No. 17-___

IN THE

Supreme Court of the United States

EDWARD BLACKORBY,

Petitioner,

v.

BNSF RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Thirteen federal whistleblower provisions, including the provision in the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, provide for relief if an employee shows that his protected activity was a "contributing factor" in an adverse personnel action, unless the employer proves it would have taken the same action in the absence of the protected conduct.

The courts of appeals are split over the following question:

Must an employee prove that his employer had an improper retaliatory motive to satisfy the "contributing factor" test?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Blackorby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, Pet. App. 1a, is reported at 849 F.3d 716. The order of the United States District Court for the Western District of Missouri denying respondent's motion for judgment as a matter of law or for a new trial, Pet. App. 15a, is unreported but available at 2015 WL 5095989.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied rehearing on April 4, 2017. Pet. App. 30a. On June 19, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 2, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

49 U.S.C. § 20109 provides in pertinent part:

(a) In general.—A railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done . . . (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury . . . .

(d) Enforcement action.—

(1) In general.—An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a) . . . may seek relief in accordance with the provisions of this section . . . by filing a complaint with the Secretary of Labor.

(2) Procedure.—(A) In general.—Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b), including: . . . Any action brought under (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b). . . .

49 U.S.C. § 42121(b) provides in pertinent part:

(2) Investigation; preliminary order.— . . . .

(B) Requirements.— . . . .

(iii) Criteria for determination by Secretary.—The Secretary may determine that a violation . . . has occurred only if the complainant demonstrates that [protected] behavior . . . was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.—Relief 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.

Complete versions of Sections 20109 and 42121 are included in the appendix to this petition. *See* Pet. App. 31a, 41a.

STATEMENT OF THE CASE

This case concerns the interpretation of 49 U.S.C. § 20109, a provision of the Federal Railroad Safety Act (FRSA) intended to ensure that railroad employees who report accidents and injuries or bring to light their employer's violations of federal regulations will not be worse off for having done so. As with a number of other federal whistleblower laws, Congress expressly specified the standard and allocation of proof for Section 20109 claims, providing that once the employee shows that his protected activity was a "contributing factor" in an adverse action, the burden shifts to the railroad to demonstrate, by clear and convincing evidence, that it would have taken the adverse action absent the employee's protected behavior.

In the decision below and others dating to 2014, the Eighth Circuit has construed this contributing factor framework as requiring the employee to prove that the employer had a culpable state of mind—an "improper retaliatory motive." On this view, "discriminatory animus" is "the essence" of the Section 20109 cause of action. In so holding, that court, and the Seventh Circuit, have rejected the contrary conclusion of other courts of appeals and the Department of Labor, which have consistently held that proof of animus is not necessary under Section 20109 and other provisions incorporating the same "contributing factor" and burden-shifting language.

The Eighth Circuit's decision warrants this Court's review. The statutory question has broad practical significance; the conflict of authority is unusually stark; and it arises in an area of federal law where uniformity is particularly needed. And the

Eighth Circuit's resolution is seriously mistaken. The text of the statute, which expressly specifies the standards and allocation of proof, leaves no room for a motive requirement; indeed, the precise "contributing factor" language that Congress chose for FRSA originated in legislation specifically meant to overrule judicial decisions that had required whistleblowing employees to prove motive.

A. Statutory Background

1. Congress enacted FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons." Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, § 101, 84 Stat. 971, 971 (codified as amended at 49 U.S.C. § 20101). Although the Nation's railroads are much safer than in early days, *see CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011) (noting "281,645 [worker] casualties in the year 1908 alone"), they continue to pose significant dangers to those who work on them and to the public at large. There were 11,105 railroad accidents in Calendar Year 2016 and 787 fatalities.[1]

Central to FRSA's regulatory regime are requirements that carriers provide the Federal Railroad Administration (FRA) with detailed information concerning accidents, injuries, and employees' hours of service. *See* 49 U.S.C. §§ 10901, 21103. These provisions, successors to laws enacted a century ago, *see, e.g.,* Accident Reports Act of 1910,

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[1] *See One Year Accident/Incident Overview—Combined*, Fed. Railroad Admin., https://tinyurl.com/yaera2hf (last visited July 29, 2017) (to locate, set "Start Month" to January 2016 and "End Month" to December 2017," then select "Generate Report").

Pub. L. No. 165, ch. 208, §§ 1-5, 36 Stat. 350, 351, reflect the practical impossibility of ensuring the safety of the Nation's vast rail network through inspections alone.

2. Since 1980, FRSA has included a provision, now codified at 49 U.S.C. § 20109, safeguarding the employment rights of railroad workers who report accidents, cooperate with federal investigations, or take other steps that advance the statute's regulatory regime. As with other whistleblower provisions, "Congress recognized that employees in the transportation industry are often best able to detect safety violations" but cannot be expected to assist federal safety regulators if doing so puts their livelihood in jeopardy. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (plurality opinion). For their part, employers have strong incentives to discourage such reporting: Costly regulatory scrutiny may be avoided by reducing the rate at which safety incidents *occur* or at which they *are reported*.

3. These dynamics operate powerfully in the rail sector. As the FRA Administrator explained in 2007 congressional testimony, adversarial labor-management relations are "deeply engrained in railroad culture." *The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transp. & Infrastructure*, 110th Cong. 139, 140 (2007) (Testimony of Joseph H. Boardman) ("2007 Hearing"). And railroads have potent means at their disposal to discourage whistleblowing: Precisely because carriers have extensive safety responsibilities, they have promulgated unusually comprehensive workplace

rules, backed by harsh penalties, that may be deployed to keep employees in check.

Underreporting of workplace injuries has been a particular problem, in part because employers' economic interests are unusually clear. Because federal law makes railroads liable for on-the-job injuries if their negligence played even the slightest role, *see* 45 U.S.C. § 51; *McBride*, 564 U.S. at 698, a railroad's best chance of avoiding liability may be to prevent an injury from being reported. Thus, as the FRA acknowledged in 1996, "many railroad employees fail to disclose their injuries to the railroad or fail to accept reportable treatment from a physician because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with [reporting]." *See* Railroad Accident Reporting, 61 Fed. Reg. 30,940, 30,941 (June 18, 1996).

Much of this underreporting is the result of outright employer "intimidation." 2007 Hearing at 130 (Boardman testimony); *see also, e.g.*, *Pan Am Rys., Inc. v. U.S. Dep't of Labor*, 855 F.3d 29, 39 (1st Cir. 2017) (describing ALJ's finding that "99% of injuries at Pan Am that were reportable to the FRA triggered formal charges against the injured employee"). But reporting can also be "unintentionally inhibit[ed]" by measures seemingly meant to promote safe operations—such as linking management compensation to reductions in (reported) injuries or assigning injured employees to "light duty." 2007 Hearing at vii-x; *id.* at 3 (statement of Rep. James R. Oberstar, Committee Chair).

4. Congress gave Section 20109 a complete overhaul in 2007, after it had become evident that the

1980 version had done little to stem "substantial underreporting and inaccurate reporting of injury and accident data by the railroads." U.S. Gen. Accounting Office, GAO/RCED-89-109, Railroad Safety: FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents 3 (1989).

First, Congress broadened the definition of protected activities, most notably to include "notify[ing] . . . the railroad carrier or the Secretary of Transportation of a work-related personal injury." 49 U.S.C. § 20109(a)(4).

Second, Congress enacted a new analytic framework for Section 20109 claims. The framework adopted language first used in 1989 amendments that strengthened protections under the Whistleblower Protection Act (WPA) for federal workers who, among other things, report violations of laws and regulations by their agency employer, 5 U.S.C. § 2302(b)(8)(A). *See* Pub. L. No. 101-12. The 1989 amendment provided that a federal worker was entitled to corrective action if he could show that that "protected activity was a contributing factor" in an adverse "personnel action," unless the agency could "demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence of" the protected activity. *Id.* § 3 (codified as amended at 5 U.S.C. § 1221(e)). That same language was repeated in 2000 in an aviation safety statute widely known as "AIR-21," *see* 49 U.S.C. § 42121(b), and in 2002 in the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, through a cross-reference to the AIR-21 provision. *See Lawson v. FMR, LLC*, 134 S. Ct. 1158, 1175 (2014) (pointing to the "parallel statutory texts and whistleblower protective aims" of the two provisions).

Congress took the same approach in the 2007 amendments to FRSA that it had taken in Sarbanes-Oxley, specifying that "the rules and procedures" and "burdens of proof" would be governed by those in AIR-21. *See* 49 U.S.C. § 20109(d)(2). Thus, an FRSA complainant must show that his protected behavior was a "contributing factor" in the adverse action. *Id.* § 42121(b)(2)(B)(iii). If he makes that showing, the burden shifts to the employer to "demonstrate[]," by "clear and convincing evidence," that it "would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(iv).[2]

5. The same 2007 legislation that amended FRSA included provisions establishing that employment rights of public transportation workers and commercial truck drivers would also be determined under the contributing factor framework. *See* Pub. L. No. 110-53, §§ 1413, 1536 (2007) (codified at 6 U.S.C. § 1142 and 49 U.S.C. § 31105). And Congress has

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[2] In addition, Congress dramatically changed the enforcement regime. Congress replaced the original dispute-resolution procedure—a "Rube Goldbergish intermingling of the Railroad Labor Grievance Procedure and a statutorily imposed schedule of compensation," H.R. Rep. No. 96-1025, at 30 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3844 (supplemental views of Rep. James T. Broyhill)—with a judicially enforceable administrative remedy, providing compensatory damages, backpay with interest, attorney's fees, and punitive damages. *See* 49 U.S.C. § 20109(e).

