



In the Matter of:

JULIE KEELER,

ARB CASE NO. 13-070

COMPLAINANT,

ALJ CASE NO. 2012-STA-049

v.

DATE: June 2, 2015

J.E. WILLIAMS TRUCKING, INC.,

and

WHW INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Julie Keeler, *pro se*, Billings, Montana

For the Respondents:

Bobby L. Williams, *pro se*, Billings, Montana

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.
Judge Igasaki, concurring.**

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2014), as amended, and its implementing regulations at 29 C.F.R. Part 1978 (2014). Complainant Julie

Keeler filed a complaint alleging that Respondents J.E. Williams Trucking, Inc. and WHW Inc. retaliated against her in violation of STAA's whistleblower protection provisions. Keeler appeals to the Administrative Review Board (ARB) from the Recommended Decision and Order Denying Claim issued by a Department of Labor Administrative Law Judge (ALJ) on June 18, 2013 (D. & O.), following a hearing on the merits. For the following reasons, the ARB affirms the ALJ's denial of Keeler's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to the Administrative Review Board to issue final agency decisions in STAA cases.¹ The Board reviews an ALJ's factual determinations under the substantial evidence standard.² The Board reviews the ALJ's legal conclusions de novo.³

BACKGROUND

Respondents J.E. Williams Trucking, Inc. and WHW, Inc., companies owned and operated by Bobby Williams, employed Complainant Keeler from April 2009, until they terminated her employment on or about July 19, 2011. D. & O. at 1-2. Throughout her employment, Keeler reported safety issues to Williams regarding complaints by Williams's drivers about driving over their hours limitations, problems with their logs, and concerns regarding the legality of driving assignments. Indeed, it was part of Keeler's job, as the interim safety person when there was not an employee in this position, to monitor and ensure drivers' compliance with Department of Transportation safety regulations. *Id.* at 47.

At some time during the second year of Keeler's employment, and in particular during the last year that Respondents employed her, Keeler's employment relationship with Williams, her supervisor, deteriorated. The record is replete with instances of Keeler undertaking initiatives beyond the scope of her authority; ignoring, undermining, and occasionally countermanding Williams's orders and instructions; and showing general disrespect of Williams's authority. Concerns arose over the adverse impact Keeler was having on company personnel matters that resulted in several instances in the loss of long term company employees. Respondents' banker, accountant, and insurance agent also began to voice concerns about

¹ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

² 29 C.F.R. § 1978.110(b).

³ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

Keeler's performance and the impact it was having on company business. *Id.* at 18, 35-36, 43, 48-51.⁴

The testimony of record reflects that the atmosphere in the months leading up to Keeler's employment termination was "tense and stressful." *Id.* at 51. By mid-2011, Williams had become thoroughly frustrated with Keeler's work in the dispatch area, where she assumed management responsibilities in early 2011. According to Williams, whose testimony the ALJ credited, Keeler's management of the dispatch area had resulted in chaos, including "bounced and empty miles, deadhead miles, and lost and missed loads." *Id.* at 49. Additionally, Keeler began to create problems with Respondents' customers, in one instance almost losing one of Respondents' biggest customers (representing 30% of Respondents' business and millions of dollars in revenue). *Id.* at 49-50.

By late June or early July 2011, Williams had decided to terminate Keeler's employment. In early July, Williams offered Keeler's position to another individual, who accepted the offer of employment on or about July 11th. *Id.* at 33-34. Because payroll was to be completed soon, Williams decided to wait to terminate Keeler's employment and bring the new employee in to replace her, until after payroll was issued. *Id.* In the interim, Keeler informed Williams about complaints she had received from two company employees, one involving an instance of driving in excess of hours limitations and the second involving a driver purportedly being assigned to drive before the results of a drug test to which he had been subjected were known. *Id.* at 27, 47. On July 18, 2011, Keeler reported the two incidents to the Department of Transportation. *Id.* at 47. Williams did not know that Keeler had contacted the DOT. *Id.*

On July 19, 2011, Williams terminated Keeler's employment. Williams credibly testified that Keeler's reports of issues with driver hours and logs played no role in his decision, and that he fired her "because she was incompetent, because she ruined his business, because she ran off all of his long term employees, and because his bankers, accountants, and insurance agents had questions about her performance." *Id.* at 48. The ALJ found that Williams was "convinced that if he had not fired the Complainant, his trucking company, a 40 year old business, would no longer exist." *Id.*

