No. 23-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for Review of the Merit Systems Protection Board
in Case No. AT-1221-09-0543-B-2

CORRECTED BRIEF OF RESPONDENT

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Pursuant to Rule 47.5, counsel for respondent states that she is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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CORRECTED BRIEF OF RESPONDENT

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Merit Systems Protection Board's (board or MSPB) conclusion that Ms. Farrington's disclosures were not protected under 5 U.S.C. § 2302(b)(8).

2. Whether, assuming that the disclosures were protected, substantial evidence supports the board's determination that the Department of Transportation, Federal Aviation Administration (FAA) did not threaten Ms. Farrington with removal and, thus, this alleged personnel action did not occur.

3. Whether, again assuming that the disclosures were protected, Ms. Farrington failed to carry her burden of demonstrating that the personnel actions she alleged were taken in reprisal for those disclosures, as required by 5 U.S.C. § 2302(f)(2).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. Ms. Farrington's Alleged Whistleblowing Disclosures

From 1997 until 2004, Ms. Farrington was employed by FAA as an Aviation Safety Inspector (Cabin Safety), responsible for investigating violations of, and enforcing, the Federal Aviation Regulations (FAR). Appx18. During the time period relevant to the issues in this appeal, Ms. Farrington was assigned to FAA's AirTran Airways (AirTran) Certificate Management Office (CMO) in Orlando, Florida. Appx18. A CMO is a field office dedicated to the surveillance and regulation of a single air carrier, and the AirTran CMO was dedicated to the surveillance and regulation of AirTran. Appx18; Appx18 n.3. The AirTran CMO was part of FAA's Southern Region Flight Standards District Office (FSDO). Appx18 n.3.

The MSPB administrative judge (AJ) found that it was Ms. Farrington's "job to investigate violations of the [FAR], in particular, in relation to flight attendant training and her responsibility to suggest changes or modifications to a flight attendant training program." Appx85. The AJ relied on the position description

for Ms. Farrington's job, which specifically listed "investigations," "surveillance" and "monitor[ing]" as duties. Appx84-85. During the summer of 2002, Ms. Farrington spent two months in Atlanta observing AirTran's month-long initial flight attendant training sessions. Appx19.

On March 26, 2003, a Boeing 717 (B-717) aircraft, operated by AirTran as Flight 356, made an emergency landing and evacuation of passengers. Appx20; Appx117. During the evacuation, flight attendants had some difficulty deploying the aircraft's tail cone emergency exit slide. The National Transportation Safety Board (NTSB) subsequently investigated the incident focusing, in part, on AirTran flight attendant training. Appx20-21.

Sometime in May 2003, Ms. Farrington wrote an 11-page report detailing complaints she had about her employment with FAA, Appx22; Appx97-107, complaining that her requests to travel to Air Tran's Atlanta training facility were not granted, Appx102, and "briefly stat[ing] that regulatory requirements are not being met without elaboration." Appx37; Appx101; Appx103. Ms. Farrington sent a copy of the report to Fred Walker, Division Manager for FSDO; Ms. Farrington alleged this was her first protected disclosure. Appx22; Appx30 (disclosure 1).

Ms. Farrington later provided a copy of this report to Mark George, a member of NTSB's Survival Factors Group, in May 2003, in what she

characterized as her second protected disclosure. Appx20; Appx23 n.12; Appx30 (disclosure 2). On May 22, 2003, Mr. George interviewed Ms. Farrington concerning the Flight 356 accident. Appx22. During this interview, Ms. Farrington made what she asserted was her third protected disclosure, Appx22; Appx30 (disclosure 3), regarding AirTran's training of flight attendants on B-717 aircraft using a mockup of a tailcone of a different aircraft (a DC-9) and her belief that such training was insufficient. Appx126.