The 2007 statute also includes provisions aimed at screening out weak claims at the threshold and supplying authority to penalize frivolous or bad faith complaints. 49 U.S.C. § 20109(d)(1) (incorporating § 42121(b)(3)(C)); *see also id.* § 420109(a) (limiting protection to those activities undertaken in "good faith").

continued to enact the same "contributing factor" language in subsequent worker protection provisions. There are now thirteen such provisions—all administered by the Secretary of Labor—protecting workers in the transportation sector and in other safety-sensitive or heavily regulated fields where whistleblowing and cooperation with investigators is important to the accomplishment of federal objectives.[3]

These provisions also share common enforcement procedures—mostly established, as under FRSA, through an AIR-21 cross-reference. *See* 49 U.S.C. § 20109(d)((2)(A). The employee's administrative complaint is filed with the Occupational Safety and Health Administration, which makes an initial "reasonable cause" determination, after which it may proceed to a hearing before an administrative law

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[3] National Transit Systems Security Act, 6 U.S.C. § 1142; Consumer Financial Protection Act, 12 U.S.C. § 5567; Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; Sarbanes-Oxley Act, 18 U.S.C. § 1514A; FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Patient Protection and Affordable Care Act, 29 U.S.C. § 218c; Energy Reorganization Act, 42 U.S.C. § 5851; Seaman's Protection Act, 46 U.S.C. § 2114; Federal Railroad Safety Act, 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; Surface Transportation Assistance Act, 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; Pipeline Safety Improvement Act, 49 U.S.C. § 60129.

The Department of Labor continues to administer numerous, earlier-enacted employee protection provisions that do not include the "contributing factor," burden-shifting language. *See, e.g.*, 29 C.F.R. § 24.104(e) (requiring that complainants under whistleblower provisions of the Safe Drinking Water Act, Clean Air Act, and other federal statutes establish that their "protected activity was a motivating factor in the adverse action").

judge, 49 U.S.C. § 42121(b)(2)(A), whose decision is subject to review by the Department of Labor's Administrative Review Board (ARB). When the ARB has issued a final decision, either party may petition a federal court of appeals for review under the Administrative Procedure Act's judicial-review standards. *Id.* § 42121(b)(4)(A). FRSA and several other of these statutes include a "kick-out" provision authorizing the employee to file a de novo action in federal district court if the Department of Labor has not issued a final decision within 210 days of the complaint's filing. *Id.* § 20109(d)(3).

B. Proceedings Below

1. Petitioner Edward Blackorby is a trackman employed by respondent BNSF Railway Co. He was working outdoors on a Wednesday in March 2012 when he began experiencing discomfort in his right eye. Pet. App. 2a. He thought it might be an eyelash or sand. Tr. 115. When the discomfort persisted after the workday, Blackorby, at his foreman's suggestion, purchased over-the-counter eye drops, which he continued to use over the next two days. Tr. 120-22; Pet. App. 2a.

On Saturday, Blackorby awoke to find his eye swollen shut. Pet. App. 2a. He could not find a doctor until Sunday, when he visited a LensCrafters at a local mall. *Id.* There, a doctor removed a small piece of rusty metal from his cornea. *Id.* 2a-3a.

Immediately after the visit, Blackorby called his supervisor, Douglas Turney, and informed Turney that a metal object had entered his eye at work. Pet. App. 3a. Blackorby also told Turney that the doctor had scheduled a follow-up appointment. *Id.* Later that

day, Turney called back and told Blackorby that BNSF manager James Sadler wanted to accompany him to the next appointment. Pet. App. 3a. Although Sadler's interest made Blackorby uncomfortable, he acquiesced. *Id.*

The next day, Sadler was waiting at LensCrafters when Blackorby arrived. Tr. 177-78. After the doctor prescribed anti-infective eye drops—at which point BNSF was required to report the injury to the FRA, *see* 49 C.F.R. § 225.19—Sadler pressed Blackorby as to whether he intended to formally report the injury to BNSF. Pet. App. 3a. Sadler was "adamant" that Blackorby should "not report[] it." *Id.* 4a. Sadler told him that he "didn't have to say it happened at work" and could say it occurred "somewhere else." *Id.*

Upset about the conversation with Sadler, Blackorby called Turney to make clear he was unwilling to lie and intended to file a report. Pet. App. 4a. On his first day back, Blackorby met with Turney to complete the requisite paperwork. Turney asked him "five or six times" whether he was "sure [he] wanted to fill this paper out," but Blackorby submitted the report. Tr. 186.

Two days after he had filed the report, Blackorby received notice from BNSF that he was under investigation. The railroad alleged he had violated BNSF Maintenance of Way Operating Rule 1.2.5, which provides that work-related injuries must be "immediately reported to the proper manager." Pet. App. 3a. After a disciplinary hearing, Sadler—who was tasked with making the final decision for BNSF—concluded that Blackorby had violated Rule 1.2.5. *Id.* 5a. BNSF assessed a Level S (Serious), 30-Day Record Suspension and imposed a one-year probationary

period, during which another rule violation would allow BNSF to suspend him without pay. *Id.*

2. In August 2012, Blackorby filed a complaint with the Labor Department. Pet. App. 5a. OSHA's Regional Administrator issued findings that BNSF had violated Blackorby's rights under Section 20109 and ordered certain preliminary relief. *Id.* Both parties challenged portions of that order. *Id.*

3. One year later, while the administrative matter was still pending, Blackorby exercised his right to file a de novo action in federal district court. *See* 49 U.S.C. § 20109(d)(3). On cross-motions for summary judgment, the district court held that (i) Blackorby's injury report was protected activity; (ii) BNSF knew he had filed the report; and (iii) the suspension and probation constituted adverse action. Order at 3 (Jan. 5, 2015). The court held that genuine disputes remained as to whether the report was a contributing factor to the discipline and whether BNSF would have disciplined him absent the report, and the case proceeded to a jury trial on those issues. *Id.*

Before the trial court, the parties disagreed sharply over the governing legal standard. BNSF, pointing to language in the Eighth Circuit's then-recent decision in *Kuduk v. BNSF Railway. Company*, 768 F.3d 786 (2014), insisted that FRSA's "contributing factor" standard "requires actual animus" and asked the court to instruct the jury that Blackorby could not prevail unless he proved that BNSF acted with an "intentional retaliatory motive." Tr. 307-08. The court rejected that proposal. After explaining that "contributing factor" means "any factor[] which alone or in combination with other factors[] tends to affect in any way the outcome of the

decision," *id.* at 309, the court instructed the jury that Blackorby was "not required to show that BNSF had a retaliatory motive"—though such evidence could be probative. Pet. App. 6a.

The jury found that Blackorby's "injury report was a contributing factor in [BNSF's] decision to discipline him." Verdict 2. It further found that BNSF had failed to prove "it would have taken the same disciplinary action" had Blackorby "not reported his injury," *id.*, and awarded him compensatory damages. Pet. App. 6a.

4. On appeal, BNSF renewed its argument that circuit precedent required FRSA plaintiffs to prove "discriminatory animus." C.A. Reply Br. 8. BNSF argued that because Section 20109's general prohibition forbids railroads from "discharg[ing], demot[ing], . . . or in any other way *discriminat*[*ing*] against an employee," 49 U.S.C. § 20109(a) (emphasis added), it should be construed as a "discrimination" rather than a "whistleblower" provision, which meant, in BNSF's view, that proof of motive was required. C.A. Reply Br. 6-7.[4]

Blackorby disputed BNSF's broad reading of the *Kuduk* opinion and instead urged that the court recognize, as had the Third Circuit, that FRSA plaintiffs "need not demonstrate the existence of a retaliatory motive." C.A. Br. 15 (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d

[4] BNSF did not challenge the district court's conclusions that Blackorby engaged in protected activity, that BNSF knew of the protected activity, or that Blackorby had been subject to an adverse action. Nor did it appeal the denial of its motion to set aside the jury's verdict on its defense.

Cir. 2013)). The Secretary of Labor submitted an amicus brief urging affirmance. The brief explained that the Department of Labor had consistently construed Section 20109 and its sibling contributing factor provisions as not "requir[ing] that the employee show that the employer took the adverse action based on animus," and that these provisions "shield[] employees from both intentional and unintentional adverse conduct." Br. for Secretary of Labor 2, 12-14.

The Eighth Circuit reversed. The court of appeals did not question that the jury instruction was appropriate under the Third Circuit's interpretation of the statute, but it held that it "ha[d] already rejected *Araujo*" in *Kuduk* and that the panel was "bound to follow" circuit precedent, "regardless of whether we find *Araujo* persuasive." Pet. App. 11a-12a. Quoting the *Kuduk* court's statements that "the contributing factor that the employee must prove is *intentional retaliation*," *id.* at 11a (quoting 768 F.3d at 791), the panel explained that *Kuduk* had read the "general language of the statute" as establishing that "discriminatory animus" is "the 'essence' of the FRSA's employee-protections provision." *Id.* (quoting *Kuduk* and *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011)). Accordingly, the district court's failure to instruct the jury as to that proof requirement meant that the verdict should not stand. *Id.* 12a.

REASONS FOR GRANTING THE WRIT

This case presents an important question over which federal courts of appeals and the Labor Department are sharply divided. Only this Court can resolve the conflict, and this case presents an ideal opportunity to do so.

I. There Is a Stark Conflict as to What the Statutory "Contributing Factor" Standard Requires

As the opinion below recognized, the courts of appeals are divided as to whether, in order to show that his protected activity was a "contributing factor" in an adverse employment action, an employee must prove retaliatory animus. The Seventh and Eighth Circuits hold that employees must prove that their employer acted with an "improper retaliatory motive," *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 728 (8th Cir. 2017), but five other circuits have rejected such a requirement, as has the Secretary of Labor.

A. Two circuits hold that FRSA's "contributing "factor" standard requires the plaintiff to prove retaliatory animus on his employer's part.

1. In *Kuduk v. BNSF*, the Eighth Circuit concluded that the contributing factor standard eased plaintiffs' burden of proof on "causation," 786 F.3d at 791, but that "the contributing factor that an employee must prove is intentional retaliation." *Id.* That requirement, the court reasoned, follows from the text of Section 20109—particularly the word "discriminate" in Section 20109(a)—which it read to signal that Congress intended for "discriminatory animus" to be "the 'essence" of the claim. *Id.* (quoting *Staub*, 562 U.S. at 417). *Kuduk* appeared to cast doubt on the "no-need-to-show-motive" conclusion in *Araujo*, observing that the Third Circuit had relied on *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)—which had interpreted a statute, the WPA, with identical "contributing factor" proof language but whose general prohibition is stated in terms of "causation in fact ('because of'), not discrimination." 786 F.3d at 791 n.4.

