatively can prevail by showing that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic" (citations, internal quotation marks, and footnotes omitted)).

²²¹ See *Bechtel*, ARB No. 09-052, slip op. at 13 ("[I]f a complainant shows that an employer's reasons for its action are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor.").

²²² See, e.g., *Deltek v. Dep't of Labor, Admin. Rev. Bd.*, ___ F. App'x ___, ___, 2016 WL 2946570, at *8 (4th Cir. 2016) ("In this case, application of the "contributing factor" standard turns critically on one key finding by the ALJ, affirmed by the Board: that the explanation proffered by Deltek for Gunther's termination was pretextual—or, more colloquially, not true."); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012) (noting that "indications of pretext," "an employer's shifting explanations for its actions," and "the falsity of an employer's explanation for the adverse action taken" are among the types of circumstantial evidence that the ALJ may consider when determining whether protected activity was a contributing factor in the adverse personnel action).

²²³ See *Fordham*, ARB No. 12-061, slip op. at 23 (claiming that "under this proof standard a complainant need not prove that the respondent's asserted reason for its action is pretext, *which would be necessary* as one means of prevailing if the respondent's evidence in support of its action was to be weighed against the complainant's causation evidence" (emphasis added)); see also NELA Brief at 8 (brief of one of the amici supporting Palmer arguing that "consideration of an employer's causation evidence when determining the contributing factor issue would require an employee" to disprove the employer's reasons); see generally *id.* at 12-13.

[can] co-exist with lawful reasons,”²²⁴ and because, in such cases, protected activity would be deemed a contributing factor, consideration of evidence of the employer’s nonretaliatory reasons when determining the contributing factor issue does *not* require the employee to disprove the employer’s reasons.

That is also why the term “weigh” when describing the ALJ’s task may well have added to the confusion.²²⁵ Since the “contributing factor” standard requires only that the protected activity play some role in the adverse action, the employer’s nonretaliatory reasons are not “weighed against” the employee’s protected activity to determine which reasons might be weightier.²²⁶ In other words, the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons. As long as the employee’s protected activity played some role, that is enough. But the *evidence* of the employer’s nonretaliatory reasons must be *considered* alongside the employee’s evidence in making that determination; for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. But, the ALJ never needs to compare the employer’s nonretaliatory reasons with the employee’s protected activity to determine which is more important in the adverse action.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence.²²⁷ One reason circumstantial evidence is so important is that, in

²²⁴ *Bobreski II*, ARB No. 13-001, slip op. at 17; *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 12 (ARB Sept. 26, 2012) (noting that “even if [the employer’s nonretaliatory reason] was a true reason, this conclusion does not rule out protected activity as a contributing factor in the termination of his employment”).

²²⁵ *Fordham*, ARB No. 12-061, slip op. at 2 (concluding that “the ALJ committed reversible error by *weighing* evidence offered by Fannie Mae in support of its affirmative defense that it would have taken the personnel action at issue in the absence of Fordham’s protected activity for legitimate, non-retaliatory reasons” (emphasis added)); *id.* at 16 (“The determination of whether a SOX complainant has met his or her burden of proving that protected activity was a contributing factor in the adverse personnel action at issue may not include the *weighing* of the respondent’s evidence supporting its statutorily-prescribed affirmative defense” (emphasis added)).

²²⁶ *See Fordham*, ARB No. 12-061, slip op. at 3 (“[A] respondent’s evidence of a legitimate, non-retaliatory reason or basis for its decision or action is not *weighed against* a complainant’s causation evidence in the determination of whether a SOX complainant has met his or her initial burden of proving “contributing factor” causation” (emphasis added).).

²²⁷ *See, e.g., Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan. 31, 2013); *DeFrancesco*, ARB No. 10-114, slip op. at 6; *cf. Bobreski II*, ARB No. 13-001, slip op. at 17 (noting that “[c]ircumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence”).

general, employees are likely to be at a severe disadvantage in access to relevant evidence.²²⁸ When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee’s protected activity played some role in the adverse action. So, for example, even though we reject any notion of a per se knowledge/timing rule,²²⁹ an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

We cannot emphasize enough the importance of the ALJ’s role here: it is to find facts.²³⁰ The ALJ must consider all the relevant, admissible evidence and make a factual determination, under the preponderance of the evidence standard of proof, about what happened: is it more likely than not that the employee’s protected activity played a role, any role whatsoever, in the adverse personnel action? If yes, the employee prevails at step one; if no, the employer prevails at step one. If there is a factual dispute on this question, as is usually the case, the ALJ must sift through the evidence and make a factual determination. This requires the ALJ to articulate clearly what facts he or she found and the specific evidence in the record that persuaded the ALJ of those facts.

B. The ALJ must determine whether the employer has proven, by clear and convincing evidence, that, in the absence of any protected activity, the employer would have taken the same adverse action.

If the complainant proves that protected activity was a contributing factor in the adverse personnel action, the ALJ must then turn to the hypothetical question, the employer’s same-action defense: the ALJ must determine whether the employer has proven, by clear and convincing evidence, that, “in the absence of” the protected activity, it would have taken the

²²⁸ See *Bechtel*, ARB No. 09-052, slip op. at 13 n.68.

²²⁹ See *supra* text accompanying note 161 to 169.

²³⁰ The statute delegates that determination to the Secretary, 42121(b)(2)(B) (“*The Secretary may determine that a violation has occurred . . .*” (emphasis added)), and through duly promulgated regulations, the Secretary has in turn delegated it to ALJs. See 29 C.F.R. § 1982.109; *id.* § 1979.109.

same adverse action.²³¹ It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.²³²

The standard of proof that the ALJ must use, “clear and convincing,” is usually thought of as the intermediate standard between “a preponderance” and “beyond a reasonable doubt”;²³³ it requires that the ALJ believe that it is “highly probable” that the employer would have taken the same adverse action in the absence of the protected activity.²³⁴ “Quantified, the probabilities might be in the order of above 70%”²³⁵

Again, as when making a determination at step one, the ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action;²³⁶ and again, it is crucial that the ALJ *find* facts and clearly articulate those facts and the specific evidence in the record that persuaded the ALJ of those facts.²³⁷

3. On remand, the ALJ Must Reconsider the Case.

We **REVERSE** and **REMAND** this case to the ALJ to reassess (1) the question of whether it is more likely than not that Palmer’s protected activity (the reporting of his injury on June 18, 2013) was a contributing factor in his termination; (2) if necessary, the question of whether it is highly probable that, even if Palmer had not reported his injury, Illinois Central would nonetheless still have terminated him; and (3) if necessary, the question of whether to award punitive damages and, if so, the amount. We limit our discussion to the most critical points.

²³¹ 49 U.S.C. § 42121(b)(2)(B)(iv); *see generally Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-14 (ARB Apr. 25, 2014).

²³² *Speegle*, ARB No. 13-074, slip op. at 11.

²³³ *See Addington v. Texas*, 441 U.S. 418, 423-24 (1979).

²³⁴ *See generally Speegle*, ARB No. 13-074, slip op. at 11-12; *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

²³⁵ *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978) (Weinstein, J.), *aff’d*, 603 F.2d 1053 (2d Cir.1979).

²³⁶ *See Speegle* ARB No. 13-074, slip op. at 11 (“The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee’s work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.”).

²³⁷ *See supra* text accompanying note 230.

A. Contributing Factor

Given our repudiation of *Fordham* and the vacated decision in *Powers*, we must reverse and remand this case. The ALJ's decision quotes extensively from our vacated decision in *Powers* and discusses *Fordham* and *Powers* as though they were binding on him.²³⁸ Given the conflicting nature of our decisions at the time, his attempt to apply those cases was understandable. However, applying *Fordham*, the vacated decision in *Powers*, or any case that relies on either of those decisions constitutes legal error.

Moreover, when discussing the contributing-factor question, the ALJ failed to discuss Illinois Central's evidence of its nonretaliatory reasons for terminating Palmer. In particular, the ALJ made no mention of the testimony of Noland and McDaniel explaining why they did what they did and their denials that Palmer's injury report had anything to do with it.²³⁹ To be clear, the ALJ *need not believe* either Noland or McDaniel, but he must consider their testimony. He could, for example, find their testimony to be self-serving and thus not credible or he could find that Klaus was the ultimate decisionmaker and so their testimony was not dispositive on the question of whether Palmer's injury report was a contributing factor in his termination. The ALJ must, however, consider that evidence.

Relatedly, the ALJ specifically stated that "the argument that [Illinois Central] had a 'legitimate business reason' to take the adverse action is inapplicable to FRSA whistleblower cases."²⁴⁰ Depending on what he meant by that statement, that too could be error. If what he meant is that a legitimate business reason, even if true, is by itself *insufficient* to defeat an employee's claim under the contributing-factor analysis, that would be correct, since "unlawful retaliatory reasons [can] co-exist with lawful reasons."²⁴¹ If what he meant, however, is that Illinois Central's "legitimate business reason" is irrelevant to that analysis, that would be clear error.

Moreover, the ALJ appears to have misunderstood what the phrase "inextricably intertwined" means.²⁴² For an adverse action to be "*inextricably intertwined*" with protected activity requires that it not be possible, even based on the employer's theory of the facts, to

²³⁸ D. & O. at 39-41.

²³⁹ Hearing Transcript (Tr.) at 316 (Noland testifying that "[the fact that Palmer had reported that injury] had no part in the decision); JX-1, at 51 (McDaniel responding "No, sir" to the question "did you base your recommendation in any way on the fact that Mr. Palmer had reported an injury on May 19, 2013); *cf. also* Tr. at 210 (Palmer's union representative Russum testifying that he was "not saying" that Palmer was fired because he reported an injury).

²⁴⁰ D. & O. at 39.

²⁴¹ *Bobreski II*, ARB No. 13-001, slip op. at 17.

²⁴² D. & O. at 41.

explain the basis for the adverse action without reference to the protected activity.²⁴³ If, for example, Palmer’s injury report on June 18th had led Illinois Central to investigate a potential rule violation and then to fire him because of *that* rule violation, then the protected activity (the reporting of the injury) would be “inextricably intertwined” with the adverse action (termination because of the rule violation that resulted in the very injury reported). Here, though, it is easy to explain the basis for the adverse action without reference to the protected activity. Illinois Central claims the basis for the adverse action was Palmer’s May 28th run-through mistake and the protected activity was an injury report that did not occur until three weeks later. The run-through mistake has nothing to do with the injury report.

