

United States Senate

WASHINGTON, DC 20510

April 14, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Thomas Perez
Secretary of Labor

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

Dear Secretary Perez:

We write in support of the Department of Labor Administrative Review Board's (ARB) recent decisions in *Fordham v. Fannie Mae*, ARB No. 12-061 (Oct. 9, 2014) and *Powers v. Union Pacific Railroad*, ARB No. 13-034 (Mar. 20, 2015), clarifying the statutory burdens of proof for parties in whistleblower cases.

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

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

To afford an employer the opportunity of defeating a complainant's proof of a 'contributing factor' causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a preponderance of the evidence would render the statutory requirement of proof of the employer's statutorily

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

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

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

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

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

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

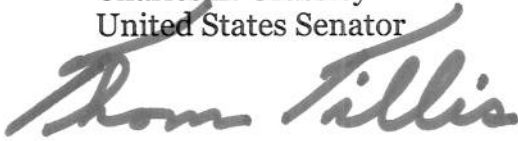
Sincerely,



Charles E. Grassley
United States Senator



Ron Wyden
United States Senator



Thom Tillis
United States Senator



Tammy Baldwin
United States Senator

³ *Id.* at 22.

⁴ *Fordham*, ARB No. 12-061 at 28-29, 31-33; *Powers*, ARB No. 13-034 at 14-18; 5 U.S.C. § 1221(e); 42 U.S.C. § 5851.

⁵ *Fordham*, ARB No. 12-061 at 28 (quoting 138 Cong. Rec. H11, 409; H11, 444 (daily ed. Oct. 5, 1992)).

⁶ *Powers*, at 25.

⁷ *Id.*

Handwritten signatures of Mark Kirk and Claire McCaskill in black ink.

Mark Kirk
United States Senator

Claire McCaskill
United States Senator

cc: Paul M. Igasaki
Chair
Administrative Review Board

E. Cooper Brown
Vice Chair
Administrative Review Board

Joanne Royce
Administrative Review Board

Luis A. Corchado
Administrative Review Board

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