In the decision here, the panel rejected suggestions by petitioner and the Secretary of Labor that *Kuduk*'s broad language could—and should—be reconciled with the Third Circuit's reading and with the understanding of the contributing factor framework adopted in decisions of other courts of appeals and of the ARB. The court instead read *Kuduk* as imposing a general motive requirement, applicable to every FRSA case, and as having "expressly rejected" the Third Circuit's interpretation. Pet. App. 11a.[5]

There is no basis for believing that the Eighth Circuit will reconsider its position. Although the panel invited Blackorby to seek reconsideration of the animus requirement by the full Eighth Circuit, *id.* 12a n.1, his rehearing petition was denied without recorded dissent, *id.* 30a. The Eighth Circuit enforced the rule in another decision issued the same day as the one here, stating in *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 728 (8th Cir. 2017), that without "specific evidence of an improper retaliatory motive," the employee had "failed to establish his prima facie case," and did so again in *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962 (8th Cir. 2017).

2. In *Koziara v. BNSF Ry. Co.*, 840 F.3d 873 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1449 (2017), the Seventh Circuit joined the Eighth. The employee in that case reported having fractured his tibia while helping replace railroad crossing planks. *See* No. 13-

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[5] The Eighth Circuit held that this language could not be read as limited to cases, like *Kuduk* itself, where the adverse action complained of was taken by managers who had no *knowledge* of the plaintiff's protected activity, requiring the employee to advance a "cat's paw" theory. *See* Pet. App. 11a-12a.

CV-834-JDP, 2015 WL 137272, at *1-2 (W.D. Wis. Jan. 9, 2015). After he filed the injury report, he was "disciplined for careless conduct" in connection with the incident. *Id.* at *2-3. The Seventh Circuit reversed a jury verdict in Koziara's favor and directed that judgment be entered for the employer, holding that the plaintiff's failure to adduce evidence that the discipline was "motivated by animus" was fatal to his FRSA claim. 840 F.3d at 878.[6]

B. Five courts of appeals reject an improper retaliatory motive requirement. As the decision below recognized, the Third Circuit held in *Araujo* that a plaintiff "*need not* demonstrate the existence of a retaliatory motive" on the employer's part to satisfy the "contributing factor" standard, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1141), and may prevail without "proffer[ing] any evidence" of animus, *id.* at 163.

The Ninth Circuit has likewise held that the "employer's subjective retaliatory animus is irrelevant" under the contributing factor standard. *See Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015). That court reasoned that the burden-of-proof language of the Energy Reorganization Act regulation at issue (which tracked exactly the

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[6] As explained below, the interpretation of the "contributing factor" language was not controlling in that case. The Seventh Circuit further held that the employer had carried its "same action" burden, 49 U.S.C. § 42121(b)(2)(B)(iv). *See Koziara*, 840 F.3d at 879. And though the certiorari petition asked this Court to review the court's application of that provision, it did not allege any decisional conflict as to its interpretation. *See* Petition for a Writ of Certiorari, *Koziara v. BNSF Ry. Co.*, No. 16-1059 (U.S. Feb. 28, 2017), 2017 WL 876216.

operative statutory language here) made clear that "[t]he relevant causal connection is not between retaliatory animus and personnel action, but rather between *protected activity* and personnel action." *Id.*

The Fifth Circuit agrees. In *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014), a case arising under the Sarbanes-Oxley Act provision, that court rejected the employer's argument that the "contributing factor" framework requires plaintiffs to prove a "*wrongfully-motivated* causal connection." *Id.* at 263. The Fifth Circuit observed that it was "unaware of any court that ha[d] held that . . . the employee must prove that the employer had a 'wrongful motive'" under a "contributing factor" statute. *Id.* And like the Third Circuit, the Fifth Circuit endorsed the Federal Circuit's conclusion that "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected activity] was a contributing factor to the personnel action." *Id.* (alterations in original) (quoting *Marano*, 2 F.3d at 1141).

The Fourth and Tenth Circuits have reached the same conclusion. In *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121 (10th Cir. 2013), another Sarbanes-Oxley case, the Tenth Circuit also emphasized that the operative "contributing factor" language had originated in legislation meant "to overrule" decisions interpreting the WPA to require employees "to prove that [their] protected conduct was . . . a 'motivating,' factor in an adverse personnel action." *Id.* at 1136 (citation omitted); *see also id.* (highlighting differences in proof standards under "contributing factor" provisions and those governing

claims "under Title VII [and] the ADEA"); *BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 638-39 (10th Cir. 2016) (applying *Lockheed* and *Marano* in an FRSA case). The Fourth Circuit in *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339 (4th Cir. 2014), similarly described the "contributing factor" standard as requiring only a showing that protected activity affected the employment action "in at least some way," *id.*, and cited with approval the same language from the Federal Circuit's *Marano* decision that the Third, Fifth, and Tenth Circuits had relied on, *see id.* at 348. (As had the *Marano* court, *Feldman* recognized that proof of retaliatory animus, though not required, can be *sufficient* to establish the causal connection between protected activity and a later adverse action. *See id.* at 349-50.).[7]

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[7] The state of the law in other circuits is less certain. An unpublished opinion of the Sixth Circuit, *Ind. Mich. Power Co. v. U.S. Dep't of Labor*, 278 Fed. Appx. 597 (6th Cir. 2008), contains language consistent with the Eighth Circuit's view. *See id.* at 604 (describing plaintiff's burden as proving "retaliatory intent" or "improper motive"). An Eleventh Circuit opinion uses similar language, *see Majali v. U.S. Dep't of Labor*, 294 Fed. Appx. 562, 566 (11th Cir. 2008) (per curiam) (describing plaintiff's burden as proving "retaliatory motive"), though that opinion also cited *Marano* with apparent approval, *see id.* But many opinions—reviewing ARB decisions under deferential "substantial evidence" standards—are imprecise as to whether plaintiffs *must* prove retaliatory animus or simply *may* rely on such evidence.

For its part, the Federal Circuit has not had occasion to address the proof requirements of any of the Labor Department-administered provisions or to respond to the Eighth Circuit's suggestion that textual differences between these statutes and the WPA are legally significant. *But see infra* p. 29 n.9. But that court has, beginning with its influential decision in *Marano*,

C. The Seventh and Eighth Circuits' interpretation also conflicts with that of the Secretary of Labor, *see* C.A. Amicus Br. 10-19, and with the consistent interpretation of the Department's Administrative Review Board, which exercises the Secretary's authority under FRSA and its sibling "contributing factor" provisions. *Cf. Lawson*, 134 S. Ct. at 1165 (explaining that certiorari had been granted to resolve a "division of opinion" between decisions of the First Circuit and the ARB). In decisions interpreting Section 20109 and its siblings, the ARB has "adopted [a] definition of 'contributing factor'" that does not require proof of "retaliatory motive" or "retaliatory intent," explaining that these provisions are targeted at "the effect of retaliation against whistleblowers, not the motivation of the employer." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002 & 09-003, slip. op. at 31 (Sept. 13, 2011); *accord Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, slip. op. at 3 (Nov. 20, 2014) (noting that ARB has "repeatedly held that neither motive nor animus is required").

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definitively concluded that the "contributing factor" language does not impose an improper motive requirement. And the First Circuit has seemingly gone further, rejecting the argument that proof of "malice" or "evil motive" is necessary to impose *punitive* damages under FRSA and concluding that "recklessness, serious indifference to or disregard for the rights of others, or even gross negligence" may suffice. *See Worcester v. Springfield Terminal Ry. Co.*, 827 F.3d 179, 183 (1st Cir. 2016) (quoting *Smith v. Wade*, 461 U.S. 30, 48 (1983)).

II. The Decision Here Raises a Broadly Important Question That Warrants This Court's Resolution

A. The question presented directly affects the employment rights of large numbers of American workers. More than 200,000 workers are covered by Section 20109, and more than two million others are employed in the other transportation sectors where "contributing factor" provisions govern. *See Industries at a Glance: Industries by Supersector and NAICS Code*, U.S. Bureau Lab. Stat., https://tinyurl.com/j37gl76 (approximately 485,000 airline employees, 65,000 maritime workers, and 1.7 million commercial motor vehicle operators).[8] And after the Court's decision in *Lawson*, the Sarbanes-Oxley provision protects not only "the millions of people who work for a public company," 134 S. Ct. at 1178 (Sotomayor, J., dissenting), but also "employees of privately held contractors and subcontractors . . . who perform work for [a] public company," *id.* at 1161 (majority opinion).

Employees frequently invoke these statutory protections. In the past three years, employees filed

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[8] Notably, the two circuits that impose a retaliatory motive requirement contain the country's three largest rail hubs: Chicago, Kansas City, and St. Louis. *See* Mo. Econ. Research & Info. Ctr., Missouri Freight Transportation: Economy on the Move; Rail Freight, (n.d.), https://tinyurl.com/k2zvglj; *Overview of Freight Flows into and out of the Chicago Region*, Chi. Metropolitan Agency Plan. (Oct. 28, 2014), https://tinyurl.com/l5nebps. And they comprise states that are home to approximately one-third of the country's freight railroad employees. *See U.S. Freight Rail Industry Snapshot*, Ass'n Amer. Railroads, https://tinyurl.com/y8jql4vz

with OSHA more than 3,500 claims of unlawful employer conduct. *See* OSHA, Whistleblower Investigation Data: Fiscal Years 2006-2016 (n.d.), https://tinyurl.com/k2v8q35. In 2016 alone, 302 claims were filed under Section 20109; 447 claims were brought under the Surface Transportation Assistance Act; and 174 under Sarbanes-Oxley. *Id.* And such proceedings represent the tip of the iceberg. As Congress and this Court have recognized, the extent and practical efficacy of these protections affect the behavior of employees and employers alike. Onerous requirements will deter employees (especially those subjected to adverse actions short of discharge) from pursuing valid claims and dissuade attorneys from offering representation; more effective protections can induce employers to think twice before taking improper action. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 259 (1987) (describing Congress's recognition that whistleblower protection would fail unless the remedy afforded employees was "practical[ly] effective[]").