By using the phrase “inextricably intertwined,” the ALJ might simply have meant that Palmer’s injury report and the termination were *intertwined*. If so, that would seem to suffice to show that the injury report played some role in the termination. If the ALJ believed that, then Palmer would have met his burden to show that the injury report was a contributing factor in his termination. However, the ALJ’s misunderstanding of the phrase “inextricably intertwined” and the cases on which he relied raises sufficient uncertainties to warrant a remand.²⁴⁴

Having said that, we want to emphasize that there is no requirement that the protected activity and adverse action be inextricably intertwined for an employee to prevail on the contributing-factor question. If, on remand, the ALJ concludes that it is more likely than not that Palmer’s injury report played some role in his termination—in essence, concludes that it is more likely than not that the run-through mistake (along with Palmer’s past discipline) was not the *only* reason for the termination—that is enough.

The ALJ’s decision does contain some hints that he considered Illinois Central’s evidence of its nonretaliatory reasons (i.e., Palmer’s run-through mistake and five previous disciplinary incidents): although the ALJ never mentions those reasons when discussing the contributing-factor question, he does refer to the “inconsistent application of and change in [Illinois Central’s] policies.”²⁴⁵ That is certainly relevant. But, by itself, that statement is insufficient to permit us to affirm here. Evidence of an employer’s inconsistent application of policies *can* provide circumstantial evidence that protected activity was a contributing factor in an adverse action.²⁴⁶

²⁴³ *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 15 (ARB May 31, 2013) (Corchado, J., concurring) (noting that protected activity and an adverse action are viewed as “inextricably intertwined” when “the basis for the adverse action [can]not be explained without discussing the protected activity”).

²⁴⁴ On this point, the ALJ may also have wrongly placed some kind of a burden on Illinois Central to show that the retaliatory and nonretaliatory reasons were separable. *See* D. & O. at 42 (“I agree with Complainant that Respondent has not met its burden of showing that the influence of legal and illegal motives cannot be separated.”).

²⁴⁵ D. & O. at 41.

²⁴⁶ *Bobreski II*, ARB No. 13-001, slip op. at 17.

But, again, if Illinois Central's inconsistent application of its policies persuaded the ALJ that Palmer's injury report was in fact a contributing factor in his termination, it is crucial that the ALJ state that explicitly.

In short, the errors in the ALJ's analysis require us to reverse and remand. Our inability to determine whether the ALJ would have found, under the correct legal standard, that Palmer's injury report was a contributing factor in his termination is compounded by the ALJ's failure to state explicitly what facts he found. For example, the ALJ wrote, "Claimant presented direct and circumstantial evidence showing [a list of things.]"²⁴⁷ But the ALJ never stated whether he found that list of things to be true—i.e., he never stated whether he *believed* the evidence showing those facts. Similarly, the ALJ said, "*Complainant in this case presented evidence showing Respondent knew of his protected activity as well as Respondent's acknowledgement that he was the only employee to be refused a waiver for his infraction.*"²⁴⁸ Again, while the ALJ seems to imply that he believed the evidence that Palmer presented, he doesn't actually say that.

Although we reverse and remand, we reiterate that it is the ALJ's task, not ours, to make the factual determination of whether it is more likely than not that Palmer's injury report was a contributing factor in his termination. The ALJ must make this determination based on his assessment of all the relevant evidence, including Illinois Central's evidence that the injury report played no role in the termination. Although the ALJ's decision would need to be supported by substantial evidence, the evidence presented in this case would, as best we can tell, likely permit a decision either way.

B. Same Action Defense

If the ALJ determines that Palmer has shown that it is more likely than not that his injury report was a contributing factor in his termination, the ALJ must determine whether Illinois Central has shown, by clear and convincing evidence (i.e., that it is highly probable), that it would have fired Palmer even if Palmer had not reported his injury.

In his Decision & Order, the ALJ failed to consider all of Illinois Central's evidence that it otherwise would have terminated Palmer even if he hadn't reported the injury. For one, the ALJ does not appear to have considered the full timeline of the events, and in particular, the fact that Illinois Central had already scheduled the formal investigation hearing before Palmer reported his injury. Indeed, if on June 10, 2013, the hearing had not been postponed, it would have occurred on June 12, 2013, six days *before* the injury report. It could of course be that Palmer would have received a "waiver" along with a suspension (for, say, 45 or 60 days) if not for the injury report. But, the fact that Illinois Central was well along the way to disciplining Palmer is certainly relevant to the question of what it would have done if Palmer had not

²⁴⁷ D. & O. at 41.

²⁴⁸ *Id.* at 42; *see also id.* ("*Complainant presented direct evidence that he was the only employee to be terminated for such an infraction.*").

reported his injury: it definitely would have done everything it did in fact do prior to Palmer's June 18th injury report.

The ALJ also appears not to have considered all of the other employees Illinois Central claimed were "similarly situated" to Palmer. This includes in particular W.P. and T.S., two former Illinois Central employees who allegedly did not engage in any protected activity but were also both fired for having disciplinary records comparable to Palmer's. The ALJ stated that "Complainant was the only employee not offered a waiver for a switch run-through,"²⁴⁹ and the evidence does appear to support that conclusion. But, it begs the question of whether employees who had a switch run-through are the only ones who can be viewed as "similarly situated" to Palmer. We make no determination on this question, but on remand, the ALJ should explain which employees he views as "similarly situated" and why.

Moreover, the ALJ appears at times to conflate the "contributing factor" question with the same-action defense. At one point while assessing Illinois Central's same-action defense, for example, the ALJ stated that "[b]ased on the email evidence, it is clear not only that McDaniel, Nolan, and Klaus knew of [Palmer's] injury, but that the injury was a factor in his termination."²⁵⁰ While this statement addresses the contributing-factor question, it does not speak directly to Illinois Central's same-action defense. In fact, it is only if Palmer's "injury was a factor in his termination" that an ALJ even needs to evaluate the employer's same-action defense at all. The question in the same-action defense requires the ALJ to determine whether Illinois Central *would have* terminated Palmer *even if Palmer had not reported an injury*, not whether the injury report was a factor in his termination.

C. Punitive Damages

Finally, if the ALJ determines on remand that Illinois Central failed to establish its same-action defense by clear and convincing evidence, he should reassess whether to award punitive damages, and if so, how much. Punitive damages might well be appropriate here—we make no determination on that question—but the ALJ failed to explain his reasons sufficiently in light of the factors that must be assessed in determining both whether to award punitive damages and the amount.²⁵¹

²⁴⁹ D. & O. at 45.

²⁵⁰ *Id.*

²⁵¹ See, e.g., *Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8-10 (ARB Sept. 8, 2016).

CONCLUSION

The ALJ's reliance on our decisions in *Fordham v. Fannie Mae*²⁵² and *Powers v. Union Pacific Railroad Company*²⁵³ was legal error. We therefore **REVERSE** and **REMAND** this case to the ALJ to reassess the question of whether Palmer demonstrated that his June 18, 2013 injury report was a contributing factor in his termination, and to do so in light of the proper legal standard. On remand, if the ALJ finds that Palmer's June 18, 2013 injury report was a contributing factor in his termination, the ALJ should also reassess the question of whether it is highly probable that, even if Palmer had not reported his injury, Illinois Central would nonetheless still have terminated him. Finally, if the ALJ finds both that Palmer's June 18, 2013 injury report was a contributing factor in his termination and that Illinois Central would not have otherwise terminated him, the ALJ should reassess the question of whether to award punitive damages and, if so, the amount.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado concurring:

Introduction and Points of Agreement

Given that we are reversing *Fordham*, I agree with the cautious approach of remanding this matter to the ALJ to make further clarifications and findings consistent with our remand order. In our remand, we do not make new law but rely on the law as it existed for many years until October 2014, when *Fordham*²⁵⁴ was issued. The *Fordham* decision contradicts two

²⁵² ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014).

²⁵³ ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 24 (ARB Apr. 21, 2015) (en banc) (reissued with full dissent).

²⁵⁴ The *Fordham* majority unequivocally announced a clear-cut evidentiary rule that an employer's explanations for its actions cannot be used against the employee when the ALJ is considering whether protected activity contributed to the employer's actions. Eleven times, the *Fordham* majority stated one way or another that a respondent's evidence should not be "considered" in deciding "contributing factor." See *Fordham*, ARB No. 12-061, slip op. at 3, 22, 24, 26 (including n.52), 28-29, 30, 33, 35 at n.84, 37. Cementing this clear-cut rule, the *Fordham* majority also said that the contributing factor should be decided in "disregard" of a respondent's reasons for its actions *Id.* at 3. Then using the terms "disregard," "examined," "presented," "weigh," and other terms, the

decades of precedent,²⁵⁵ including *Bobreski II*,²⁵⁶ where the conflicting causation evidence from both sides factored into determining whether protected activity contributed to an unfavorable employment action.²⁵⁷ To be clear, our decision does not rely on the *McDonnell Douglas*

Fordham majority reaffirmed more than a dozen times that the respondent's reasons for its employment actions cannot dissuade the ALJ from finding that protected activity was a contributing factor in the employment action. *Id.* at 2, 3, 16, 17, 21, 22-23, 23, 24, 25, 26, 31, 31-32, 32 at n.74, 35, 35 at n.84.

²⁵⁵ *Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022, slip op. at 2 n.3, 4 (ARB Feb. 26, 2013) (the Board unanimously affirmed an ALJ's rejection of causation based on the complainant's insufficient evidence and the employer's evidence of "serious violations" but expressly declined to review the ALJ's ruling on the "affirmative defense"); *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at 2, 3 (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); *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007, slip op. at 5-6 (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, slip op. at 5-7 (ARB Oct. 17, 2012) (unanimous three-judge panel affirmed summary dismissal of a claim while relying on the employer's reasons); *Bechtel*, ARB No. 09-052, slip op. at 3, 11, n.60, 14-15. See also *Addis v. Exelon Nuclear Generation Co., LLC*, ARB No. 05-118, ALJ No. 2004-ERA-023, slip op. at 6 (ARB Oct. 31, 2007) (both the ARB and the Seventh Circuit Court of Appeals unequivocally dismissed the complainant's case solely on the issue of contributing factor and they did so by considering the "entire record"), *aff'd*, *Addis v. U.S. Dep't of Labor*, 575 F.3d 688 (7th Cir. 2009). See *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 21-24 (ARB Sept. 28, 2015) (Corchado, J., dissenting) (discussing ARB and federal court precedent).