PROCEEDINGS BEFORE THE ALJ

On September 13, 2011, Keeler filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration (OSHA) alleging that Respondents had discriminated against her in retaliation for engaging in STAA protected whistleblowing activities. After conducting an investigation, OSHA issued findings on behalf of the Secretary of

⁴ For example, Respondents' accountant of many years believed that Keeler was lying to him about how she balanced loans, and advised Williams to take the mail and deposits from her control due to his concerns.

Labor on August 9, 2012, concluding that there was no reasonable cause to believe that Respondents violated the Surface Transportation Assistance Act.

Keeler filed an appeal of OSHA's determination with the Office of Administrative Law Judges. The case was assigned for hearing before an ALJ. Following hearing on the merits, and the subsequent filing of post-hearing briefs, the ALJ issued a Recommended Decision and Order Denying Claim on June 18, 2013, from which Keeler timely filed an appeal with the ARB.

DISCUSSION

The Surface Transportation Assistance Act (STAA) provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.⁵ To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he or she engaged in STAA protected activity; that he/she was subjected to adverse employment action; and that his/her protected activity was a contributing factor in that adverse action.⁶ If a complainant proves by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same personnel action even in the absence of the protected activity.⁷

1. Protected Activity and Adverse Action

The ALJ found that Keeler engaged in STAA protected activity when, at various unspecified times during her employment, she reported numerous instances to Williams about Respondents' drivers exceeding their hours limits, log violations, and her concerns about the legality of runs. The ALJ also found, more specifically, that Keeler engaged in protected activities when she raised concerns with Williams in June of 2011 about a driver having to drive in excess of his hours, and when in early to mid-July of 2011 she complained to Williams and reported to the DOT about one of Respondents' drivers being sent out on a run without receiving the results of his drug test. D. & O. at 47.

⁵ 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

⁶ *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 9 (ARB Sept. 15, 2011). See also *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 13, 2014).

⁷ *Salata*, ARB Nos. 08-101, 09-104; slip op. at 9.

The ALJ also found that Keeler suffered an “adverse action” under STAA when Williams terminated her employment on or about July 19, 2011. *Id.* at 56.

The ALJ’s findings regarding protected activity and adverse action are not challenged on appeal.

2. Contributing Factor Causation

The STAA incorporates by reference the legal burden of proof standards governing employee whistleblower protection under the Wendell H. Ford Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b) (Thomson/West 2007).⁸ Under AIR 21, and thus under STAA, “[t]he Secretary may determine that a violation . . . has occurred only if the complainant demonstrates [by a preponderance of the evidence] that any behavior [protected by the statute] was a contributing factor in the unfavorable personnel action alleged in the complaint.”⁹

Keeler contends on appeal that the ALJ erred in finding that she failed to meet her burden of proving that her protected activity was a contributing factor in Respondents’ decision to terminate her employment.

The ALJ found that Williams was unaware of Keeler’s report to the DOT when he made his decision to terminate her employment. Because substantial evidence of record supports the ALJ’s finding as to Williams’s lack of knowledge of the DOT complaint, the ALJ committed no reversible error in disallowing the DOT report as a contributing factor in Keeler’s employment termination.

Regarding the protected activity of which Williams was aware, *i.e.*, the concerns Keeler expressed to Williams about drivers exceeding their driving hours limitations and having problems with their logs, the ALJ held that Keeler failed to meet her burden of proving that the protected activity was a contributing factor in Williams’s decision terminating her employment.¹⁰ We find the ALJ’s finding of no contributing factor causation with regard to the

⁸ See 49 U.S.C.A. § 31105(b)(1).

⁹ 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a). Proof of “contributing factor” causation does not, however, automatically result in a finding of a violation of STAA’s whistleblower provisions, inasmuch as the statute, by use of the term “may” rather than “shall” within the phrase “may determine that a violation has occurred,” conditions the finding of a violation, and thus a determination of liability, on whether or not the respondent can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the complainant’s protected activity. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 20, 2015) (reissued Apr. 21, 2015) (*en banc*) (reaffirming *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014)).