And all these provisions, in addition to promoting fair treatment of individual employees, advance vital public interests. "Congress installed whistleblower protection in the Sarbanes-Oxley Act . . . to ward off another Enron debacle," *Lawson*, 134 S. Ct. at 1169; and provisions like Section 20109 and its AIR-21 and STAA siblings, by protecting employees who report injuries, hazardous conditions, or violations of federal law, help ensure the safe operation of the transportation system. *See also Rose v. Sec'y of Labor*, 800 F.2d 563, 565-66 (6th Cir. 1986) (Edwards, J., concurring) (observing that if nuclear power plant

employees "remain[] silent when they should speak out, the results can be catastrophic").

B. Decisional non-uniformity is especially problematic because most of the "contributing factor" provisions govern interstate industries, and many protect individual employees for whom interstate work is part of the job. Absent this Court's intervention, an employee's FRSA protections will depend on whether his injury occurred in Kansas City, Missouri or a mile down the tracks in Kansas City, Kansas. As BNSF highlighted below, "[a]t the time relevant to this case, Blackorby was assigned to work for . . . a traveling steel gang covering Texas, Arizona, New Mexico, Oklahoma, Kansas, Wisconsin, and Minnesota," BNSF C.A. Br. 15—states within the Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. (Indeed, while this case was pending, a district court in Oklahoma, where Blackorby's injury occurred, specifically rejected an employer's *Kuduk* argument, instead affirming that an employee "*need not* demonstrate the existence of a retaliatory motive," *Mosby v. Kan. City S. Ry. Co.*, No. CIV-14-472-RAW, 2015 WL 4408406, at *6 (E.D. Okla. July 20, 2015) (quoting *Araujo*, 708 F.3d at 158).).

Moreover, because these statutes' judicial review provisions permit "any person adversely affected" by a final ARB order—the employee, the employer, or both—to obtain review either where the violation occurred or where the plaintiff resided, *see, e.g.*, 49 U.S.C. § 20109(d)(4), the *same administrative decision* may be subject to review in courts that interpret the statutes differently, sending parties on a race to the courthouse. *See, e.g.*, *Doyle v. U.S. Sec'y of Labor*, 285 F.3d 243, 248 & n.3 (3d Cir. 2002) (noting that

employer had "petitioned the Court of Appeals for the Sixth Circuit because the events at issue here took place within that circuit," one day before worker had filed a review petition in the Third Circuit challenging damage award). And an employee who would otherwise see the administrative process through may, if faced with the prospect of review under the Eighth Circuit rule, consider exercising his rights under 49 U.S.C. § 20109(d)(3) to start again in district court.

C. Finally, as this Court recognized when it granted review in *Lawson*, the mechanism Congress created for adjudicating these claims is especially ill-equipped to manage interpretive conflicts between the judiciary and the Department of Labor. The structure, with multi-level agency review and tight time deadlines, suggests that Congress expected that the Secretary would have the last word in most cases under these provisions, which often involve individual claims for modest amounts. It therefore is unlikely that Congress meant for the Secretary to apply starkly different legal rules depending on where judicial review was predicted to occur (or which district court or courts might have jurisdiction under the "kick-out" provision). *Cf.* 49 U.S.C. § 20106(a) ("Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable."). But settling on a single uniform administrative interpretation will not, by itself, prevent courts from setting aside whichever rule the Secretary selected. *See Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 155-56 (1996) (noting that agency, in pursuit of uniformity, had decided to apply one circuit's interpretation nationwide, but that

Seventh Circuit had then rejected that construction); *cf. Lawson*, 134 S. Ct. at 1165 (endorsing ARB interpretation announced "several months after" First Circuit had reached the opposite conclusion).

All of which to say the "division of opinion" here is considerably more complex and intractable than the one that prompted the grant of certiorari in *Lawson*. *See* 134 S. Ct. at 1165. The disagreement there pitted a single First Circuit decision interpreting a single statutory provision against a single and recent ARB decision. Here, the disagreement concerns the meaning of that provision *and* those of twelve other federal statutes; there are multiple circuits on each side; and the ARB's construction is longstanding and repeatedly reaffirmed.

III. The Eighth Circuit's Construction Is Wrong

Before the Eighth Circuit's decision in *Kuduk*, no court "ha[d] held that . . . the employee must prove that the employer had a 'wrongful motive'" under a "contributing factor" provision. *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014). Rather, it was widely understood, including by district courts in the Eighth Circuit, *see, e.g.*, *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 882 (S.D. Iowa 2013), that the plaintiff's burden entailed establishing four things—at which point the burden shifted to the employer—namely that:

> (i) he engaged in a protected activity; (ii) [the employer] knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) that the protected activity was a contributing factor in the adverse action.

29 C.F.R. § 1982.104(e)(2). On this formulation, evidence of animus was not required (only knowledge of some sort), though—as the jury here was instructed—such evidence was admissible and probative.

In holding that Section 20109 imposes an additional motive requirement, the *Kuduk* court first treated the text of the "burdens of proof" provision as incomplete. The Eighth Circuit recognized that the "contributing factor" language was meant to demand less from the employee than would a "predominant" or "substantial factor" standard, 768 F.3d at 791; but, the court posited, Congress had not specified *what* must be shown to have made the "contribut[ion]." To fill that perceived gap, the court then looked to the word "discriminate" in Section 20109(a)'s general prohibition; and because the "essence" of discrimination claims, 768 F. 3d, at 791, is "discriminatory animus," *id.* (quoting *Staub*, 562 U.S. at 417), the Eighth Circuit concluded, the statute requires employees to prove an improper retaliatory motive and to connect that to the adverse action, *id.* That reasoning is wrong at every turn.

1. First, the statutory text Congress enacted left no gap to fill. The relevant provision specifying the "burdens of proof" provides that an employee may prevail by showing that the "*behavior* described in [Section 20109(a)-(c)] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added). As the Ninth Circuit recognized, this language is clear that "[t]he relevant causal connection is not between retaliatory animus and personnel action, but rather between *protected activity* and personnel

action." *Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015).

2. Moreover, the "contributing factor" language originated in congressional efforts "specifically intended to overrule," 135 Cong. Rec. 5033 (1989), decisions that had interpreted the Whistleblower Protection Act as requiring plaintiffs to prove their employer's "motives in taking the retaliatory action were inappropriate," S. Rep. No. 100-413, at 13-15 (1988). By the time Congress enacted AIR-21 in 2000, it had codified identical "contributing factor" language in the Energy Reorganization Act whistleblower provision, *see* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902, 106 Stat. 2776, 3123-25 (1992) (codified as amended at 42 U.S.C. § 5851), and courts had held that prior decisions requiring proof of "retaliatory motive" had been superseded, *see Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Whether or not the textually identical terms in the WPA and these later provisions would necessarily require identical interpretations, *see, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), it is singularly improbable that had Congress meant to *impose* a "motivating factor" requirement in AIR-21 or FRSA, it would have done so through the exact language it had recently chosen to eliminate that requirement.

3. Nor does the presence of the word "discriminate" in FRSA's general prohibition (or its absence from the WPA provision, *see infra* n.9) support the Eighth Circuit's rule. At the outset, that term does not appear in the operative "burdens of proof" provision, which requires proof of a connection between the protected "behavior" and an "unfavorable personnel action." *See* 49 U.S.C. § 42121(b)(2)(B)(i). And it is simply not the

case that "animus" is the "essence" of all discrimination claims. This Court has repeatedly recognized that some "antidiscrimination laws *must be* construed" to impose liability without proof of intent. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (emphasis added); *see also Bd. of Educ. v. Harris,* 444 U.S. 130, 140-41 (1979) (holding statutory prohibition against "discriminat[ion]" to have been violated by conduct "not shown to amount to purposeful racial discrimination").

In fact, the operative text here refutes the notion that employers' "mindset," *Inclusive Communities Project*, 135 S. Ct. at 2518, was Congress's ultimate concern. Under FRSA, a railroad that exudes pure retaliatory spite may avoid liability if it proves that it would have discharged the employee anyway. 49 U.S.C. § 42121(b)(2)(B)(iv). *Compare* 42 U.S.C. § 2000e-5(g)(B) (authorizing award of relief under Title VII even where employer has "demonstrate[d] that [it] would have taken the same action in the absence of [an] impermissible motivating factor").

But much worse, the precedent to which the Eighth Circuit looked to discern the "essence" of the Section 20109 cause of action construed a provision that expressly requires "motivating factor" proof. This Court's opinion in *Staub v. Proctor Hospital* explained that "[t]he central difficulty in this case is construing the phrase 'motivating factor in the employer's action,'" 562 U.S. 411, 417 (2011) (quoting 38 U.S.C. 4311(c)), and it went on to distinguish between "a motivating factor" and a "causal factor," explaining that only the former would require "unlawful animus on the part of the [decisionmaker]," *id.* at 418. It would

be hard to find a starker example than this of the perils of "apply[ing] rules applicable under one statute to a different statute without careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).[9]

4. In any event, classifying FRSA as a "discrimination" statute, rather than some other kind of law, does not support interpreting it to impose an additional proof requirement *on plaintiffs.* It may fairly be said that Congress intended that under FRSA—as under familiar anti-discrimination statutes—employers who treat whistleblowers differently than other employees would be liable. But it would not follow that the statutes' proof requirements are the same. This Court has inferred from the absence from Title VII of any contrary statutory language that the burden "of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). But FRSA and its

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[9] Nor, for sake of completeness, is there any merit in the Eighth Circuit's suggestion that other circuits' reliance on *Marano* is "improper[]" because the WPA "require[s] *only* an ultimate showing of causation in fact (because of), not discrimination." *Kuduk*, 768 F.3d at 791 n.4 (emphasis added). This Court has made clear that "because of" requires a *greater* causation showing ("but-for") than does a "motivating factor" standard. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). Indeed, had Congress not enacted a provision directly specifying burdens of proof, FRSA's general prohibition uses language that would be less demanding than that in the WPA. *See* 49 U.S.C. § 20109(a) (prohibiting adverse treatment that is "due, in whole or in part, to" protected activity).

relatives *do* prescribe a detailed framework, where the persuasion burden *does* shift to the defendant. And Congress has likewise specified when the burden shifts: upon proof that an employee's protected behavior contributed to adverse personnel action. 49 U.S.C. § 42121(b)(iii)-(iv).[10]

5. Inconsistency with the Secretary of Labor's longstanding, contrary resolution is reason not only for reviewing, *see supra* p. 20, but also for rejecting the Eighth Circuit's decision. Congress charged the Department of Labor with primary responsibility for administering and applying Section 20109 and its sibling provisions in light of concrete workplace realities. And the Department's construction, reached through a centralized and relatively formal process and affirmatively endorsed by the Secretary, reflects careful attention to the text and structure of the provisions. Congress's continued enactment of this language in new and amended employment protection provisions—and entrustment of their administration to the Secretary of Labor—is itself confirmation that the regime is operating as intended.