²⁵⁶ In *Bobreski II*, the Board explained how the ALJ must avoid fragmenting relevant evidence to determine the causation question but must view the evidence as a whole. In a rare case, the Board reversed the ALJ's finding on the question of contributing factor as well as the question of clear and convincing. The Board did not and could not reverse the ALJ's finding by simply looking at Bobreski's evidence. Instead, the Board necessarily examined what the ALJ said about the employer's evidence on the question of causation. Had there been a material conflict in the evidence as to the role that the protected activity played, the Board *could not reverse* the ALJ. The only reason that the Board could reverse was by finding that the ALJ had resolved the material conflicts in the parties' causation evidence in such a way as to support a finding for Bobreski as a matter of law. The ALJ's ruling on the employer's causation evidence was *necessary* to the Board's ultimate reversal on the causation question.

²⁵⁷ Instead of following or even acknowledging this ARB precedent, the *Fordham* majority reached for a lone federal court decision that relies on nonexistent "per se" language in a statute adjudicated by a Board overseeing federal employment appeals. Prior to the *Fordham* decision, the Board cited to that one federal case, *Kewley*, only three times and never to advance the *Fordham* evidentiary rule. See *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 8 (ARB Apr. 25, 2013); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029A, ALJ No. 2005-ERA-006, slip op. at 10, n.69 (ARB Jan. 31, 2013) (Corchado, J., concurring); *Smith*

framework as the causation test for whistleblower claims. Some parties have created a false dilemma that we must choose between *Fordham* or *McDonnell Douglas*. This false dilemma seems based on a failure to appreciate that (1) the courts do not apply *McDonnell Douglas* after a final trial on the merits²⁵⁸ and (2) there is third choice: the Board's law prior to *Fordham* that does not rely on *McDonnell Douglas*.

I agree with many points made in the majority decision, many of which we have made before. First and most important, contributing factor means protected activity was an actual factor (influence) in the employer's unfavorable employment action.²⁵⁹ Second, contributing factor is any factor, small or big, that actually influenced the employer's actions, regardless of how many other influences there were.²⁶⁰ Third, once an ALJ decides that protected activity contributed, no number of legitimate reasons can undo that finding, not even a truckload of reasons—*once that causation finding is settled by the ALJ*. Until that finding is settled, the ALJ approaches the causation question with a blank slate to determine what caused the employer to do what it did. Fourth, *Fordham* is plainly wrong and inconsistent with the FRSA and AIR-21 statutes. Fifth, AIR-21 procedures changed the *Mt. Healthy*²⁶¹ standards of proof by lowering complainant's standard from "motivating factor" to "contributing factor" and raising the employer's affirmative defense standard from "preponderance" to "clear and convincing." I agree that the employee need not prove that his employer had a motive *to retaliate* or had animus or that the employer's non-retaliatory reasons were pretext.²⁶² As the majority explains in some detail, what the complainant *must prove* to succeed on a whistleblower claim differs from what the complainant *may prove* to persuade the fact finder (the ALJ) that protected activity indeed contributed to unfavorable employment action. I agree with some (but not all) of the discussion of the more intricate nuances of whistleblower law, but the simplicity of the FRSA statute should not be overlooked as to the causation question.

The Significance of the Substantive Anti-Retaliation Provisions

As stated in the majority decision, the ALJ found for the employee on the question of contributing factor by relying, to some degree, on the Board's decisions in *Fordham* and *Powers*.

v. Duke Energy Carolinas LLC & Atl. Grp., ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. 6-7 (ARB June 20, 2012).

²⁵⁸ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-511 (1993) (*McDonnell Douglas* framework no longer relevant after the case is tried to the trier of fact); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (same).

²⁵⁹ *Bobreski II*, ARB No. 13-001, slip op. 16.

²⁶⁰ *Franchini*, ARB No. 11-006, slip op. at 12.

²⁶¹ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

²⁶² *Bechtel*, ARB No. 09-052, slip op. at 13.

As the majority explains, we reject *Fordham*. *Powers* has been withdrawn. The majority begins its legal analysis with the AIR-21 procedures, but I begin with the even more significant substantive procedures.

The first reason for rejecting *Fordham* lies at the beginning of the FRSA whistleblower statute and every whistleblower statute adjudicated by the ARB. FRSA and every whistleblower statute begin with anti-retaliation provisions that prohibit employers from treating whistleblowers unfavorably “in whole or in part”²⁶³ due to (or “because of”²⁶⁴) protected activity. There is no equivocation in these prohibitions; they plainly constitute laws that say “may not” (as in “shall not”). Consequently, whistleblower complainants appearing before the ARB seek redress because an employer allegedly violated the anti-whistleblower prohibitions. Straightforwardly, these prohibitions mean that the employer’s mental processes and reasons for acting against a whistleblowing employee are *the central issue* in deciding the contributing factor (causation) element of whistleblower claims.

As the majority opinion explains in Section 2 (“Discussion”), the ALJ’s job is to consider any and all relevant evidence in deciding what caused the employer to act against the whistleblower complainant. The employee will argue that protected activity contributed to the unfavorable employment action and the employer will deny that it did. In addition to its denial, the employer will attempt to explain why it did what it did. All of this is necessarily relevant to the ALJ’s ultimate finding as to what the ALJ believes occurred and whether the protected activity played *any role*. As the majority decision explains, the ALJ does not “weigh” or count the employer’s reasons to see if they outweigh or outnumber the employee’s allegation of unlawful discrimination. But the ALJ does weigh the logic, persuasiveness, and credibility (reliability and truthfulness) of the conflicting evidence to make fact findings about what the ALJ believes occurred. The ALJ has to decide which way the conflicting evidence preponderates or, in other words, which side is more convincing as to the role that protected activity played, if any, in the employer’s employment decisions. It is simply baffling to see arguments that an employer’s reasons are irrelevant when the ALJ is deciding why the employer did what it did.

The AIR-21 Procedures

²⁶³ For decades, the courts have understood that phrase “in whole or in part” to mean “any factor, even the slightest significance.” *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506-08 (1957). This mirrors the plain meaning of “contributing factor” standard used in FRSA’s procedural provisions (Section 20109(d)) and in AIR-21.

²⁶⁴ Most of the whistleblower statutes under the ARB’s jurisdiction use the word “because”—that an employer may not discriminate against an employee “because” of protected activity. *See, e.g.*, 15 U.S.C.A. § 2087(a)(2014) (Consumer Product Safety Act); 18 U.S.C.A. § 1514A(a)(2014) (Sarbanes-Oxley Act of 2002); 21 U.S.C.A. § 399d(a)(2014) (Food Safety Modernization Act); 49 U.S.C.A. § 31105(a)(2014) (Surface Transportation Assistance Act); 49 U.S.C.A. § 42121(a)(2014) (AIR-21). But these whistleblower statutes define the causation standard as “contributing factor” in their statutory “procedures” by incorporating the AIR-21 procedures.

Parties arguing for the novel *Fordham* model conspicuously bypass the substantive prohibitions to advance new interpretations of the AIR-21 procedures and transform “causation” into a jumbled concept of “contributing factor” that resembles a presumption rather than an actual fact finding. No *Fordham* proponent explains the nature of this “causation” finding (inference, presumption, actual finding of causation, or something else) and they leave many questions unanswered. For example, in analyzing the employer’s affirmative defense, is the ALJ required to then ignore the employee’s contributing factor evidence? If so, this improperly converts the employer’s affirmative defense into a personnel hearing where the employer merely justifies its decision under a higher burden of proof. But, in my view, the safety-sensitive whistleblower statutes like FRSA deliberately make it difficult for employers to prove what it *would have done* after extricating *the influence* of whistleblower retaliation from the intertwined pile of reasons leading to the unfavorable employment action. The question is not “step two” to determine only whether the employer has strong reasons for its actions but also whether it has strong, clear evidence of what it *would have done*. Congress obviously intended FRSA whistleblower victims to win unless the employer proves a very strong affirmative defense, which some might see as leading to a windfall in some cases.²⁶⁵

In any event, contrary to the *Fordham* proponents’ view, the AIR-21 procedures continue along the exact same rail as the substantive anti-whistleblower provisions. AIR-21 provides that a “violation” can only occur if protected activity “contributed” to an unfavorable employment action.²⁶⁶ Of course, the word “violation” means a violation of the substantive anti-retaliation provision and the causation standard is the same (“in whole or in part” and “contributing factor”). In the substantive anti-retaliation provision, Congress unequivocally declared it a violation of the law when employers allow protected activity to contribute to unfavorable actions, regardless of whether the Secretary is procedurally required or permitted to find a violation of the law under the AIR 21 procedures.²⁶⁷ Again, the simplicity of the word

²⁶⁵ Arguably, and for public safety reasons, Congress intended FRSA whistleblowers to have an advantage that other discrimination victims do not have, such as in Title VII cases where the employer need only prove its affirmative defense by a preponderance of the evidence. To elaborate, assume that an employer presents the same exact reasons for its affirmative defense in Title VII and FRSA cases. The employer’s higher standard of proof in whistleblower cases (clear and convincing) may mean that FRSA whistleblower victims will win more often and receive a full damage award while Title VII victims will lose (under a preponderance standard) and only get attorney’s fees. This difference in the standard of proof may explain the reason Congress allows Title VII victims to recover attorneys’ fees even if they lose under a lower standard of proof for employers’ affirmative defense. After all, if a FRSA employer proves in rare cases by clear and convincing evidence that the same result would have occurred, arguably, the employee should have known the significant risk of proceeding to trial on a whistleblower claim. But ALJs and courts must correctly understand that the clear and convincing standard is truly a high standard. If the clear and convincing standard is applied lower than Congress intended, employees will be reluctant to come forward with safety concerns at the public’s peril.

²⁶⁶ 49 U.S.C. § 42121(b)(2)(B)(iii).

²⁶⁷ Inexplicably, the *Fordham* proponents try to “wag the dog with the tail” and water down the substantive anti-retaliation provision by arguing that an alleged ambiguity in the AIR-21 procedures

“contributing,” that a factor *actually* “played a role” in the employer’s actions against the employee, makes relevant the employer’s explanations for why it did what it did.