On June 17, 2003, Mr. Walker visited the CMO to meet with all employees. Appx23. After this meeting, Ms. Farrington had a discussion with Mr. Walker that she alleges is her fourth protected disclosure.[1] Appx23; Appx30 (disclosure 4). The AJ noted, based on the testimony of Mr. Walker and Jim Ellison, a Supervisory Labor Relations Specialist for FAA's Southern Region, Appx24, that "[i]t was not unusual for Mr. Walker to meet with employees after his meeting and he would routinely meet with Aviation Safety Inspectors to discuss safety issues." Appx23.

II. FAA's Alleged Personnel Actions

On June 17, 2003, Klaus Goersch, Vice President of Flight Operations

[1] Although the AJ's decision, on page seven, refers to a discussion with "Moyers," Appx23, this is an error, given the later explanations that the conversation was with Mr. Walker, the Division Manager. Appx30; Appx22.

at AirTran, wrote to Mr. Walker requesting that Ms. Farrington be removed from oversight of AirTran. Appx23. Mr. Goersch stated that it had become increasing difficult over the past two years to work with her and that discussions with the CMO about it had not resulted in any improvement. Appx23.

On July 11, 2003, Vicki Stahlberg, Assistant Manager of the CMO, Appx19, conducted a formal counseling with Ms. Farrington about performance issues. Appx24. Dawn Veatch, Assistant Manager for FSDO, asked Mr. Ellison to assist Ms. Stahlberg with the counseling meeting; Mr. Ellison therefore attended the meeting. Appx24; Appx51.

Ms. Farrington was told during the counseling meeting that she had to limit her direct communication with AirTran – an instruction the board referred to as a "moratorium." Appx25 (citing Appx108). Although Ms. Farrington asserted before the AJ that she was also threatened with removal from her job at the counseling, the AJ concluded that, no such threats were made. Appx55. FAA did not remove Ms. Farrington from the AirTran CMO at that time, Appx24 n.13, and there is no support for Ms. Farrington's assertion that "FAA acted swiftly . . . to honor AirTran[']s demands to rid itself of the whistleblower." Petitioner's Corrected Opening Brief (Pet. Br.) 20 (Oct. 13, 2023).

Instead, on July 24, 2003, Ms. Farrington stopped reporting for work, providing notes during her absence from her psychiatrist indicating that she was

not able to work. Appx25; Appx25 n.18. Ms. Farrington never returned to the CMO. Appx25. Jack Moyers, the CMO Manager, Appx19, subsequently received a letter from Mr. Farrington's psychiatrist, stating that she could not return to duty until at least March 1, 2004. Appx25. On January 20, 2004, Mr. Moyers informed Ms. Farrington that her position needed to be filled by an employee available on a regular, full-time basis, and that disciplinary action could be taken for excessive absenteeism or unavailability for duty if she continued to be absent. Appx25 (citing Appx115).

After further communication from Ms. Farrington's psychiatrist, in an August 11, 2004 letter to Ms. Farrington, Mr. Moyers proposed her removal based on her continued unavailability for full-time duty for over a year. Appx26 (citing Appx134-135). He noted that he "simply c[ould] no longer continue to hold [her] position for [her]." Appx26. Ms. Farrington did not respond to the proposal, and, on September 16, 2004, Mr. Moyers issued a decision removing Ms. Farrington from Federal service based on her unavailability for full-time duty. Appx26 (citing Appx136-137). Her removal was effective October 3, 2004, and she did not file an appeal. Appx26.

III. Proceedings Before The Board From 2009 To 2013

On April 17, 2009, Ms. Farrington filed an appeal with the board. Appx27. In 2010, the AJ issued an initial decision, concluding that Ms. Farrington had

alleged that she made the four protected disclosures described above. Appx77. The AJ further concluded that three personnel actions asserted by Ms. Farrington – her removal and the three actions alleged to have occurred on July 11, 2003 (threatened removal, counseling, and significant change in job duties) – were "personnel actions" under 5 U.S.C. § 2302(a)(2)(A). Appx75. Applying the test in *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001), the AJ determined that Ms. Farrington's disclosures were not protected because they were within her normal job duties – based on her position description – and she reported them through normal channels. Appx84-86. The AJ dismissed the appeal for lack of jurisdiction. Appx88.