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[10] This does not mean that motive is irrelevant. As the jury instruction here recognized, that an employer harbored animus toward an employee's whistleblowing may be highly probative evidence. *See Marano*, 2 F.3d at 1141 (under 1989 WPA amendments, "retaliatory motive" would still be sufficient, but not necessary, to establish a violation). But the Eighth Circuit erred by elevating one type of useful proof into a required element of the plaintiff's cause of action. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (refusing to transform one means of proving an impermissible racial gerrymander into a "mandatory precondition" for liability).

6. The reasons why Congress enacted this regime—and did not require employees to prove wrongful intent—are familiar and straightforward. First, the fundamental concern of provisions such as Section 20109 is not the "mindsets" of employers. Congress was not seeking to eradicate class-based bigotry or counteract stereotypes that disadvantage workers based on an immutable characteristic unrelated to their productivity. Congress's principal concern was in ensuring that employees possessing information necessary to the operation of the statute's safety regulation regime would come forward. And Congress well understood that deterrence might be "unintended"—rewarding managers for lower incident results is not necessarily *meant* to suppress accurate reporting. Indeed, there is no doubt that the ultimate "motive" for the vast majority of employer conduct that Section 20109 prohibits is not the infliction of hardship on disfavored groups or individuals, but rather protecting the railroad's bottom line.

Equally important, Congress's choice of this framework reflects its concern that protections be practically sufficient, so that employees will come forward. No less than under the WPA, it is unfair and "unrealistic to expect the whistleblower . . . to demonstrate improper motive," 135 Cong. Rec. 5037 (1989); the employer knows its reasons and has far greater access to evidence that would tend to establish (or disprove) that an adverse action was related to protected activity. Whistleblowing employees, by contrast, are poorly positioned to take on that burden. There is no enforcement agency on which to "piggyback" in these cases and no class with whom to share the expense of uncovering the facts. Section

20109 and like provisions afford redress for individual wrongs, including ones that are relatively modest, such as wrongful "reprimand[s]." 49 U.S.C. § 20109(a).

IV. This Case Is an Optimal Vehicle for Deciding the Question Presented

The question whether the "contributing factor" standard requires proof of improper motive not only was fully litigated and passed upon in both courts below, but it is outcome determinative in this case. The Eighth Circuit decision makes clear that if Section 20109 does not require a jury finding of improper motive, the verdict for Blackorby should stand. And were review to be granted, there is no other factual or legal issue that would even potentially interfere with this Court's reaching the question.

Although the question arises regularly, it rarely is presented as pristinely as it is here. It is often the case, as was true in *Kuduk* and *Koziara v. BNSF Ry. Co.*, 840 F.3d 873 (7th Cir. 2016), that a lower court that finds the employee has not carried his burden of showing that protected activity was a contributing factor will *also* conclude that the employer carried *its* burden of showing it would have taken the adverse employment action in any event, *see Koziara*, 840 F.3d at 878-79. In such cases, the meaning of the "contributing factor" standard is without practical significance. The jury here ruled for Blackorby on that question, and BNSF did not ask the Eighth Circuit to overturn that finding.

Moreover, in other cases under FRSA and its sibling provisions, there are often substantial disputes as to jurisdictional or preclusion rules, and as to whether the plaintiff's activity falls within the

statute's protection; as to whether the challenged action was an "adverse personnel action"; and as to how to analyze questions of employer knowledge when some participants in the personnel process were aware of the protected activity, but others were not. *See Kuduk*, 768 F.3d at 790-91. Not so here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-3192

Edward Blackorby
Plaintiff-Appellee

v.

BNSF Railway Company
Defendant-Appellant

Secretary of Labor
Amicus on Behalf of Appellee

Appeal from United States District Court
for the Western District of Missouri – Kansas City

Submitted: September 21, 2016
Filed: February 27, 2017

Before COLLOTON, MELLOY, and SHEPHERD, Circuit Judges.

MELLOY, Circuit Judge.

BNSF Railway Company ("BNSF") disciplined its employee, Edward Blackorby, for not promptly reporting a workplace injury. Blackorby sued, claiming BNSF's discipline violated the employee-protections provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109(a)(4). The case went before a jury, and after the close of evidence, the jury was instructed that Blackorby need not establish intentional retaliation to prevail on his claim. The jury found for Blackorby and awarded him damages for emotional distress. Because we conclude that this Court's decision in *Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014), required Blackorby to establish intentional retaliation and that the jury instructions did not compel such a finding, we reverse and remand.

I.

Blackorby worked on a traveling steel gang that repaired and maintained track for BNSF. While working on a dusty, windy day, Blackorby began to experience discomfort in his right eye. After work, Blackorby told a union foreman that he thought something had entered his eye, and the foreman recommended saline drops. The drops soothed Blackorby's eye, but it still felt "scratchy." Two days after the discomfort began, Blackorby had an unrelated root canal, the dentist gave him pain pills, and he went home to bed. But when Blackorby woke up on the third day, he noticed his eye had begun to swell. And by the fourth day, a Sunday, Blackorby's eye had significantly worsened. He went to the only place he thought an eye doctor would be available on a Sunday: a mall LensCrafters. There, a doctor removed

a small metallic object from the surface of Blackorby's cornea.

Under Rule 1.2.5 of BNSF's Maintenance of Way Operating Rules, "[a]ll cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed." The rule further provides that "[i]f an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager."

Accordingly, Blackorby called Assistant Roadmaster Douglas Turney, a BNSF manager, immediately after the doctor removed the object from his eye. Blackorby told Turney that an object entered his eye at work, that a doctor removed the object, and that he had a follow-up appointment with the doctor the next day. Turney then relayed this information to James Sadler, also a BNSF manager. Sadler asked to accompany Blackorby to his follow-up appointment. Blackorby called his union representative, and the representative said it would be fine if Sadler went to the doctor's appointment so long as Sadler did not go into the examining room or ask for Blackorby's records. As a result, Blackorby acquiesced to Sadler's request, but he did not "feel comfortable" with Sadler coming to his appointment.

The next day, Blackorby went to his follow-up appointment and learned that his eye would be okay. After receiving the good news, Blackorby walked out to the lobby of the LensCrafters where Sadler was waiting. According to Blackorby, Sadler asked him if he wanted to formally report the injury. Blackorby said

he did want to report the injury, but Sadler "was kind of adamant on [Blackorby] not reporting it." Sadler told him that Blackorby "didn't have to say it happened at work," and that he "could say it happened at home or . . . say it happened somewhere else if [Blackorby] felt comfortable with that." Blackorby asked whether he would "have to go through an investigation" if he reported the injury. Sadler said that he "hated investigations, [and] he'd rather not have them." Nevertheless, Sadler said "it was up to [Blackorby]" to decide whether to formally report the injury.

Blackorby "was pretty upset" about the conversation with Sadler and called Turney to make clear that he wanted to file a formal injury report. Although Turney already knew about Blackorby's injury, Blackorby felt the need to make the phone call because he "didn't know what [Sadler's] intention was." During this phone call, Turney told Blackorby that it would be "late reporting" if Blackorby reported the injury. Blackorby felt like Turney and Sadler "were discouraging [him] from reporting."

Six days after Blackorby first began experiencing discomfort in his eye, he filed his formal injury report. Soon after, Blackorby received a letter informing him that he was being investigated by BNSF. He "wasn't too happy" about the letter. He did not think his injury was reported late because he had immediately told Turney about the injury after the doctor discovered the metal in his eye. According to Blackorby, he would have reported the injury the day he began experiencing discomfort if he had known at the time he had metal in his eye.

After an investigation and hearing, Sadler determined that Blackorby had violated Rule 1.2.5. Accordingly, Blackorby received a Level S (Serious), 30-Day Record Suspension and a one-year probationary period. The effect of this discipline was that Blackorby faced a 30-day suspension without pay if he committed another rule violation during the one-year probationary period.

Blackorby did not ultimately receive any time off without pay as a result of his Record Suspension. In the meantime, however, Blackorby appealed the discipline within BNSF. Blackorby then filed a complaint with the Occupational Health and Safety Administration, which issued findings that BNSF violated Blackorby's rights under the FRSA. These findings were challenged before an administrative law judge, but while the challenge was still pending, Blackorby filed the present action in federal district court for de novo review pursuant to 49 U.S.C. § 20109(d)(3).

The facts detailed above were presented to a jury through evidence and testimony. At trial, Sadler testified that Blackorby could not have been disciplined under Rule 1.2.5 had Blackorby not filed the injury report. BNSF, moreover, stipulated that "management/personnel[ ] may earn bonuses based in part on the rates and/or occurrence of employee injuries." Blackorby also testified of the worry and stress he experienced during the year-long probationary period. He stated, "[I]t was pretty upsetting because you know you can't mess up. I mean, when that's on your record, something major could

actually end your career, and you ain't going to go out and get another railroad job. It ain't going to happen."