The obvious reason an ALJ must consider both sides in deciding “causation” is because the employer’s decision-making is a metaphysical mental process and neither the complainant nor the employer can show the ALJ the actual mental processes that occurred. The invisible influences on the decision-maker’s thoughts cannot be displayed on a movie screen or downloaded as computer data onto a computer monitor. Instead, at the evidentiary hearing, the ALJ faces a complainant trying to prove he was the victim of unlawful mental processes and the employer who denies that protected activity influenced any part of the mental process that led to the employment action in question. The complainant might rely on temporal proximity, inconsistent employer policies, disparate treatment, e-mails, and witness testimony, among other evidence, to prove circumstantially that protected activity contributed. The employer will do the same to prove that protected activity did not contribute. It is this evidence battle that the ALJ must evaluate together to decide as best as possible what the truth is. But whether the causation evidence consists of memoranda, documents, depositions, hearing testimony, etc., all causation evidence presented to the ALJ will be about the influences that did or did not factor into *the employer’s mental processes* that led to the ultimate decision against an employee.

Until the ALJ decides the contributing factor issue, the causation question remains open and unproven. As the employee offers evidence, the ALJ will determine whether it has any tendency to show that protected activity contributed to the adverse action and, if so, will admit the evidence into the record without deciding the ultimate question of contributing factor until all the evidence has been submitted by both sides.²⁶⁸ Likewise, when the employer offers evidence

permits the Secretary to decide whether an employer did or did not violate the law when the employer acts against an employee “in whole or in part” due to protected activity. Consequently, the *Fordham* proponents see the violation label as meaningless. But the violation of the law is not meaningless and, in fact, the violation is the *sole* and *necessary* causal link that establishes liability unless the employer can prove its affirmative defense by clear and convincing evidence. Undoubtedly, it is the employer’s violation of a safety-sensitive whistleblower law that prompted a *majority* of Congress and the President to impose such a high standard of proof on employers under FRSA and other safety-sensitive whistleblower laws. The *Fordham* proponents’ semantic fencing with the AIR-21 procedures presumably hides an implicit recognition of the due process problems with labeling an employer a “law violator” without permitting the employer to explain the reasons for its actions. See also *Fordham*, slip op. 46-47 (Corchado, J., concurring/dissenting). Moreover, the Board should avoid minimizing the significance of the violation finding where other U.S. Departments also monitor the progression of a whistleblower claim. *Supra* at 23-29, see 49 U.S.C. § 20109(i) and (j) (expressly discussing the monitoring by the Secretary of Transportation and the Secretary of Homeland Security). See also 49 U.S.C. § 42121(b)(1) (Secretary of Labor must notify the Administrator of the Federal Aviation Administration). In the end, we must remember that the safety-sensitive whistleblower laws transcend the interests of the single employee suing his or her employer as these laws are written to protect the public who travel in trains, planes, public highways, etc.

²⁶⁸ The ALJs are the triers of fact and make the first call as to what evidence is relevant to the question of causation. 29 C.F.R. § 1982.110(b). *Cf. Marrone v. Miami Nat. Bank*, 507 So.2d 652,

to show that protected activity was not a contributing factor and that some other reasons were, the ALJ will again consider only whether the evidence may be admitted into the record as having “any tendency” of making “contributing factor” more or less probable. That is the definition of relevance.²⁶⁹ Evidence rules for hearings do not change because Congress dropped the causation standard from “but for” or “motivating factor” to “contributing factor.” Once evidence is admitted into the record, absent a limiting instruction, the parties and the trier of fact may refer to it freely to decide the ultimate questions of causation, affirmative defenses, and damages.²⁷⁰ To be clear, the complainant’s burden of proving “contributing factor” is slight, but his or her evidence (of contributing factor) must persuade the ALJ and withstand the employer’s counter-evidence (of no contributing factor). Proving “contributing factor” is not really step one; it is simply the employee’s case-in-chief. Here it is unclear whether the ALJ truly considered the evidence from both sides or followed the clear-cut prohibition announced in *Fordham* and the unclear evidentiary model announced in *Powers*.

LUIS A. CORCHADO
Administrative Appeals Judge

Judge Royce dissenting.

Due to the exigencies of one Judge’s departure from the Board, the dissenting opinion will follow.

JOANNE ROYCE
Administrative Appeals Judge

653 (Fla. App. 3rd Dist. 1987) (“In a non-jury case, it is the trial court’s duty to reconcile conflicts in the testimony, to judge the credibility of witnesses, and to determine the weight of the evidence presented.”).

²⁶⁹ “Relevant 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.” 29 C.F.R. § 18.401 (emphasis added).

²⁷⁰ See, e.g., Florida Standard Jury Instruction 301.1 and 301.2 (all admitted evidence available for witness testimony during trial and the jury upon deliberation).

Judge Royce, concurring, in part, and dissenting, in part:

Ostensibly overturning *Fordham*, the key holding of the plurality is nevertheless entirely consistent with the spirit, if not the letter, of *Fordham*. The plurality states that, in the first step of the AIR-21 two-step burden-of-proof provisions, “the employer’s nonretaliatory reasons are not ‘weighed against’ the employee’s protected activity to determine which reasons might be weightier.”²⁷¹ *Fordham* similarly held that an “employer’s evidence . . . of a legitimate, non-retaliatory basis or reason for its action is not weighed against the Complainant’s causation evidence” in the first step.²⁷²

Both opinions address the principal and recurring error that *Fordham* sought to rectify; namely, the tendency of factfinders to indiscriminately weigh a respondent’s evidence of nonretaliatory reasons against a complainant’s evidence of retaliation at the first “contributing factor” step. This practice will almost always result in error because, as *Palmer* recognizes, “employees are likely to be at a severe disadvantage in access to relevant evidence” of causation.²⁷³

Whistleblowers rarely have direct evidence because managers seldom write or inform other employees of their intent to retaliate. Supportive witness testimony is also much harder to come by—while theoretically complainants can subpoena employee witnesses, those employees may be reluctant to testify against their employer or fear retaliation themselves.²⁷⁴ Managers, on the other hand, have far greater access to documents and witnesses supporting their personnel decisions.²⁷⁵ Consequently, employers typically are able to adduce not only direct evidence but significant amounts of it, in contrast to employees who generally must prove retaliation with circumstantial evidence, and less of it. This evidentiary imbalance all too often misleads factfinders into prematurely dismissing cases either by setting a complainant’s evidentiary bar too high or disregarding his or her pertinent causation evidence.

²⁷¹ *Supra* at 55.

²⁷² *Fordham*, ARB No. 12-061, slip op. at 35, n.84.

²⁷³ *Supra* at 55.

²⁷⁴ *See Remusat v. Bartlett Nuclear, Inc.*, 1994-ERA-036, slip op. at 5 (Sec’y Feb. 26, 1996) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) (“[t]he danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage.”)).

²⁷⁵ *See* 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20); 133 CONG. REC. S1932 (daily ed. Feb. 5, 1987) (Senator Levin remarks introducing S. 508, the Whistleblower Protection Act of 1987).

As demonstrated below, Congress expressly developed the distinctive two-step whistleblower burden-of-proof framework to address this imbalance in access to relevant evidence. The ARB and courts have long interpreted this evidentiary framework in ways consistent with the clear Congressional goals of encouraging whistleblowing. The two-step whistleblower framework has variously been described as “broad and forgiving,” “much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard,” and “employee-friendly.”²⁷⁶ The plurality likewise ruled “[w]e want to reemphasize how low the standard is for the employee to meet.”²⁷⁷ *Palmer* correctly reaffirmed other long-standing precedent interpreting the whistleblower evidentiary framework stating that “unlawful retaliatory reasons [can] co-exist with lawful reasons.”²⁷⁸ For, as the ARB has ruled countless times, a complainant can prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct.”²⁷⁹ Despite these imperatives, however, many factfinders continue to shove all of an employer’s evidence of legitimate reasons into step one and precipitately dismiss a complaint (and complainant’s evidence), once convinced that legitimate reasons for discipline exist. This is error and a patent violation of the two-step statutory language and purpose.

Factfinders, similarly, tend to misapply the two-step whistleblower framework when analyzing evidence of pretext. Established precedent, rightfully reaffirmed by the plurality, holds that a complainant need not *disprove* an employer’s reasons for adverse action to prevail at the “contributing factor” step. Nevertheless, in practice when a complainant fails to disprove a respondent’s legitimate reasons by a preponderance of the evidence, ALJs often dismiss the complaint without properly considering a complainant’s other evidence of causation. In effect, therefore, factfinders are requiring complainants to “disprove” respondent’s reasons or risk dismissal.

Because judicial interpretations of the statute failed to curb the tendency of factfinders to improperly weigh the parties’ evidence, *Fordham* articulated a mechanistic rule whereby ALJs were required to view complainant’s evidence of causation in isolation (with no distractions from evidence of legitimate reasons) to determine whether a complainant adduced sufficient evidence to *infer* contributing factor. *Fordham* urged ALJs to determine at the first step whether the

²⁷⁶ See *Lockheed Martin Corp. v. Admin. Review Bd.*, U.S. Dep’t of Labor, 717 F.3d 1121, 1136 (10th Cir. 2013); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159, 162 (3d Cir. 2013); *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999)(the 1992 amendments aim, in part, “to make it easier for [ERA] whistleblowers to prevail in their discrimination suits . . .”).

²⁷⁷ *Supra* at 53.

²⁷⁸ *Supra* at 58.

²⁷⁹ See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006) (discussing contributing factor test under the whistleblower provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514(A) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

intrinsic weight of the complainant's causation evidence was enough to demonstrate or infer contributing factor.²⁸⁰

Palmer purports to overrule this formula with the prepossessing holding that a factfinder may consider any and all relevant, admissible evidence at step one. Theoretically, it is entirely possible to properly apply the two-step whistleblower framework in the context of conventional evidentiary law, i.e., that a trier of fact can consider any evidence in the record. But because an employer's evidence of reasons tends to overwhelm the evidence complainant can adduce, thereby confusing factfinders, the *Fordham* rule barred consideration of certain evidence in the first step.

The principle tenet *Fordham* sought to communicate was that, once the employee proves, through inference or otherwise, that the employer gave some small weight to protected activity in deciding the adverse action, no amount of evidence of respondent's legitimate reasons can rebut complainant's proof.²⁸¹ Certainly, as the plurality explains, an employer's alleged legitimate reasons should not be weighed against (or compared to) a complainant's protected activity at the first step. But nor should all the evidence supporting a respondent's legitimate reasons be weighed indiscriminately against the evidence supporting a complainant's theory of causation. Either practice completely undermines the careful statutory bifurcation by which Congress sought to even the evidentiary playing field to benefit employees and thereby promote the goal of protecting whistleblowers and the free flow of information.