After Ms. Farrington filed a petition for review, the board, in 2012, granted the petition and remanded the appeal to the AJ for further factfinding and a hearing. Appx27. Before the AJ issued an initial decision, the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, § 101(b)(2)(C), 126 Stat. 1465, 1466, was signed into law on November 27, 2012. Appx28-29. The board subsequently issued a decision in *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, 602 (2013), concluding that the WPEA protects disclosures made in an employee's normal course of duties and applied retroactively to cases pending before the board prior to the WPEA's effective date. Appx29. The new 5 U.S.C. § 2302(f)(2), added through the WPEA, stated that,

when a disclosure was made in an employee's normal course of duties, it was protected

> if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

5 U.S.C. § 2302(f)(2) (effective January 14, 2013, through June 13, 2017).

IV. Proceedings Before The AJ Related To Ms. Farrington's Refiled Appeal

Ms. Farrington subsequently requested that her appeal be refiled, which occurred on July 23, 2013. Appx29. The AJ held a hearing on December 18-19, 2013. Appx17.

In a June 1, 2016 decision, the AJ denied Ms. Farrington's request for corrective action. Appx17. The AJ concluded that Ms. Farrington "fail[ed] to show by a preponderance of the evidence that her disclosures are protected under 5 U.S.C. § 2302(b)(8)" – that is, that she reasonably believed they evidenced a violation of law, rule, or regulation or a substantial and specific danger to public safety. Appx34. The AJ noted that, although Ms. Farrington alleged violations of the FAR in her May 2003 report, that "report contains no specific citations to the FAR, does not explain how [she] believes the FAR is being violated and briefly states that regulatory requirements are not being met without elaboration."

Appx37. Ms. Farrington alleged before the AJ that she disclosed, in her May 22, 2003 interview by Mr. George, that AirTran's training of flight attendants using "a DC-9 tail cone mock[]up instead of on a B-717 mock[]up . . . was in violation of 14 C.F.R. § 121.417, an FAA regulation governing crewmember emergency training," Appx41. However, the AJ noted, Appx39, that – according to Mr. George's report, summarizing Ms. Farrington's statements during the interview – she "said that the AirTran training program is *'in compliance' with the FARs*." Appx126 (emphasis added). In any event, the AJ determined that Ms. Farrington had not shown a reasonable belief that the mockup training violated 14 C.F.R. § 121.417, because FAA – through Martin Polomski, the CMO's principal operations inspector (POI) – had discretion in how to apply that provision. Appx43-44; Appx18. Finally, the AJ concluded that she had not shown a reasonable belief that there was a substantial and specific danger to public safety due to FAA's alleged restrictions on her travel, since she had spent two months with AirTran's flight attendant training program in Atlanta in 2002 and could fly to Atlanta to inspect it at any time, because "[o]nly overnight trips were limited due to [FAA's] budget issues." Appx36-38.

The AJ also determined that, "[e]ven assuming, arguendo, that [Ms. Farrington's] disclosures are protected, she has not shown that any personnel actions were taken against her in reprisal for" them. Appx45. The AJ explained

that, under 5 U.S.C. § 2302(f)(2), Ms. Farrington had the burden to demonstrate that each alleged personnel action was taken "in reprisal for" a disclosure that was made during the normal course of duties and not just "'because' of" that disclosure.[2] Appx29-30.

The AJ then concluded that Ms. Farrington had not demonstrated reprisal. First, with regard to her removal, the AJ relied on, among other things, testimony of Mr. Moyers, the deciding official, "that he 'wanted [Ms. Farrington] to come back to work,' and . . . 'she would have had a job' if she had returned." Appx46. The AJ "found the testimony of Mr. Moyers to be direct and forthcoming and [] found him to be a credible witness," while finding Ms. Farrington's "testimony to be inconsistent with some of the contemporaneous documentation and her own prior statements." Appx47. The AJ "developed the distinct impression" that, in her testimony, Ms. Farrington was "using" the Flight 356 accident "to turn her workplace complaints about her managers into something far more than they were at the time that she made them." Appx47.