After the close of evidence, the district court instructed the jury on the elements of Blackorby's FRSA claim. The jury was instructed that "Blackorby is not required to show that the defendant had a retaliatory motive but such motive will prove a violation of [the FRSA] if it contributed or tended to affect in any way the outcome of the decision to take adverse action." As to the damages, BNSF proposed an instruction stating that any emotional distress damages "must be supported by competent evidence of genuine injury." The district court rejected this instruction, however, instead instructing the jury as follows: "[Y]ou must award plaintiff such sum as you find will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of the defendant's decision to discipline plaintiff. You must determine the amount of any damages sustained by plaintiff, such as emotional distress damages."

The jury returned a verdict for Blackorby, awarding him $58,280 in damages for emotional distress. The district court denied BNSF's motion for judgment as a matter of law, denied BNSF's motion for a new trial, and awarded costs and attorneys' fees to Blackorby. BNSF now appeals.

II.

Although BNSF raises several arguments, we resolve the present appeal on the issue of the district court's jury instructions. "We review a district court's jury instructions for an abuse of discretion." *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 744

(8th Cir. 2010). "A district court possesses 'broad discretion in instructing the jury, and jury instructions do not need to be technically perfect or even a model of clarity.'" *Id.* (quoting *Brown v. Sandals Resorts Int'l*, 284 F.3d 949, 953 (8th Cir. 2002)). But the jury instructions, "taken as a whole," must "fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury in a particular case." *Id.* (quoting *Brown*, 284 F.3d at 953). "[E]ven if we find that a district court erroneously instructed the jury, we will reverse only where the error affects the substantial rights of the parties." *Am. Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455, 468 (8th Cir. 2013) (alteration in original) (quoting *Der v. Connolly*, 666 F.3d 1120, 1126 (8th Cir. 2012)).

"[A] district court's decision to reject a proposed jury instruction also is reviewed for an abuse of discretion." *Retz v. Seaton*, 741 F.3d 913, 919 (8th Cir. 2014). "A party 'is not entitled to a particularly worded instruction.'" *Id.* (quoting *United States v. Meads*, 479 F.3d 598, 601 (8th Cir. 2007)). And "[t]here is no abuse of discretion in a denying a [party's] requested instruction if the instruction[s] actually given by the trial court adequately and correctly cover[ ] the substance of the requested instruction.'" *Id.* (first alteration added) (quoting *Meads*, 479 F.3d at 601).

A.

The FRSA's employee-protections provision protects certain acts by railroad employees. *See* 49 U.S.C. § 20109(a). It provides that "[a] railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if

such discrimination is due, in whole or in part, to the employee's lawful, good faith act done . . . (4) to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness." *Id.* To establish a prima facie case under the employee-protections provision, an employee must show "(i) he engaged in a protected activity; (ii) [the railroad carrier] knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action." *Kuduk*, 768 F.3d at 789 (citing 49 U.S.C. § 42121(b)(2)(B)(i)); *see also* 49 U.S.C. § 20109(d)(2) (incorporating into the FRSA the standards and burdens of proof set forth under 49 U.S.C. § 42121(b)).

In the present case, the parties dispute whether the contributing-factor causation standard required Blackorby to show that BNSF intentionally retaliated against him for reporting his injury. Blackorby and the United States (as *amicus curiae*) both urge this Court to follow *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013). In *Araujo*, the Third Circuit considered whether an employee's injury report was a contributing factor to his discipline. *Id.* at 160. The court noted that "the term 'contributing factor' is a term of art that has been elaborated upon in the context of other whistleblower statutes." *Id.* at 158. The court stated that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of [the employer's] decision. 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." *Id.* at 158 (emphasis omitted) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); *see also* 135 Cong. Rec. 5033 (1989) (using the same language to explain why Congress incorporated the contributing-factor standard into the Whistleblower Protection Act). The court further noted that, in the context of other whistleblower statutes employing the contributing-factor standard, "an employee *'need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.'" *Araujo*, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1141).

The Third Circuit extended this interpretation of the contributing-factor standard to the FRSA's employee-protections provision. Id. at 159-61. In so doing, the court noted that the contributing-factor standard was incorporated into the FRSA in 2007 after Congress examined systemic problems in the railroad industry. *Id.* at 157, 159-61. The court explained that "the House Committee on Transportation and Infrastructure held a hearing to 'examine allegations . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job injuries.'" *Id.* at 159 (alteration in original) (quoting Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transp. and Infrastructure, 110th Cong. at v (2007) (memorandum from

Committee's Majority Staff)). The court noted congressional concern that "the underreporting of railroad employee injuries has long been a particular problem." *Id.* (quoting Impact of Railroad Injury, 110th Cong. at vi). And the court noted concerns "that some railroad supervisors intimidated employees from reporting injuries to the [Federal Railroad Administration ("FRA")], in part, because their compensation depended on low numbers of FRA reportable injuries within their supervisory area." *Id.* at 161 n.7. Citing this problematic history of injury reporting and railroad programs, the court reasoned that Congress incorporated the contributing-factor standard into the FRSA in order to "reduce[ ] an employee's burden in making a prima facie case." *Id.* According to the *Araujo* court, this reduced burden meant – consistent with whistleblower statutes using the contributing-factor standard – that "an employee need not ascribe motive to the employer." *See id.*

BNSF, however, argues that this Court has already rejected *Araujo*. In *Kuduk*, we considered whether, under the FRSA, an employee established a prima facie case that BNSF terminated the employee for his safety report. 768 F.3d at 789-92. In that case, a supervisor, who was aware of the employee's prior safety report, reported the employee for walking between the rails – a serious violation of BNSF rules. *Id.* at 788. Because the employee already had other serious violations on his record, the employee was discharged by BNSF. *Id.* Relying on *Araujo* and a "cat's paw" theory of causation, the employee argued that, because the supervisor knew about the employee's safety report and because it was disputed whether the

employee even violated BNSF rules, the employee had established that the safety report was a contributing factor to the supervisor reporting the employee. *Id.* at 790-91. The *Kuduk* court, however, disagreed. *Id.* at 791. The court concluded that "the contributing factor that an employee must prove is *intentional retaliation* prompted by the employee engaging in protected activity." *Id.* (emphasis added). The court then noted that there was no evidence to suggest that the supervisor reacted negatively to the safety report. *Id.* Further, the court noted that there was no evidence that the BNSF manager who actually disciplined the plaintiff knew about the safety report and, therefore, affirmed the district court's grant of summary judgment to BNSF. *Id.* at 791, 793.

We find *Kuduk* controlling. The court reasoned from the general language of the statute that the "essence" of the FRSA's employee-protections provision is "discriminatory animus." *Id.* at 791 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 1193 (2011)). And, in a footnote, the court expressly rejected the *Araujo* conclusion which Blackorby now urges this panel to adopt. *Id.* at 791 n.4 ("In our view, the *Araujo* panel may have improperly relied on *Marano* . . . for its no-need-to-show-motive conclusion because the court in *Marano* was construing a federal employee whistleblower statute that required only an ultimate showing of causation in fact ('because of'), not discrimination.").

Accordingly, regardless of whether we find *Araujo* persuasive, we are bound to follow *Kuduk*. *See United States v. Anderson*, 771 F.3d 1064, 1066 (8th Cir. 2014) ("[I]t is a cardinal rule in our circuit that one panel is

bound by the decision of a prior panel." (alteration in the original) (quoting *United States v. Betcher*, 534 F.3d 820, 823 (8th Cir. 2008))).[1] Because we find no plausible way for this panel to distinguish *Kuduk*'s conclusion that a showing of intentional retaliation is required under the FRSA's employee-protections provision, we hold that the district court abused its discretion when it instructed the jury that Blackorby need not establish intentional retaliation. "Taken as a whole," the instruction did not "fairly and adequately represent" the law in this Circuit. *See McCoy*, 593 F.3d at 744 (quoting *Brown*, 284 F.3d at 953). Under *Kuduk*, a jury must find intentional retaliation prompted, at least in part, by the protected activity. The jury instruction in the present case did not require the jury to make such a finding.

Having found the jury instruction improper, we consider the proper disposition of this case. Blackorby argues that he has presented sufficient evidence of intentional retaliation under the contributing-factor standard and is therefore entitled to a new trial on remand. We agree. Under the contributing-factor standard, "[a] prima facie case does not require that the employee *conclusively* demonstrate the employer's retaliatory motive." *Kuduk*, 768 F.3d at 791 (alteration in original) (emphasis added) (quoting *Coppinger-Martin v. Solis,* 627 F.3d 745, 750 (9th Cir. 2010)). Indeed, the standard is "more lenient" than other causation standards. *Id.* at 792. Viewed in the light

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[1] In effect, Blackorby argues that we should overrule *Kuduk*. He may properly raise this contention in a petition for rehearing en banc.

most favorable to Blackorby, the evidence shows that two BNSF managers repeatedly discouraged him from filing his injury report. BNSF stipulated, moreover, that managers may earn bonuses based on the rates of employee injuries – one of the very concerns examined by Congress before incorporating the contributing-factor standard into the FRSA. *See Araujo*, 708 F.3d at 159, 161 n.7. This evidence, taken together, sufficiently "raise[s] an inference" that Blackorby's injury report prompted, at least in part, intentional retaliation by BNSF. *See Kuduk*, 768 F.3d at 789.

B.

Before concluding, we briefly address whether the district court erred in rejecting BNSF's proposed jury instruction regarding emotional distress damages. BNSF proposed an instruction stating that claims of emotional distress "must be supported by competent evidence of genuine injury." We agree that this instruction correctly states the law. *See Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) ("An award of damages for emotional distress must be supported by competent evidence of 'genuine injury.'" (quoting *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978))). But we disagree that the district court abused its discretion by rejecting the instruction. Such an instruction, without more, may be misleading because emotional distress damages need not be supported by "medical or other expert evidence." *See Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552 (8th Cir. 2013). Further, "[a] plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden in this regard." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997)

(quoting *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996)).

III.