In the final analysis, both the plurality and *Fordham* struggle with the same challenge, which has bedeviled courts for decades, of trying to develop an objective, concrete framework for evaluating evidence pertaining to the inherently subjective employer mind-set regarding whether retaliation factored, in any way, into an employer's personnel decision. Both opinions

²⁸⁰ For example, knowledge plus close temporal proximity should nearly always be sufficient to infer contributing factor. Under this commonsense principle, evidence proving that a respondent took adverse action shortly after protected activity, of which it was aware, gives rise to a rational inference that the protected activity was a contributing factor to the adverse action. This inference is analogous to the inferential presumption that the Supreme Court created in Title VII disparate-treatment cases whereby intentional discrimination can be presumed from four facts: that the plaintiff was protected by Title VII, applied and was qualified for the job, was rejected, and the job remained open. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The stated goals behind enactment of the whistleblower laws, along with an employee's severe disadvantage in access to relevant evidence, similarly warrant the evidentiary presumption embodied in a knowledge/temporal proximity rule.

²⁸¹ See *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 33 (ARB Aug. 29, 2014) (*Bobreski II*) (Royce, J., concurring) ("Assuming the complainant's evidence is sufficient to sustain proof of 'contributing factor' causation; the respondent's non-retaliatory reason for its action may not be weighed against the complainant's evidence of causation but instead must be weighed at the second affirmative defense stage under the higher clear and convincing evidence standard.").

explicitly recognize that step one (“contributing factor” step) and step two (“same-action defense”) are distinct factual questions.²⁸² The plurality curiously submits that “[o]ne of *Fordham*’s fundamental errors” was its failure to recognize that step one and step two are asking different factual questions. On the contrary, *Fordham* stressed that “[d]ifferent ultimate facts are at issue in the two separate stages of proof;” indeed these very differences are the animating source of the *Fordham* rule that principally sought to address the improper conflation of the two steps.²⁸³

As *Fordham* explained, early whistleblower statutes were interpreted to require a complainant to prove that protected activity was a “motivating,” “substantial,” or “predominant” factor in the adverse action. Under these standards, “the *weighing* of the parties’ respective causation evidence under the preponderance of the evidence test” was *required*.²⁸⁴ But this weighing or comparing of respondent’s reasons against complainant’s evidence of causation is exactly what the “contributing factor” statutory provision was designed to eliminate. Regrettably, this indiscriminate weighing of evidence in the first step continues. *Palmer*’s innocuous ultimate holding—that a factfinder may consider any and all relevant, admissible evidence at step one—will do little to check the frequency with which factfinders continue to weigh evidence without attention to statutory guidelines.

1. AIR-21 two-step whistleblower burden-of-proof provisions are the same as those in the 1989 WPA and should be interpreted consistently

The plurality goes to considerable effort to undermine *Fordham*’s reliance on the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989)(1989 WPA) and its detailed legislative history as a guide to the interpretation of the AIR-21 burdens of proof.²⁸⁵ But the ARB and the circuit courts have repeatedly cited both the WPA and its legislative history to assist in interpreting the very similar burdens of proof contained in the ERA amendments and all the DOL-administered whistleblower laws enacted thereafter.²⁸⁶ Indeed, just last year

²⁸² *Supra* at 22

²⁸³ *Fordham*, ARB No. 12-061, slip op. at 24.

²⁸⁴ *Id.*

²⁸⁵ *Supra* at 35-52. The plurality concludes that “AIR-21 copied not from the WPA, but instead from the ERA.” *Supra* at 39. Of course it did—both whistleblower provisions are administered by the DOL, so naturally Congress would look to provisions similarly administered. This does not detract from the argument that the 1992 ERA amendments (which AIR-21 adopted) should be interpreted consistently with the 1989 WPA.

²⁸⁶ *See Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 8 (ARB Apr. 25, 2013): “The ARB relies on the interpretation of ‘contributing factor’ specified by the court of appeals in *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). In *Marano*, the court of appeals interpreted ‘contributing factor’ in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 1221(e) (1), to mean ‘any factor which, alone or in

OSHA’s comments to the final FRSA rules contained a definition of “contributing factor” explicitly citing the 1989 WPA.²⁸⁷

The plurality concedes that “the text of the 1989 WPA is very similar to the 1992 ERA amendments,”²⁸⁸ but fails to grasp the significance of the similarity. Because of the difficulty of proving retaliation, Congress and the courts have long struggled with developing effective formulas for analyzing evidence.²⁸⁹ But Congress established the particular bifurcated “contributing factor”/“clear and convincing” framework *for the first time* in the 1989 WPA. The long and detailed WPA legislative history demonstrates that Congress included the operative language contained in WPA’s new framework—specifically an employee’s burden to demonstrate “contributing factor” in step one and the burden switching to the employer to prove its affirmative defense by “clear and convincing evidence” in step two—only after years of investigations, hearings, deliberation, and compromise.

After an 18-month investigation into the handling of federal employee whistleblower complaints, the Subcommittee on Civil Service of the Committee on Post Office and Civil Service held a series of hearings on whistleblower protection in early 1985.²⁹⁰ On January 22,

connection with other factors, tends to affect in any way the outcome of the decision.’ 2 F.3d at 1140. ‘Any weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.’ *Id.* The federal courts have consistently applied this definition of ‘contributing factor.’ *See, e.g., Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep’t of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). In proving contributing factor, a complainant can show ‘either direct or circumstantial evidence’ of contribution. *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012);” *see also* S. Rep. No. 107-146, at 19 (“Although current law [the WPA] protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies.”).

²⁸⁷ A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Araujo*, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1140 (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). Final Rule 80 Fed. Reg. 69,115, 69,122 (Nov. 9, 2015).

²⁸⁸ *Supra* at 37.

²⁸⁹ *See, e.g.,* 133 CONG. REC. 3094 (1987) (Senator Levin remarks introducing S. 508, the Whistleblower Protection Act of 1987); *McDonnell Douglas Corp.*, 411 U.S. 792; *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981) (adapting *Mt. Healthy* to § 8(a)(3) of the NLRA or retaliation for engaging in union activities, the NLRB held: “First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”).

²⁹⁰ H. REP No. 100-274, at 15 (1987).

1986, the same Subcommittee introduced H.R. 4033, the “Whistleblower Protection Act of 1986.” Two more days of hearings followed on February 20 and 21, 1986. H.R. 4033 contained a two-step, dual causation framework, reflecting the *Mt. Healthy* framework, but the burden of proof for employees was “substantial evidence”—explicitly lower than the “preponderance of the evidence” burden.²⁹¹ Employers, on the other hand, were required to prove “by a preponderance of the evidence, that such personnel action was taken [] solely for” reasons independent of protected activity.”²⁹² A statement submitted by a witness testifying at the February 21, 1986 hearing on H.R. 4033 explained the employee’s new burden as follows:

Instead of having to present a “preponderance of the evidence” as currently, under this change the employee wins when the whistleblowing reprisal charges are supported by “substantial evidence.” This is an excellent improvement and represents exactly what is needed—strengthening the rules that define the right to dissent. Unfortunately, since most Board decisions take an overkill approach to rejecting whistleblower complaints, the

²⁹¹ See H.R. 4033, 99th Cong. § 1221(d)(2)(B)(1986). The Supreme Court interpreted this standard to mean “such relevant evidence as a mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938).

²⁹² H.R. 4033 states in relevant part:

(d)(1) Subject to paragraph (2), the Board shall order such corrective action as the Board considers appropriate if the Board determines that the individual has demonstrated that a prohibited personnel practice has occurred, exists, or is to be taken, by-

(A) substantial evidence, in the case of a prohibited personnel practice described in section 2302(b)(8);

or

(B) a preponderance of the evidence, in the case of a prohibited personnel practice other than one described in section 2302(b)(8).

(2) Corrective action under paragraph (1) shall not be

(A) if the personnel action involved is justified on a basis independent of the prohibited personnel practice referred to in paragraph (1); and

(B) if the agency demonstrates, by a preponderance of the evidence, that such personnel action was taken, is or to be taken, solely for the reason under subparagraph (A).

H.R. 4033, 99th Cong. § 1221(d)(2)(B)(1986); H. REP NO. 100-274, at 11 (1987).

distinction may not have as much impact as it should. It would be an important standard for judicial review^[293]

H.R. 4033 passed the House on September 22, 1986, but the Senate did not act upon it before Congress adjourned.²⁹⁴

The following year, the House introduced H.R. 25, the “Whistleblower Protection Act of 1987.”²⁹⁵ H.R. 25 was similar to H.R. 4033 and contained the exact same burden of proof language, reducing an employee’s burden to prove retaliation in the first step from the existing preponderance burden to “substantial evidence.”²⁹⁶ House Report accompanying H.R. 25, the “Whistleblower Protection Act of 1987” explains that the bill provided for dual causation consistent with *Mt. Healthy*, but contained “a lower burden of proof for whistleblower cases, substantial evidence, than exist for other prohibited personnel practices and for most administrative proceedings.” Employers, on the other hand, were required to prove “by a preponderance of the evidence, that such personnel action was taken [] solely for” reasons independent of protected activity.”²⁹⁷

Meanwhile, Senators Carl Levin and Charles E. Grassley introduced S. 508, also titled the Whistleblower Protection Act of 1987, on February 5, 1987. Like the House bill, S. 508 contained a dual motive framework based upon *Mt. Healthy* but no explicit burdens of proof whatsoever—it did however base the first step on a demonstration that protected activity need only be a “factor” in a personnel action.²⁹⁸ The draft of S. 508 introduced in 1987, required that

²⁹³ *Whistleblower Protection Act of 1986; Hearings before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, House of Representatives on H.R. 4033, 99th Cong. 142 (1986) (statement of Thomas Devine).*

²⁹⁴ S. REP. NO. 100-413, at 7 (1988).

²⁹⁵ H. REP. NO. 100-274, at 11 (1987).

²⁹⁶ H.R. 25, Sec. 1221(d)(2)(B); H. REP. NO. 100-274, 100-274, at 11 (1987).

²⁹⁷ H.R. 25, Sec. 1221(d)(2)(B); H. REP. NO. 100-274, 100-274 at 26-27 (1987).