¹⁰ D. & O. at 48, *et seq.*

protected activity of which Williams was aware legally unsustainable, as we discuss briefly below. However, given that the ALJ's alternate determination—that Respondents proved by clear and convincing evidence that Keeler would have been discharged in the absence of the protected activity—is sustainable as a matter of law, as also discussed below, the errors in the ALJ's "contributing factor" determination do not prevent the ARB from affirming the ALJ's Decision and Order denying Keeler's claim.

Notwithstanding the ALJ's recognition that to prevail under STAA, a complainant must prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action (D. & O. at 48), the ALJ analyzed whether Keeler met her burden of proof applying the standard that preceded the 2007 amendments to STAA. Citing *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033 (ARB Oct. 31, 2003), and *Assistant Sec'y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-044 (ARB July 31, 2003), both of which were abrogated by the 2007 STAA amendments insofar as the burden of proof standard is involved, the ALJ based her holding of no causal connection on her finding of "no evidence to indicate that any adverse action taken by Respondents was in any way motivated by the Complainant having engaged in alleged protected activity," and that Keeler thus failed to establish "that her termination was motivated by any prohibited reasons." D. & O. at 57.

The proof standard the ALJ actually employed is no longer applicable in light of the 2007 amendments to STAA.¹¹ As the Board explained in *Beatty v. Inman Trucking Mgmt.*:

[T]he "contributing factor" standard was "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." The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination." A "contributing factor," the ARB has repeatedly noted, is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the

¹¹ *Salata*, ARB Nos. 08-101, 09-104.

reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity.”^{12]}

Moreover, the ALJ's rejection of Keeler's proof of "contributing factor" causation was due, in part, to the ALJ's weighing of Respondents' evidence supporting its non-retaliatory basis for its action against Keeler's causation evidence under the preponderance of the evidence standard. *See, e.g.*, D. & O. at 51 (citing, among other things, Williams's "more than ample reasons to fire the Complainant" and Williams's "reasonable basis to be dissatisfied with the Complainant's performance, especially as reflected in the advice he received from his financial advisors"). Based upon such findings, the ALJ found "that the Complainant has not met her burden to show by a preponderance of the evidence that her protected activity was a factor in Mr. Williams' decision to fire her." *Id.* However, the weighing of a respondent's affirmative defense evidence supporting a non-retaliatory reason or basis for the personnel action at issue against a complainant's causation evidence at the "contributing factor" proof stage is not, as the ARB has recently held, legally permissible, as the respondent's affirmative defense evidence must be weighed under the heightened "clear and convincing evidence" burden of proof standard.¹³

Notwithstanding the failure of the ALJ to properly analyze "contributing factor" causation, remand to the ALJ for reconsideration of this issue is unnecessary because, as discussed below, the substantial evidence of record supports the ALJ's determination that Respondents nevertheless proved by clear and convincing evidence that they would have terminated Keeler's employment regardless of her protected activity.¹⁴

3. The ALJ's determination that Respondents proved by clear and convincing evidence that they would have fired Keeler even if she had not engaged in protected activity is supported by substantial evidence, and warrants affirming the ALJ's dismissal of Keeler's complaint

The ALJ found that even if Keeler had been able to prove contributing factor, that Respondents ultimately established by clear and convincing evidence that they would have terminated Keeler's employment even if she had not engaged in protected activity. Critical to the ALJ's findings were her credibility determinations. While the ALJ assessed all of the

¹² ARB No. 13-039, slip op. at 8 (citations omitted).

¹³ *See Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014), reaffirmed *en banc* in *Powers v. Union Pacific Railroad*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 20, 2015) (reissued Apr. 21, 2015).