Under *Kuduk*, a plaintiff must establish intentional retaliation to prevail on an FRSA claim. Because the instruction in this case did not require the jury to make such a finding, we reverse and remand for proceedings consistent with this opinion

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

EDWARD BLACKORBY, Plaintiff,	)	
vs.	)	Case No.
BNSF RAILWAY COMPANY,	)	4:13-cv-00908-SRB
Defendant.	)	

ORDER

Before this Court is Defendant BNSF Railway Company's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) or, in the Alternative, Motion for New Trial Pursuant to Rule 59 (Doc. # 121). After reviewing the Motion, the record, and the applicable law, the Motion is denied.

I. Background

On September 16, 2013, Plaintiff Edward Blackorby ("Blackorby") brought his claim against BNSF Railway Company ("BNSF") based on allegations BNSF violated the Federal Rail Safety Act ("FRSA") by retaliating against Blackorby after he reported a workplace injury. While this case was originally assigned to Judge Gaitan, who decided the summary judgment motions, it was transferred to this judge prior to trial. On June 16, 2015, after a three day trial, the jury returned a verdict in Plaintiff's favor and awarded damages in the amount of $58,280. After

hearing testimony regarding punitive damages in the second phase of the trial, the jury returned a verdict in favor of Plaintiff, but awarded zero damages. On June 17, 2015, BNSF filed two motions for judgment as a matter of law at the close of all the evidence. BNSF's motions were denied. BNSF subsequently filed the instant renewed motion and seeks relief under Federal Rule of Civil Procedure 50(b) or, in the alternative, Rule 59.

II. Legal Standard

Rule 50(b) allows a party that has previously moved for judgment as a matter of law to renew that motion no later than 28 days after the entry of judgment. "In the matter of a renewed [motion for judgment as a matter of law], a court must affirm the jury's verdict unless, in viewing the evidence in the light most favorable to the prevailing party, the court concludes that a reasonable jury could not have found for that party." *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006) (citation omitted). When determining a Rule 50 motion for judgment as a matter of law, "the [C]ourt should review all of the evidence in the record," and "draw all reasonable inferences in favor of the nonmoving party," without making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citations omitted). "Judgment as a matter of law is proper only when there is a complete absence of probative facts to support the conclusion reached so that no reasonable jury could have found for the nonmoving party." *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001) (internal quotation and citation omitted).

Rule 50 also allows a party to move, in the alternative or jointly, for a new trial under Rule 59. Rule 59 "confirms the trial court's historic power to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996). "A new trial is appropriate when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice." *Id.* When determining a Rule 59 motion for a new trial, the Court has broad discretion. *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998). However, a Rule 59 motion serves the "limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *Id.* at 1286 (internal quotation and citations omitted).

III. Discussion

Defendant BNSF argues it is entitled to the requested relief for four reasons: (1) Plaintiff did not suffer any cognizable adverse action; (2) Plaintiff failed to present sufficient evidence to establish the work-place injury was a contributing factor to the adverse employment action and BNSF would have taken the same actions in the absence of Plaintiff's injury report; (3) Plaintiff is not entitled to emotional distress damages awarded by the jury; and (4) BNSF was prejudiced by the punitive damages instruction which was not warranted.

a. Cognizable Adverse Action

First, BNSF argues the actions taken against Blackorby are not the types of events actionable under

the FRSA pursuant to 49 U.S.C. § 20109(a). BNSF asserts the Court should use the Supreme Court's definition of "adverse action" articulated in *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53 (2006), as the applicable standard under the anti-retaliation laws. The standard set forth in *White* states "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal citations and quotations omitted). BNSF claims it conducted an investigation of Plaintiff's conduct and issued a "record suspension" which does not satisfy the *White* standard. BNSF notes courts have applied the *White* standard to determine what actions are cognizable adverse actions. However, BNSF states the "Eighth Circuit has not specifically addressed the issue but has confirmed that an FRSA claim requires an adverse employment action."

Blackorby claims the issue of whether Plaintiff suffered any cognizable adverse action is not properly before the Court under Fed. R. Civ. P. 50 because this issue was decided by Judge Gaitan in the cross-motions for summary judgment. Blackorby claims that under Rule 50, a judgment as a matter of law may be granted when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *see also Peters v. Risdal*, 786 F.3d 1095, 1098 (8th Cir. 2015) (finding that when summary judgment was properly granted leaving no

proper reason to instruct the jury on the claim, then the motion for new trial was properly denied). Blackorby concludes that because the issue was properly decided pursuant to Fed. R. Civ. P. 56 and was not tried to a jury, the Court may not grant the Motion for Judgment as a Matter of Law on this issue.

Alternatively, Blackorby suggests BNSF's argument fails because the standard suggested by BNSF proposes a standard for adverse action rooted in Title VII jurisprudence and statutes other than the FRSA. Plaintiff cites to *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d. Cir. 2013), which suggests the FRSA is "much more protective of employees" than cases decided under the Title VII framework.

The Court relies on the decision of Judge Gaitan in the January 5, 2015, Order on the cross-motions for summary judgment which states:

> In particular, the Court does not find defendant's arguments that plaintiff did not suffer an adverse action convincing, because the FRSA provides broader protection than Title VII, and provides that employers "may not discharge, demote, suspend, *reprimand*, or *in any other way discriminate* against an employee if such discrimination is due, in whole or in part" to the employee "notify[ing], or attempt[ing] to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work related illness of an employee." 49 U.S.C. § 20109(a)(4) (emphasis added). Plaintiff's 30 day record

> suspension and his loss in pay for time spent in the investigation hearing constitute adverse actions under the statute.

Blackorby v. BNSF Ry. Co., No. 13-CV-00908-FJG, 2015 WL 58601, at *3 (W.D. Mo. Jan. 5, 2015). Both parties were allowed an opportunity to fully brief the Court on their positions regarding the third element of Blackroby's FRSA claim, adverse action. Ultimately, the issue was resolved by Judge Gaitan in the January 5, 2015, Order, granting summary judgment pursuant to Fed. R. Civ. P. 56. The Court declared Blackorby's 30 day record suspension and his loss in pay for time spent in the investigation hearing constituted "adverse action" under the statute. Thus, for the reasons explained by the Court in the January 5, 2015, Order, this Court concludes BNSF's actions constitute adverse actions under the statute. BNSF is not entitled to judgment as a matter of law or a new trial on the issue of adverse action.

b. Evidence of Contributing Factor

Second, BNSF seeks a judgment as a matter of law or a new trial based on its argument Blackorby failed to present sufficient evidence to establish the work-related injury was a contributing factor to the adverse action. BNSF argues the uncontroverted evidence proves BNSF disciplined Blackorby solely for the late reporting of his injury to the proper manager, and not because he reported his injury. BNSF asserts it would have taken the same actions in the absence of Plaintiff's reporting of the workplace injury. Additionally, BNSF states "the issue for jury was whether BNSF solely disciplined Plaintiff for violating

a rule or whether BNSF engaged in intentional retaliation . . .” (Doc. #124, p. 6). BNSF claims the Court’s failure to instruct the jury BNSF intentionally retaliated or discriminated against Plaintiff was an error because intentional retaliation was a factor for the jury to consider pursuant to *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). Based on the evidence presented to the jury, BNSF states no reasonable inference can be drawn that Plaintiff established the causation element in this action because he failed to prove his protected activity of reporting an injury contributed to the actions of BNSF. Alternatively, assuming Blackorby did prove the causation element of his FRSA claim, BNSF claims it “proved by clear and convincing evidence that BNSF would have taken the complained-of actions in the absence of Plaintiff reporting his workplace injury to the proper manager.”

In response, Blackorby asserts BNSF’s argument that he failed to present sufficient evidence proving the injury report was a contributing factor to the actions taken by BNSF is in contradiction to BNSF’s own proposed jury instruction. BNSF’s own proposed jury instruction stated, in part: “A contributing factor is a factor that, whether taken alone or in conjunction with other factors, tends to affect the outcome of the decision in any way.” (Doc. #71). Blackorby notes BNSF failed to reconcile its proposed instruction with its new arguments presented in its motion. Blackorby also states that whether he asserted sufficient evidence to prove the causation element is irrelevant because it would require the Court to reweigh the evidence and make credibility determinations. Furthermore,

Blackorby argues BNSF's belief that the Court's failure to instruct the jury that BNSF "intentionally retaliated or discriminated" against Plaintiff was an error based on BNSF's misrepresentation and misapplication of the holding in *Kuduk*. Blackorby notes BNSF's argument claiming plaintiff must prove intentional retaliation was pulled from *Kuduk*, but was made "in a wildly different legal and factual scenario than the one here." In *Kuduk*, the Eighth Circuit referenced the Sixth Circuit's decision in *Consol. Rail Corp. v. U.S. Dep't of Labor*, which considered the appeal of a final decision of the U.S. Department of Labor and applied a higher standard of review of the findings of fact of the Administrative Law Judge. 567 Fed.Appx. 334, 338-39 (6th Cir. 2014). The Sixth Circuit held that the factual findings of the ALJ "constitute[d] substantial evidence that animus was a contributing factor in [plaintiff's] termination." *Id.* at 338.

The Court fully analyzed the facts and law pertaining to the issue of "contributing factor." In the January 5, 2015, Order, the Court explained:

> However, questions of material fact remain as to the fourth element of plaintiff's prima facie case. *See, e.g.*, *Ray v. Union Pac. RR. Co.*, 971 F. Supp. 2d 869, 888 (S.D. Iowa 2013) (finding, in a case similar to Blackorby's, that questions of material fact remained as to whether the protected activity was a contributing factor to the adverse employment action, "both because of temporal proximity between the report [of injury] and the subsequent investigation, and because Plaintiff's report [of injury] is inextricably intertwined with the adverse

> employment action."). In particular, the credibility of defendant's management employees is at issue, and a jury can choose whether to believe that defendant was disciplined solely because of the late reporting of the injury. Additionally, for the same reasons, questions remain as to whether defendant would have taken the same adverse action in complete absence of the protected act.