²⁹⁸ S. 508, 100th Cong. § 1221(e)(2) (1987):

(A) Subject to the provisions of subparagraph (B), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

(B) Corrective action under subparagraph (A) shall not be ordered if-

an employee “has demonstrated that [protected activity] was a factor in the personnel action.” The affirmative defense required only that “the [employer] demonstrates that such personnel action was taken or is to be taken solely for” other than protected (or justified) conduct. Introducing the bill, Senator Levin explained:

In addition, this bill makes a specific legal change in light of the difficulties employees face under the Mount Healthy test. Under this legislation, an employee [proving] reprisal must [succeed] in showing that prohibited retaliation was a factor in the action taken against him. This is consistent with Congress’ intent that an employee should simply not face reprisal for engaging in any protected conduct, such as whistleblowing or filing an appeal. In employee cases, [employers] have the weight of the system on their side, the resources and witnesses who are often reluctant to testify against the [employer]. It is necessary to provide some reduction in the many legal burdens employees face in attempts to prove unwarranted retaliation.^[299]

Hearings followed, along with negotiations with Administration stakeholders, and various changes were made to the bill. On May 19, 1988, a revised version of S. 508 was reported out of the Committee on Governmental Affairs.³⁰⁰ Among the principal changes was a new provision stating that an employee may demonstrate that his or her disclosure was a factor in the adverse personnel action by showing that the deciding official knew of the disclosure and the adverse action “occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.”³⁰¹ This provision became known as the “knowledge/timing test.” The Senate Report accompanying the bill explained that “[t]he Committee intends for the Board to use this reasonable time standard liberally because most reprisal cases are necessarily built on such circumstantial, rather than direct, evidence.”³⁰² The revised bill additionally required employers to prove the affirmative defense by “clear and convincing” evidence rather than “a preponderance of evidence” as was the case under *Mt. Healthy*.³⁰³

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- (i) the personnel action involved is justified on a basis independent of the disclosure referred to in subparagraph (A); and
 - (ii) the agency demonstrates that such personnel action was taken or is to be taken solely for the reasons under clause (i).

²⁹⁹ 133 CONG. REC. 3095 (1987) (remarks of Senator Levin introducing S. 508).

³⁰⁰ S. REP. NO. 100-413, at 7 (1988).

³⁰¹ *Id.* at 14.

³⁰² *Id.*

³⁰³ S. 508, 100th Cong. § 1221(e) (1988) (134 CONG. REC. S10632-01 (1988)):

Seeking to expedite consideration due to the imminent end of the session, House sponsors of the whistleblower bill skipped conference and resolved differences with the Senate and agreed upon a version of S. 508, along with a Joint Explanatory Statement expressing the mutual understanding of the Senate and House as to the intent of the bill. One of the principal sponsors of the bill, Representative Schroeder, introduced S. 508 into the House on October 3, 1988, stating, “We rewrite the test to make it quite easy for a whistleblower to prove a prima facie case of retaliation and to force the [employer] to prove, by clear and convincing evidence, that the action would have been taken in the absence of the protected disclosure.”³⁰⁴

The House unanimously passed this version of S. 508 on October 4, 1988,³⁰⁵ and the Senate concurred on October 7, 1988.³⁰⁶ Although the compromise bill did not contain the knowledge/timing test (from the earlier version of S. 508), the Joint Explanatory Statement explicitly stated that “[o]ne of the many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”³⁰⁷ The Senate Report accompanying the 1994 amendments to the WPA, explained:

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- (1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee, former employee, or applicant for employment may demonstrate that the disclosure was a factor in the personnel action by showing that-
 - (A) the official taking the personnel action knew of the disclosure; and
 - (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.
 - (2) Corrective action under paragraph (1) shall not be ordered if the agency demonstrates by clear and convincing evidence that-
 - (A) the personnel action involved is justified on a basis independent of the disclosure referred to in paragraph (1); and
 - (B) the disclosure was not a material factor in the personnel action.

³⁰⁴ 134 CONG. REC. 27,853 (1988).

³⁰⁵ *Id.* at 28,129-130.

³⁰⁶ 134 CONG. REC. 29,544 (1988).

³⁰⁷ 134 CONG. REC. 27,853 (1988); 135 Cong. Rec. 4513 (1989).

As the Joint Explanatory Statement makes clear, the per se rule was placed in report language at that time not because Congress did not have a per se rule to apply, but because Congress wanted to make it clear that proof of knowledge and timing was only ‘one of many possible ways’ that a whistleblower could use to establish a prima facie case.^[308]

Former President Reagan pocket-vetoed the bill on October 26, 1988,³⁰⁹ but the burden-of-proof language that became law the following year (contained in S. 20) was exactly the same as that of the bill passed in 1988 (S. 508) with only the insertion of “contributing” prior to “factor” in the first step. The new Administration insisted on this modification stating:

We have agreed to clarify the word “factor” by adding the word ‘contributing’ in the two places in which the Mt. Healthy test appears in the bill. A ‘contributing factor’ need not be ‘substantial.’ The individual’s burden is to prove that the whistleblowing contributed in some way to the [employer’s] decision to take the personnel action.^[310]

Before passing S. 20 on March 16, 1989, the Senate incorporated by reference the legislative history of the previously passed bill, in particular the Joint Explanatory Statement (issued upon final passage of S. 508).³¹¹ Senator Levin explained that “this legislative history is controlling as to the intent of Congress in the interpretation of S. 20.”³¹² The House did the same and passed S. 20 a few days later on March 21, 1989.³¹³

The purpose of this digression into the long, complicated legislative history of WPA is to demonstrate just how deliberate were the operative standards and burdens contained in the WPA. As mentioned, Congress established the particular bifurcated “contributing factor”/“clear and convincing” framework *for the first time* in the Whistleblower Protection Act of 1989. Three years later, Congress amended the 1978 whistleblower provisions of the Energy Reorganization

³⁰⁸ S. REP. NO. 103-358, at 8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3556.

³⁰⁹ *See Id.* at 7.

³¹⁰ 135 CONG. REC. S 2781 (daily ed. Mar. 16, 1989) (reprinted Mar. 3, 1989 letter from Attorney General Dick Thornburg to Senator C. Levin)

³¹¹ 135 Cong. Rec. 4511-13 (1989).

³¹² 135 CONG. REC. 4510 (1989) (remarks of Senator Levin).

³¹³ 135 CONG. REC. 5037, 5040 (1989).

Act (1992 ERA amendments) to pointedly insert nearly the exact same burden-of-proof framework.³¹⁴ That choice was not random. The framework and burden-of-proof language used in 1989 WPA was heavy with Congressional deliberation and intent and the nearly identical 1992 ERA amendments should be interpreted no differently.

The plurality attempts to downplay the obvious connection between the text of the 1989 WPA and that of the 1992 ERA amendments by characterizing the 1992 ERA amendments as “simply the same two changes to the *Mt. Healthy* test”³¹⁵ as were made by Congress in the 1989 WPA. Certainly, both statutes adopted the dual-motive analysis contained in *Mt. Healthy*, but the changes were not simple and were, in fact, deliberately chosen to *repudiate* the application of the *Mt. Healthy* burdens in whistleblower cases because of the difficulty of proving whistleblower retaliation under that precedent.³¹⁶

The plurality ultimately discounts even the legislative history, which it acknowledges supports *Fordham*, claiming that because the relevant provisions of the statute are clear, there is no need to resort to legislative history as an interpretive guide.³¹⁷ But the burden-of-proof provisions at issue here are not at all clear or the plurality would not need 66 pages to explain them. To list just a few of the anomalies contained in § 42121(b)(2)(B): (1) why is clause (iii) the only one of four clauses which contains no **explicit** burden of proof; (2) why are the employer’s burdens in (ii) and (iv) exactly the same but the complainant’s burdens in (i) and (iii) appear to be different; (3) why does (i) require a complainant to make only “a prima facie showing” of causation whereas (ii) appears to require employer to demonstrate its affirmative defense “by clear and convincing evidence;” and (4) what does “prima facie” mean and how does that meaning affect the other 3 clauses?

³¹⁴ Congress passed the Energy Reorganization Act in 1974, *see* Pub. L. No. 93-438, 88 Stat. 1233 (Oct. 11, 1974), but did not include a whistleblower protection provision until 1978, *see* Pub. L. No. 95-601, sec. 10, 92 Stat. 2947, 2951 (Nov. 6, 1978).

³¹⁵ *Supra* at 49.

³¹⁶ *See e.g.*, S. REP. NO. 100-413, at 14 (1988) (the Committee finds that in practice, the *Mt. Healthy* test has allowed an agency to search an employee’s work record for conduct that can be cited as the reason for taking an adverse action. It has proved to be difficult for employees to refute the agency’s contention that it would have taken the personnel action anyway.”); 33 CONG. REC. 3094 (1987) (“the evidence suggests that the Mount Healthy test for corrective action cases has made the important job of protecting employee’s rights unnecessarily difficult”—remarks of Senator Levin introducing S. 508).

³¹⁷ *Supra* at 32 (“Where the statute’s text in light of its provenance is clear, as it is here, we think it best not to ‘pick[] out [our] friends’ from among the various pieces of legislative history”); *id.* at 47 (“Still, if the statute were ambiguous, we wouldn’t necessarily view that as an absolute bar on considering these statements.”); *id.* at 16(“the text unambiguously requires”).

When statutory provisions are unclear, we necessarily turn to other means of statutory construction, including legislative history and other statutes, as interpretive tools.³¹⁸ As explained in *Fordham*, there is no legislative history addressing the AIR-21 whistleblower burden-of-proof provisions and very little pertaining to the 1992 ERA amendments from which they were copied.³¹⁹ As a consequence, it is sensible to apply the statutory construction doctrine, *in pari materia*, which states that different statutory provisions relating to the same subject matter and purpose should be construed together.³²⁰ A critical question for an *in pari materia* analysis is whether it is reasonable to assume that the legislators of the amendments were aware of the 1989 WPA burdens of proof when they amended the ERA. Given the length of deliberations over the whistleblower provisions, the unique and precedential nature of the framework, and the similarity in the operative legal language (“contributing factor” and “clear and convincing”), it is eminently reasonable to use the detailed legislative history of the WPA burden-of-proof provisions to discern the intent of Congress in passage of the ERA amendments.

The plurality insists repeatedly that the similarity of the *text* of the 1989 WPA and the 1992 ERA amendments (and AIR-21), does not signify that the *intent* is likewise the same.³²¹ But that is precisely what the *in pari materia* doctrine of statutory construction entails—statutes relating to similar subjects, in this case, the same unique language and framework, should be similarly interpreted.