¹⁴ *Cf. Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (in affirming the lower court's dismissal of the plaintiff's retaliation claim, the appellate court focused on the plaintiff's failure to present sufficient evidence that the alleged adverse action was causally related to the alleged protected activity, assuming for purposes of the appeal but explicitly not deciding that the plaintiff's conduct constituted statutorily protected activity).

witnesses' credibility, she particularly assessed the credibility of Keeler and Williams, and between those two, accorded more weight to Williams's testimony. D. & O. at 45. The ALJ questioned the accuracy and reliability of Keeler's testimony because of "her willingness to make public accusations of serious misconduct or criminal activity against numerous persons that are not supported by a shred of evidence, and are based on nothing but speculation," and because of her "repeated misrepresentation of the testimony and evidence." *Id.* at 45-46. Williams, on the other hand, the ALJ found "to be fully credible." *Id.* at 47, 48. Beyond the ALJ's credibility determinations, much of the very same evidence Respondents presented that the ALJ cited in her "contributing factor" proof analysis (see D. & O. at pp. 48-56) clearly and convincingly supports the ALJ's alternate conclusion that Respondents would have terminated Keeler's employment in any event, even had she not engaged in protected activity.

The ALJ's determination that Respondents proved by clear and convincing evidence that it would have fired Keeler even if she had not engaged in protected activity is supported by the substantial evidence of record. Respondents demonstrated by clear and convincing evidence that the decision to terminate Keeler's employment took place prior to the last protected activity in which she engaged, for reasons having nothing at all to do with her earlier protected activities. Given that substantial evidence supports the ALJ's determination that Respondents established by clear and convincing evidence that they would have terminated Keeler's employment regardless of any STAA protected activity, the Board affirms the ALJ's decision dismissing Keeler's complaint on this basis.

CONCLUSION

Accordingly, for the foregoing reasons, the ALJ's dismissal of Complainant's complaint is **AFFIRMED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Igasaki, concurring:

I concur in the result in this case, but disagree with the majority for three reasons, which I discuss below. I concur because we agree that the ALJ's determination that there was clear and convincing evidence that Williams would have terminated Keeler's employment in the absence

of protected activity is supported by substantial evidence. *Supra*, at 7-8. That is enough to resolve this case and, had the decision ended there, I would not need to write separately.

First, I disagree with the majority's characterization of the ALJ's standard of causation. The majority states that the ALJ used an incorrect proof standard because she found that there was "no evidence to indicate that any adverse action taken by Respondents was in any way motivated by the Complainant having engaged in alleged protected activity." *Supra* at 6 (quoting D. & O. at 57). The majority makes too much of the ALJ's use of the word "motivated" in this case to mean something that the ALJ did not indicate. Nowhere does the ALJ state that the correct standard is "motivating factor" or require that Keeler prove that her protected activity was a "motivating factor" in the termination decision. Rather, after explaining the contributing factor standard (the proper standard and the standard that the ALJ used), the ALJ found "that the Complainant has not met her burden to establish by a preponderance of the evidence that her protected activity, that is, her complaints to Williams about drivers driving over their hours or having problems with their logs, was a factor in his decision to terminate her." The ALJ further explained that "Williams, whose testimony [she] found to be fully credible, categorically stated that the Complainant's reports of issues with driver hours and logs did not play any part in his decision to fire her." *Id.* As the ALJ found that protected activity was not a factor, did not play any part in the decision, and therefore was not a contributing factor in the termination decision, the ALJ's later language using the word "motivated" was harmless, because she simply used the word in its common usage, meaning "to give (someone) a reason for doing something; to be a reason for (something),"¹⁵ rather than as a term of art indicating use of the "motivating factor" standard of causation.

My second point of disagreement with the majority opinion stems from their statement that the ALJ failed to properly analyze "contributing factor" causation in this case. The majority has stated that the ALJ erred because "the weighing of a respondent's affirmative defense evidence supporting a non-retaliatory reason or basis for the personnel action at issue against a complainant's causation evidence at the 'contributing factor' proof stage is not, as the ARB has recently held, legally permissible, as the respondent's affirmative defense evidence must be weighed under the heightened 'clear and convincing evidence' burden of proof standard." This statement is ambiguous. To the extent that this language means that the ALJ cannot in any way legally consider Williams's reasons for his decisions about Keeler's employment to analyze the issue of contributing factor, I disagree. The majority in *Powers* never states, as the *Keeler* majority suggests, that an employer's evidence about its reasons for acting is "not legally permissible" when determining contributing factor. The majority cites no page for this statement, nor could I find one.