Blackorby, 2015 WL 58601, at *3. Unless the Court finds "a reasonable jury could not have found for that party," the Court "must affirm the jury's verdict." *Hite*, 446 F.3d at 865. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves*, 530 U.S. at 150. During the first phase of trial, the parties presented witness testimony, including testimony from BNSF employees that testified BNSF treated other employees in a similar manner and that Blackorby was disciplined solely for late reporting. From this testimony, the jury was instructed to weigh the evidence, determine the credibility of the witnesses and draw their own inferences from the testimony. The Court does not find the evidence and testimony presented at trial demonstrates a "complete absence of probative facts" to support the jury's conclusion and warrant a judgment as a matter of law or new trial.

Furthermore, the Court concludes it is not necessary to instruct the jury to decide whether BNSF "intentionally retaliated" against Blackorby. The Eighth Circuit has held:

> "We agree with the Ninth Circuit that, under the statute's 'contributing factor' causation standard, '[a] prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.'"

Kuduk, 768 F.3d at 791 (citing *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). Thus, the Eighth Circuit has confirmed there is no requirement under the FRSA to "demonstrate the employer's retaliatory motive" and no error was committed by this Court.

After a review of all of the evidence in the record and the standard set forth by the Eighth Circuit, the Court finds BNSF's argument is insufficient to establish there is a "complete absence of probative facts to support the conclusion reached" by the jury. *Foster*, 250 F.3d at 1194. Thus, the Court must deny BNSF's motion for judgment as a matter of law and for a new trial.

c. Emotional Distress Damages

Third, BNSF states Blackorby is not entitled to emotional distress damages because he did not present sufficient evidence that he sustained recoverable damages or that the damages were caused by BNSF's alleged FRSA violation. BNSF cites to 49 U.S.C. § 20109(e)(2)(C) which states: "relief . . . . shall include – compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." BNSF believes the evidence does not support a genuine injury suffered by Blackorby, and, alternatively, if Blackorby

established his emotional distress claim, the jury award of $58,280 was excessive. BNSF relies on the holding of *Forshee v. Waterloo Indus. Inc.*, 178 F.3d 527, 529 (8th Cir. 1999). In *Forshee*, the Eighth Circuit reversed the jury's award of emotional distress damages because the plaintiff suffered no physical injury, was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress. *Id.* at 531.

Blackorby asserts he is entitled to the damage award because, pursuant to *Forshee*, it must be generally supported by "competent evidence of genuine injury" and plaintiff need not present medical or expert testimony to sustain an award. *Id.* at 531. Blackorby argues *Forshee* is neither fatal, nor dispositive of, Blackorby's damages award. Blackorby notes that in *Forshee* plaintiff sustained emotional distress for one single afternoon, unlike the instant case, where Blackorby experienced fear for his job for an entire year. Blackorby claims he presented competent evidence and testimony concerning his stress, discomfort, and associated problems he experienced as a result of the retaliatory events.

The Eighth Circuit has held "[a] compensatory damage award for emotional distress may be based on a plaintiff's own testimony." *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552 (8th Cir. 2013) (citing *Forshee*, 178 F.3d at 531). "Such an award must be 'supported by competent evidence of genuine injury,' *Forshee* at 531 (internal quotation omitted), but medical or other expert evidence is not required." *Bennett* at 552 (citing *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir.

1997)). "A plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden in this regard." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997) (quoting *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215-16 (6th Cir. 1996)).

In *Forshee*, a Title VII action, the plaintiff "admitted [the sexual harassment] was not the source of her post-termination distress." *Forshee*, 178 F.3d at 531. But, the testimony in this action demonstrates the alleged retaliatory events, subsequent investigation and lawsuit are the source of Blackorby's emotional distress claim. Blackorby testified at trial that receiving the disciplinary letter "was pretty upsetting because you know you can't mess up." (Doc. #126-1, Tr. 30:2-3). Blackorby went on to state "I mean, when that's on your record, something major could actually end your career, and you ain't going to go out and get another railroad job. It ain't going to happen." (*Id.*, Tr. 30:3-6). Blackorby explained he had "marital problems just like everybody, but the stress of all these appeals and everything that's going on, it's put an extra toll on my marriage." (*Id.*, Tr. 31:14-16). The parties stipulated "Ed Blackorby did not receive treatment from his family doctor for the subject matter of this case." (Doc. #124-3). The Court further notes Blackorby testified he never saw a psychologist or a counselor for the stress. (Doc. #124-1, Tr. 92:19 – 93:2).

The Court concludes Blackorby presented competent evidence of a genuine injury through his testimony presented to the jury regarding the stress he suffered and the strain this issue had on his relationship with his wife and mother. Even though

Blackorby did not seek medical or psychological help for emotional distress, "medical or other expert evidence is not required." *Kim*, 123 F.3d at 1065. Blackorby's testimony, along with the circumstances of this case, sustain Blackorby's burden in this case. The Court finds sufficient evidence was presented to sustain an award for emotional distress damages. The jury was presented with competent evidence and found in favor of Blackorby on this issue. The Court does not find an absence of probative facts that would warrant a judgment as a matter of law or a manifest error of law or fact that would necessitate a new trial. Therefore, BNSF is not entitled to judgment as a matter of law or a new trial based on the emotional damages award.

d. Punitive Damages

Fourth, BNSF asserts it is entitled to judgment as a matter of law on Blackorby's claim for punitive damages because a punitive damages instruction was not warranted. BNSF argues that because the jury awarded zero in punitive damages the issue of punitive damages should no longer be in the case. Though, if Blackorby should "choose[] to file post-trial motions seeking to revive in any way his attempt to recover punitive damages, . . . BNSF conditionally renews its argument for judgment as a matter of law" on this issue. BNSF claims Blackorby is not entitled to punitive damages because "[e]ven if the plaintiff can show that individuals in the company demonstrated the requisite intent, punitive damages are only appropriate if such intent can be imputed to the employer." *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968, 974 (8th Cir. 2007). BNSF alleges it has shown company policies and resources in place to

address allegation of discrimination and retaliation and has established a good-faith defense.

Blackorby plainly responds because no such post-trial motion has been filed, "there is no justiciable case or controversy for the court to decide and any ruling on the issue would, in essence, be an advisory opinion." But, if a case or controversy existed on this issue, Blackorby asserts that submission to a jury was appropriate because it is up to a jury to determine whether it believed BNSF made a good-faith effort to comply with the FSRA.

The United States Supreme Court has explained a justiciable controversy "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Gustin v. F.D.I.C.,* 843 F. Supp. 536, 537 (W.D. Mo. 1993) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Furthermore, a justiciable controversy "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* If the courts rule on motions that present no justiciable controversy, "it would be, in effect, issuing an advisory opinion in direct violation of the United States Constitution, Article III, Section 2." *Id.* (citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250 (1911)).

The Court finds that based on the language of BNSF's motion, BNSF was simply reserving its right to submit its argument should Blackorby file a post-trial motion on this issue in the future. Since no post-trial motion has been filed at this time regarding punitive damages, there is no justiciable issue before

the Court. The jury had the responsibility of weighing the evidence presented by the party and determining whether BNSF made a good faith effort to comply with the FRSA. Thus, it was properly submitted to the jury and BNSF's motion for judgment as a matter of law and motion for a new trial on the issue of punitive damages is denied.

IV. Conclusion

Defendant BNSF Railway Company has failed to demonstrate that a reasonable jury could not have found for Plaintiff Blackorby or that the trial resulted in a miscarriage of justice to necessitate a new trial. Accordingly, it is hereby

ORDERED that Defendant BNSF Railway Company's Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) or in the Alternative, Motion for New Trial Pursuant to Rule 59 (Doc. #121) is denied.

Date: August 28, 2015

/s/ Stephen R. Bough
STEPHEN R. BOUGH,
JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-3192

Edward Blackorby

Appellee

v.

BNSF Railway Company

Appellant

Secretary of Labor

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court
for the Western District of Missouri – Kansas City
(4:13-cv-00908-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Riley and Judge Kelly did not participate in the consideration or decision of this matter.

April 04, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

49 U.S.C.A. § 20109

§ 20109. Employee protections

(a) In general.–A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done–

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by–

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property

occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.

(b) Hazardous safety or security conditions.–

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for–

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if–

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that–

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

(c) **Prompt medical attention.–**

(1) **Prohibition.–**A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is

requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.–A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

(d) Enforcement action.–

(1) In general.–An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be

initiated by filing a complaint with the Secretary of Labor.

(2) Procedure.–

(A) In general.–Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b), including:

(i) Burdens of proof.–Any action brought under (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b).

(ii) Statute of limitations.–An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b) or (c) of this section occurs.

(iii) Civil actions to enforce.–If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121.

(B) Exception.--Notification made under section 42121(b)(1) shall be made to the person named in the complaint and the person's employer.

(3) De novo review.–With respect to a complaint under paragraph (1), if the Secretary of Labor has

not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

(4) Appeals.–Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b), may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

(e) Remedies.–

(1) In general.–An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.–Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include–

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) **Possible relief.**–Relief in any action under subsection (d) may include punitive damages in an amount not to exceed $250,000.

(f) **Election of remedies.**–An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

(g) **No preemption.**–Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(h) **Rights retained by employee.**–Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(i) **Disclosure of identity.**–

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions.

(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosures shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

(j) Process for reporting security problems to the Department of Homeland Security.–

(1) Establishment of process.–The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities.

(2) Acknowledgment of receipt.–If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to

such person and acknowledge receipt of the report.

(3) Steps to address problem.–The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

APPENDIX E

49 U.S.C.A. § 42121

§ 42121. Protection of employees providing air safety information

(a) Discrimination against airline employees.–No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)–

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.–

(1) Filing and notification.–A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.–

(A) In general.–Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe

that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(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.

(3) Final order.–

(A) Deadline for issuance; settlement agreements.–Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy.–If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) 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 to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall

assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints.–If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) Review.–

(A) Appeal to Court of Appeals.–Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings

under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack.–An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by Secretary of Labor.–Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.–

(A) Commencement of action.–A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees.–The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus.–Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Nonapplicability to deliberate violations.–Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.

(e) Contractor defined.–In this section, the term "contractor" means a company that performs safety-sensitive functions by contract for an air carrier.