[2] The AJ noted that, "[i]n adding this additional burden, Congress was distinguishing between employees who have a general obligation to report wrongdoing and those employees whose very job involves investigating such as auditors and investigators." Appx30 (citing S. Rep. 112-155 at *5 (Apr. 19, 2012), reprinted in 2012 U.S.C.C.A.N. 589, 593). The AJ found that Ms. Farrington, "as an Aviation Safety Inspector responsible for ensuring compliance with the FARs[,] falls under this provision." Appx30.

Second, although Ms. Farrington alleged that, during the counseling meeting, Mr. Ellison threatened her with removal, the AJ found that this did not happen. Appx55. The AJ "f[ou]nd it improbable that someone in Mr. Ellison's position" would do so and "credit[ed] his testimony that he did not do so," Appx55, finding him "to be a compelling witness with no motive to lie or be untruthful." Appx47. Additionally, the AJ found that his testimony was "supported by the testimony of other agency employees that emphasized that they were not out to get rid of [Ms. Farrington]." Appx55.

Third, the AJ assumed that the counseling itself was a personnel action, but concluded that Ms. Farrington "failed to show [the counseling] was held in reprisal for any allegedly protected disclosures" because it was conducted to address AirTran's complaints about her and "let [her] know that her contact with AirTran was being limited." Appx51. The AJ noted that Mr. Ellison testified that "there had been some interaction problems between [Ms. Farrington] and the airline that were contrary to the more collaborative approach [FAA] was taking at the time" to encourage "self-disclosure of regulatory violations" by airlines, through what FAA called "a Customer Service Initiative." Appx52.

Fourth, the AJ determined that "a preponderance of the evidence does not support that" the moratorium "was done in retaliation for any protected disclosures [she] may have made." Appx56. Instead, the AJ noted that the "counseling and

moratorium . . . seemed designed to assist her with her interaction skills" after complaints from AirTran as early as 2002, "culminat[ing]" in Mr. Goersch's July 11, 2003 letter, and her resistance to FAA's Customer Service Initiative. Appx56; Appx56 n.50.

V. Proceedings Before The Board After The 2016 Initial Decision

On November 22, 2016, Ms. Farrington submitted a petition to the board for review of the initial decision. Appx138-164. She asserted that the AJ's "findings that [she] failed to prove that she made any protected whistleblower disclosures [we]re clearly erroneous," but did not provide developed argumentation on this issue. Appx162. She also argued that "there was no duty speech in this case" – that is, that her disclosures were not made within the normal course of her duties – meaning that 5 U.S.C. § 2302(f)(2) had no effect on the case. Appx160. And, if the disclosures were in the normal course of her duties, Ms. Farrington asserted that "Congress intended" that employees provide "'extra proof' that the agency took or threatened the personnel action with 'an improper, retaliatory motive,'" but that the board should not "impos[e] a heavy evidentiary burden." Appx161.

In a March 15, 2023 order, the board "affirm[ed] the initial decision," except as to two issues not relevant here, and affirmed the initial decision "[e]xcept [by] expressly modif[ying]" it to find explicitly "that 5 U.S.C. § 2302(f)(2) applies to this matter because [Ms. Farrington's] disclosures were

made in the normal course of her duties."[3] Appx2 (capitalization omitted); Appx5. The board relied on its earlier conclusion, in its 2012 order, that Ms. Farrington's disclosure to Mr. George as part of the NTSB investigation (disclosure 3) was within the normal course of her duties, because participation in investigations was a duty described in her position description. Appx5 (citing Appx72). With regard to disclosures 1 and 2 of the May 2003 report, the board concluded that they were made in the normal course of her duties "[g]iven that the content of the [] report was information that she learned during the course of her duties . . . , she provided the report to someone in her chain of command" (Mr. Walker, her fourth- or fifth-level supervisor), "it was a common practice for aviation safety inspectors to elevate disagreements on such issues to a higher level, and [FAA made a] formal response to her concerns" in her report. Appx7; Appx5; Appx22 (discussing Ms. Veatch's response to the report). And, with regard to disclosure 4 to Mr. Walker, the board concluded that it was in the normal course of her duties because "the content of their conversation focused on work-related issues, and her position description contemplates such communications with field and regional office