To support its position, the majority points to a new idea set forth for the first time in the *Fordham* decision and referred to, but fundamentally changed in *Powers*. To the extent the majority considers the holdings of *Fordham* and *Powers* to be the same, I also disagree. While

¹⁵ 2015 Merriam-Webster Inc., <http://www.merriam-webster.com/dictionary/motive>.

the *Fordham* decision clearly would bar any consideration of a respondent's alleged reasons for an adverse action when determining contribution (a mixed decision by a three-judge panel), the *Powers* decision (an en banc panel decision) is less clear about this. Standing in clear contrast to *Fordham*, *Powers* states that "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*" (citing 29 C.F.R. § 18.401). *Powers*, ARB No. 13-034, slip op. at 21. It further states that relevancy is to be determined by the ALJ who decides facts and reviews evidence and credibility¹⁶ *Powers* suggests that a respondent's "subjective testimony" is of "highly questionable relevance," but does not bar it from consideration as *Fordham* did.¹⁷ The majority in *Powers* refused to consider the respondent's evidence on contribution, not because it was automatically excluded as suggested in *Fordham*,¹⁸ nor because it had no relevance,¹⁹ but because the weight or quality of the evidence was simply not persuasive to the *Powers* majority.

The third disagreement I have with the majority is its statement that when a complainant proves the elements of her case, she has not necessarily proven a violation of the STAA. In note 9, the majority states that even after finding that protected activity was a "contributing factor" to an adverse employment action, it "does not automatically result in a finding of a violation of STAA's whistleblower provisions." This is incorrect and improperly nullifies the statutory language, which states as a prohibition that "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because" the employee engaged in activity that is protected by the statute. 49 U.S.C.A. § 31105. I assume that the majority makes this statement to support the restriction of relevant evidence when determining causation so that an employer will not be found to be a violator without having been able to present its evidence and have it considered. But making the clear and convincing analysis a part of the determination of causation to determine whether there has been a violation adds an additional step after the basis for a violation (a complainant proving all of the elements of her case by a preponderance of the evidence) has been established. There should not be an additional step. The burden only shifts to an employer to prove that it would have taken the same action absent protected activity by "clear and convincing" evidence after

¹⁶ *Id.* at 20 ("all of the evidence admitted at the hearing is available to the ALJ in assessing whether the complainant meets his or her burden of proving the requisite elements that the FRSA requires "and "the trier-of-fact bears the responsibility to ensure that specific evidence advanced at hearing to rebut an element of complainant's claim be relevant to that showing").

¹⁷ *Id.* at 26-27.

¹⁸ *Fordham*, ARB No. 12-061, slip op. at 33.

¹⁹ *Powers*, ARB No. 13-034, slip op. at 26-27 (again, the *Powers* majority does not say that evidence of an employer's reasons for making an unfavorable personnel decision is not relevant, but rather stated that "the subjective testimony of Company managers regarding their alleged legitimate business reasons for Powers' termination [is] evidence that is of highly questionable relevance to contribution."

prohibited discrimination (“a violation”) has been found. “Clear and convincing” is not in any way used to judge whether there has been retaliation. That has already been established. It is only to determine whether, after finding discrimination, relief will be denied due to factors that would’ve justified the adverse action in the absence of protected activity. The affirmative defense was not intended to be the only opportunity for an employer’s evidence as to its reasons for making an unfavorable employment action to be considered.

In summary, I concur with the majority that the ALJ’s decision should be affirmed. I disagree with the majority decision for three reasons. First, the ALJ did not apply an incorrect causation standard—the ALJ cited and applied the contributing factor standard of causation even though she stated at one point that there was no evidence that any adverse action was in any way motivated by any protected activity. Second, *Fordham’s* rule that an employer’s reasons for taking adverse action cannot be considered when determining whether protected activity contributed to adverse action is not the law after the decision in *Powers*, the ALJ did not fail to properly analyze contributing factor causation. And third, when a complainant has proven all the elements of her case—protected activity, adverse action, and causation—by a preponderance of the evidence, then she has proven a violation; it is only at that point the burden shifts for an employer to prove by clear and convincing evidence that although it violated the statute, it should be free from liability because it would have acted the same way absent any protected activity.

PAUL M. IGASAKI
Chief Administrative Appeals Judge