As recognized by the Federal Circuit in *Kewley*,³²² Congress gave clear guidance on the interpretation of the 1989 WPA (pre-enactment): “One of the many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”³²³ Congress additionally urged factfinders to “use this reasonable time standard liberally.”³²⁴

³¹⁸ *Spinner v. David Landau & Assocs., LLC*, ARB Nos. 10-111, -115; ALJ No. 2010-SOX-029, slip op. at 9 (ARB May 31, 2012). *Accord NLRB. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179, 184 (1967).

³¹⁹ *Fordham*, ARB No. 12-061, slip op. at 29.

³²⁰ 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.2 (7th ed. 2016 Update).

³²¹ See *supra* at 46, 48.

³²² *Kewley*, 153 F.3d at 1362-1363.

³²³ 135 CONG. REC. 4513 (1989) (Joint Explanatory Statement)

³²⁴ *Kewley*, 153 F.3d at 1363 (citing S. REP. NO. 100-413, at 14) (1988). This is pre-enactment legislative history—not the additional “post-enactment” legislative history supporting *Fordham*, which the plurality rejected. *Supra* at 47.

As the plurality recognizes, this “knowledge/timing rule” creates in effect “an irrebuttable presumption at step one for any employee who” can prove knowledge (or constructive knowledge) and close temporal proximity.”³²⁵ Congress intended for the 1989 WPA to contain this knowledge/timing rule and, as explained above, because the 1992 ERA amendments (and every DOL-administered whistleblower law passed thereafter) contain the same burden-of-proof language as the 1989 WPA, they should be construed in harmony. Finally, adoption of this timing/knowledge rule does not necessarily also entail adoption of *Fordham*’s dictate that the employer’s evidence of its nonretaliatory reasons *cannot* be considered at step one—only that it need not.

In an effort to properly effectuate the remedial purposes of the statute,³²⁶ and avoid too narrowly construing the statute, *Fordham* may have overstated what the statutory language dictates. Nevertheless *Fordham*’s categorical formula for applying the statute to the facts is ultimately the surest method for factfinders to accurately analyze both parties’ evidence consonant with the overall goal of whistleblower provisions to protect employees who risk careers to speak up concerning violations of law.³²⁷ The *Fordham* rule may result in the exclusion of some relevant evidence in the initial evaluation of a complainant’s burden to prove that protected activity contributed to the adverse action in question.³²⁸ In fact, ALJs are already empowered to exclude a respondent’s relevant evidence of legitimate business reasons if its probative value is outweighed by danger of confusion of issues or misleading the judge as trier of fact.³²⁹ Moreover, any such exclusion is ultimately harmless since a respondent has a full opportunity, in step two, to prove it would have undertaken the adverse action even in the absence of protected activity.

³²⁵ *Supra* at 50.

³²⁶ The Supreme Court and the Courts of Appeal have routinely held that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *See, e.g., English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990) (to “encourage” employees to report safety violations and protect their reporting activity); *NLRB. v. Scrivener*, 405 U.S. 117, 121-26 (1972); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (“narrow” or “hyper-technical” interpretations are to be avoided as undermining Congressional purposes.).

³²⁷ *See Poulous v. Ambassador Fuel Oil Co., Inc.*, No. 1986-CAA-001 (Sec’y Apr. 27, 1987).

³²⁸ In any case, a respondent’s relevant evidence of legitimate business reasons may be excluded if its probative value is outweighed by danger of confusion of issues or misleading the judge as trier of fact. 29 C.F.R. § 18.403.

³²⁹ 29 C.F.R. § 18.403.

2. The ALJ’s findings were supported by substantial evidence.

Despite citing *Fordham* and quoting portions of *Powers*, the ALJ explicitly considered Respondent’s causation evidence in the course of his analysis of “contributing factor,” stating that “Respondent alleges the basis for complainant’s termination was his admitted rule violations in the May 28 incident and other violations”³³⁰ and that Palmer had demonstrated contributing factor “by a preponderance of evidence.”³³¹ While I agree with the plurality that the ALJ may have misapplied the “inextricably intertwined” legal theory,³³² any possible error was harmless, and the ALJ accurately applied other well-established ARB precedent to the evidence and stipulated facts. I would affirm his ultimate findings on causation because they are supported by substantial evidence. In addition to Palmer’s showing of close temporal proximity (of less than a month), the ALJ listed considerable other circumstantial evidence in support of his contributing factor finding including: Respondent’s knowledge of Palmer’s protected activity and inconsistent application of Respondent’s policies on both (a) the holding of formal hearings on run-throughs and (b) the granting of waivers as well as the hostility expressed by McDaniel when Palmer notified him of his injury.³³³ Finally, the ALJ reasonably inferred contributing factor from the July 3, 2013 and July 7, 2013 email chain between McDaniel, Noland, and Kraus that explicitly referenced Palmer’s injury in connection with his termination.³³⁴

Substantial evidence also supports the ALJ’s finding that Respondent failed to establish its affirmative defense. The ALJ briefly cited the vacated *Powers* decision, but largely based his analysis on accepted ARB law holding that a respondent’s burden to prove what it “would have” done (rather than what it “could have” done) is a high one.³³⁵ The ALJ relied on a number of facts to support his ultimate finding including: McDaniel’s hostility when Palmer initially reported his injury; Palmer was the only employee not offered a waiver for a switch run-through;³³⁶ there were no written procedures or guidelines for waiver or sentencing;³³⁷ and the implied lack of credibility of Noland, Respondent’s only witness at the hearing.³³⁸

³³⁰ D. & O. at 42.

³³¹ *Id.* at 41.

³³² *Supra* at 58-59.

³³³ D. & O. at 41, 42.

³³⁴ *Id.* at 32-34, 42.

³³⁵ *Id.* at 42-43.

³³⁶ *Id.* at 27.

³³⁷ *Id.* at 25.

³³⁸ *Id.* at 45.

CONCLUSION

As explained above, Congress deliberately developed the two-step whistleblower burden-of-proof framework to balance the uneven evidentiary playing fields between an employee-whistleblower and his or her employer. The legislative history of the 1989 WPA demonstrates conclusively that this unique, bifurcated framework reflected both Congressional recognition of the severe evidentiary disadvantage facing whistleblowers, as well as Congressional intent to encourage whistleblowing and thereby promote enforcement of the substantive laws whistleblowers address. The AIR-21 whistleblower framework was copied from the 1992 ERA amendments, which themselves were modeled on the 1989 WPA and they should all be interpreted similarly to allow complainants to prevail at step one by proving an inference of “contributing factor”; for example, by proving “that the respondent knew or suspected that the employee engaged in protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity), and that . . . the adverse action took place shortly after the protected activity”³³⁹

JOANNE ROYCE
Administrative Appeals Judge

Judge Desai, concurring:

I concur in the plurality opinion in its entirety. I write separately to mention a few points on which everyone on this en banc Board is in complete agreement and to explain my understanding of the principal disagreements.

First, the entire Board recognizes that, in many cases, employees are at a disadvantage in access to relevant evidence on the question of whether the protected activity was a contributing factor in the adverse action.³⁴⁰ While this does not change *what* evidence ALJs need to consider—they must consider all relevant admissible evidence—it should affect how ALJs think about how to weigh the evidence. We all agree that ALJs should remain cognizant of this mismatch in access to evidence when determining “contributing factor” causation and that they should not categorically reject an employee’s claim simply because the employee lacks direct evidence or has far less evidence than the employer.

³³⁹ 29 C.F.R. § 1982.104(e)(3).

³⁴⁰ See Plurality Op. at text accompanying note 228; Partial Dissent at text accompanying notes 274 to 275.

Second, we all agree that an ALJ is *permitted* to find for an employee at the “contributing factor” step of the analysis even if the only evidence the employee has is evidence showing that the relevant decision makers knew of the protected activity (“knowledge”) and that the adverse action was taken sufficiently soon thereafter (“timing”). Indeed, in many cases, that will be the only evidence the employee has.

Third, the majority³⁴¹ rejects any per se knowledge/timing rule, whereas the partial dissent appears to adopt one, or at least something close to it. This is where we disagree. The majority does not *require* the ALJ to find for the employee who can show knowledge plus timing. In contrast, the Whistleblower Protection Act jurisprudence in the Merit Systems Protection Board and Federal Circuit provides for a per se knowledge/timing rule;³⁴² and, though there are some conflicting signals, this appears to be the approach the partial dissent advocates.³⁴³

Fourth, and directly related, the majority also rejects any limitations on the evidence ALJs should consider in making the “contributing factor” determination,³⁴⁴ whereas the partial dissent’s knowledge/timing rule appears to preclude ALJs from considering an employer’s evidence of its alleged nonretaliatory reasons *if* the employee is able to satisfy the knowledge/timing rule.³⁴⁵ The partial dissent’s approach thus appears to conflate a permissible inference with a found fact. Certainly an ALJ may make inferences; however, without considering all the relevant admissible evidence, an ALJ cannot determine whether an allegation is a fact. The partial dissent writes that the AIR-21 burden-of-proof provision should be

³⁴¹ Where I use the term “majority,” I mean the plurality together with Judge Corchado concurring.

³⁴² See Plurality Op. at text accompanying notes 155 to 159; *id.* at text accompanying note 207.

³⁴³ See Partial Dissent at text following note 325 (noting that “Congress intended for the 1989 WPA to contain this knowledge/timing rule and . . . because the 1992 ERA amendments (and every DOL-administered whistleblower law passed thereafter) contain the same burden-of-proof language as the 1989 WPA, *they should be construed in harmony*” (emphasis added)). *But see id.* at 71 n.280 (stating that “knowledge plus close temporal proximity should *nearly* always be sufficient to infer contributing factor” (emphasis added)). *Fordham* would not have adopted a per se knowledge/timing rule, but would instead have had the ALJ make the determination without considering any of the evidence of the employer’s alleged nonretaliatory reasons. See Plurality Op. at text accompanying notes 20 to 21.

³⁴⁴ Plurality Op. at Discussion Section 1.A; Judge Corchado Concurrence at text in paragraph following note 264 (“[T]he ALJ’s job is to consider any and all relevant evidence in deciding what caused the employer to act against the whistleblower complainant.”).

³⁴⁵ *Cf.* Partial Dissent at text following note 325 (noting that “adoption of this timing/knowledge rule does not necessarily also entail adoption of *Fordham*’s dictate that the employer’s evidence of its nonretaliatory reasons *cannot* be considered at step one—only that it need not” (emphasis in original)).

interpreted to “allow complainants to prevail at step one by *proving an inference* of ‘contributing factor’; for example, by proving ‘that the respondent knew or suspected that the employee engaged in protected activity . . . and that . . . the adverse action took place shortly after the protected activity’”³⁴⁶ But, the phrase “*proving an inference*” only confuses things. An ALJ may *make* an inference based on knowledge plus timing, but it is the ALJ’s task to determine whether to do so, since the ALJ is the factfinder. The employee does not need to prove an *inference*, but instead needs to prove the *fact* of “contributing factor” causation.³⁴⁷ Thus, while the employee may use circumstantial evidence to persuade the ALJ to infer that protected activity was a contributing factor in the adverse action (based for example on knowledge plus timing), nothing in the statute *requires* the ALJ either to make such an inference or to ignore the employer’s evidence in determining whether the inference is warranted.

Indeed, ALJs must simply do what factfinders in the American system of justice are tasked with doing day in and day out: determine actual facts in the context of specific disputes and do that to the best of their ability based on all the relevant admissible evidence presented to them. Judicial proceedings are designed to make *individualized* determinations based on the specific facts of a specific case. When there is both knowledge and timing in a whistleblower case, that does not necessarily mean protected activity was a contributing factor in the adverse action; sometimes the protected activity played a role and sometimes it did not. It is the ALJ’s job to determine whether it did, and to do so based on all the relevant admissible evidence presented in the case at hand.

Fifth, weighing the *reasons* for an adverse action is not the same as weighing the *evidence* for proving those reasons: the ALJ may not weigh *reasons*, but must weigh *evidence*. The majority thus rejects the following statement in the partial dissent: “But nor should all the *evidence* supporting a respondent’s legitimate reasons be weighed indiscriminately against the *evidence* supporting a complainant’s theory of causation.”³⁴⁸ We can debate what the word “indiscriminately” might mean—perhaps no judge should ever do anything “indiscriminately”—but “all the evidence supporting a respondent’s legitimate reasons” most decidedly *must* “be weighed . . . against the evidence supporting a complainant’s theory of causation.” That is

³⁴⁶ Partial Dissent at text accompanying note 340 (quoting 29 C.F.R. § 1982.104(e)(3) (emphasis added) (ellipses in original)).

³⁴⁷ Given the standard of proof, a more precise way to say “prove . . . the fact” is to say that the employee needs to persuade the factfinder that it is more likely than not that the protected activity was a contributing factor in the adverse action. See Plurality Op. at text following note 81 (“[T]he employee must *persuade* the factfinder—here, the ALJ—that the protected activity played some role in the adverse action. The factfinder must thus believe it is more likely than not that the protected activity was a factor in the adverse action.” (emphasis in original)).

³⁴⁸ Partial Dissent at text following note 281 (emphasis in original); see also *id.* at text accompanying note 273 (calling it a recurring error for “factfinders to indiscriminately weigh a respondent’s *evidence* of nonretaliatory reasons against a complainant’s *evidence* of retaliation at the first ‘contributing factor’ step” (emphasis added)).

precisely what an ALJ must do to determine whether protected activity was a contributing factor in the adverse action, at least in those cases in which the employer’s theory of the case is that the protected activity played no role whatsoever. Without weighing—I would prefer the term “considering”—all the relevant admissible evidence, there is simply no other way to make that factual determination. Indeed, a failure to consider all the relevant admissible evidence is itself error: here, the ALJ’s failure to state clearly whether he considered Noland’s and McDaniel’s testimony that Palmer’s injury report played no role in the termination is one of the reasons we remand this case.³⁴⁹

Of course, if the ALJ determines that the protected activity was one of the reasons for the adverse action, the ALJ must not weigh that *reason* against the employer’s nonretaliatory reasons to determine how important the retaliatory reason was.³⁵⁰ the whole point of Congress lowering the causation standard from “substantial” to “contributing” in step one was to say that if a retaliatory reason is a factor at all, the employee prevails at step one.

Finally, the text of the AIR-21 burden-of-proof provision mandates this result. Although the text of the statute may raise some questions,³⁵¹ it is unambiguous on the central questions on which the plurality disagrees with *Fordham*: (1) Does the employee need to “demonstrate” (i.e., prove) to the factfinder (here, the ALJ) that the protected activity was a contributing factor in the adverse action? and (2) Are there any limitations on the evidence that the factfinder is permitted to consider in answering that question? The statute’s text conclusively answers both questions. The answer to the first question is “yes,” and the answer to the second is “no.”³⁵² If not for the need to address *Fordham* and the numerous arguments made by the complainant and amici in this case, the analysis could have ended right there.

Similarly, on the specific question raised by the partial dissent, whether the statute contains an irrebuttable presumption that an employee who shows knowledge plus timing has proven that protected activity was a contributing factor in the adverse action, the text of the AIR-21 burden-of-proof provision is equally clear: there is no irrebuttable presumption or per se rule anywhere in the statute. As the plurality points out, (1) there is no reference to a per se knowledge/timing rule in the text of the AIR-21 burden-of-proof provision; and (2) the Whistleblower Protection Act contains specific language referencing a possible knowledge/timing rule, language not found in the AIR-21 burden-of-proof provision (or in any of the Department of Labor-administered whistleblower provisions).³⁵³ The absence of that

³⁴⁹ See Plurality Op. at text accompanying note 239.

³⁵⁰ See Plurality Op. at text following note 226 (“[T]he ALJ should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.”).

³⁵¹ See Partial Dissent at text following note 318.

³⁵² See Plurality Op. at Discussion Section 1.A.i.

³⁵³ See Plurality Op. at Discussion Section 1.B.ii.

language is precisely why, even assuming the Whistleblower Protection Act contains such a per se rule, the Whistleblower Protection Act cannot be treated as *in pari materia* with the AIR-21 burden-of-proof provision *on the specific question* of whether AIR-21 contains a per se knowledge/timing rule.³⁵⁴ Thus, the fact that this Board and OSHA have relied on interpretations of the Whistleblower Protection Act on other questions, where the text of the statutes is the same,³⁵⁵ does not mean we may do so here, where the specific text in the Whistleblower Protection Act that has been interpreted to create the per se rule is not found anywhere in AIR-21 (or any of the other Department of Labor-administered whistleblower provisions).³⁵⁶

Moreover, as the plurality points out, it is not difficult to draft language that creates an irrebuttable presumption if Congress wants to do that.³⁵⁷ One example of a statute that specifically provides for an irrebuttable presumption on a question of causation is the Black Lung Benefits Act. One of its provisions states, “If a miner is suffering or suffered from a chronic dust disease of the lung which [manifests certain symptoms as determined by particular medical diagnostic procedures], then *there shall be an irrebuttable presumption* that he is totally disabled *due to* pneumoconiosis or that his death was *due to* pneumoconiosis, or that at the time of his death he was totally disabled *by* pneumoconiosis, as the case may be.”³⁵⁸ The Black Lung Benefits Act thus mandates a finding of causation—that the miner’s disability or death was “due to” pneumoconiosis—as long as the miner submits certain medical evidence.

If Congress had really wanted to create an irrebuttable presumption in a whistleblower provision (based, for example, on knowledge plus timing), it could have done so. Using language similar to the Black Lung Benefits Act, Congress could have added (and could still add) something like, “If the complainant demonstrates that (A) the agent of the respondent who

³⁵⁴ *But see* Partial Dissent at text accompanying notes 319 to 322.

³⁵⁵ *See* Partial Dissent at text accompanying note 286.

³⁵⁶ Indeed, one portion of the legislative history of the 1989 Whistleblower Protection Act cited by the partial dissent undermines any argument that Congress intended a *per se* knowledge/timing rule. The partial dissent notes that the original Senate Report says, “the Committee intends for the Board to use this reasonable time standard *liberally* because most reprisal cases are necessarily built on . . . circumstantial, rather than direct, evidence.” Partial Dissent at text accompanying note 302 (quoting S. REP. NO. 100-413, at 14 (1988)) (emphasis added). The clear implication is that there is no *per se* rule: “liberally” might mean “often” or “very often” or even “most of the time,” but it certainly does not mean “always.” This might be why the partial dissent appears to hedge on whether the knowledge plus timing “rule” is really a per se rule. *See* Partial Dissent at 71 n.280 (stating that “knowledge plus close temporal proximity should *nearly* always be sufficient to infer contributing factor” (emphasis added)).

³⁵⁷ *See* Plurality Op. at text accompanying note 80.

³⁵⁸ 30 U.S.C. § 921(c)(3) (2016) (emphases added).

took the unfavorable personnel action knew of the protected activity; and (B) the unfavorable personnel action occurred within a period of time such that a reasonable person could conclude that the protected activity was a contributing factor in the unfavorable personnel action, then there shall be an irrebuttable presumption that the protected activity was a contributing factor in the adverse personnel action.” What the partial dissent appears to want is to add language of that sort to the AIR-21 burden-of-proof provision. Doing so might or might not be a good idea as a matter of policy. But such language is nowhere to be found in the AIR-21 burden-of-proof provision, the statutory text we were tasked with interpreting in this case.³⁵⁹

ANUJ C. DESAI
Administrative Appeals Judge

³⁵⁹ Cf. *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 17-19 (ARB May 25, 2011) (en banc) (holding that it is error to require a SOX complainant to meet an evidentiary standard of “definitive and specific” where statute contained no such language and expressly overruling *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027 (ARB Sept. 29, 2006), which had imposed a “definitive and specific” requirement); *id.* at 14 (noting that the statute’s “plain language provides the proper standard for establishing protected activity”); *id.* at 24-28 (Corchado, J., concurring) (explaining in more detail why principles of statutory interpretation preclude “definitive and specific” standard); see also *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (concluding that *Sylvester*’s interpretation of SOX was entitled to *Chevron* deference); *Nielsen v. Aecom Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014) (concluding that *Sylvester*’s interpretation of SOX was entitled to *Skidmore* deference and noting that “that the ‘definitively and specifically’ requirement is not in keeping with the language of the statute”); *Rhinehimer v. Bancorp Invs., Inc.*, 787 F.3d 797, 811 (6th Cir. 2015) (“adopt[ing] as persuasive the reasoning of the ARB in *Sylvester* and reject[ing] the ‘definitively and specifically’ standard”); *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380 (8th Cir. 2016) (“adopt[ing] the *Sylvester* standard”).