[3] The board noted that, since AJ issued the initial decision, "[t]he National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), signed into law on December 12, 2017, amended 5 U.S.C. § 2302(f)(2)" to apply to disclosures in the normal course of duties of employees, "the principal job function of whom is to regularly investigate and disclose wrongdoing,' . . . if the employee demonstrates that the agency 'took, failed to take, or threatened to take or fail to take a personnel action' with respect to that employee in reprisal for the disclosure." Appx4.

managers." Appx8. In addition, Mr. Walker "held regular 'All Hands' meetings in the field offices," "would often invite Aviation Safety Inspectors to speak with him afterwards," as Ms. Farrington did, and these inspectors "'[r]outinely' took advantage of his open-door policy to speak to him about various issues." Appx7-8.

The board did not modify the AJ's decision that the disclosures were not protected. Appx1-16. The board stated that, "[e]ven if [it] assume[d] for the purposes of [its] analysis that [Ms. Farrington] proved that" her disclosures were protected, Appx8, the board "agree[d] with the [AJ] that [she] failed to prove that [FAA] took the personnel actions against her in reprisal for her disclosures." Appx8.

SUMMARY OF ARGUMENT

The Court should affirm the board's decision denying the corrective action sought by Ms. Farrington.

The AJ, in a decision affirmed by the board, reasonably concluded that Ms. Farrington's four disclosures were not protected whistleblowing disclosures under 5 U.S.C. § 2302(b)(8). Contrary to her claim, the AJ did not err in analyzing whether she reasonably believed there had been a violation of law or danger to public safety. In any event, Ms. Farrington waived any challenge to the board's

conclusion by failing to present developed argumentation opposing it in her petition for review to the board.

In the absence of a protected disclosure, Ms. Farrington cannot obtain corrective action; thus, there is no reason for the Court to consider the remainder of her arguments or any of those raised by *amici curiae*. If the Court does consider them, substantial evidence supports the board's conclusion that, under 5 U.S.C. § 2302(f)(2), Ms. Farrington's disclosures were made in the normal course of her duties and, thus, she had a burden to demonstrate that the alleged personnel actions were taken in reprisal for her disclosures. The board was not required to consider whether the restriction, in the 2018 NDAA, of this burden only to employees with a principal job function of regularly investigating and disclosing wrongdoing applied to Ms. Farrington because this restriction did not apply retroactively to her pending appeal before the board. Even if the Court disagrees, substantial evidence supports the board's conclusion that Ms. Farrington fell within 5 U.S.C. § 2302(f)(2)'s scope, meaning that her principal job function was regularly investigating and disclosing wrongdoing, and that she had not demonstrated reprisal. The Court should, thus, affirm the board's denial of corrective action.

And, even if the Court disagrees with the board's findings described above, the Court should, nonetheless, affirm the board's determination that one of the alleged personnel actions – an alleged threatened removal – did not occur.

ARGUMENT

I. Standard Of Review

The scope of judicial review in appeals from board decisions is deferential, narrowly defined, and limited by statute. The board's decision must be sustained unless the decision is found to be: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). There is no support for Ms. Farrington's request that the Court conduct a "*de novo*" review of "[t]he Board's application of § 2302(f)(2)," Pet. Br. 34; the Court conducts such a review only of the board's legal conclusions. *McIntosh v. Dep't of Def.*, 53 F.4th 630, 638 (Fed. Cir. 2022). The petitioner has the burden of establishing reversible error by the board. *Harris v. Dep't of Veterans Affs.*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

This Court considers whether a board decision is supported by substantial evidence – "a lower standard of proof than preponderance of the evidence." *Giove v. Dep't of Transp.*, 230 F.3d 1333, 1338 (Fed. Cir. 2000) (internal quotations omitted). Substantial evidence means such "relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion even though other reasonable persons might disagree." *Id.*

Procedural and evidentiary decisions of the board and AJ are reviewed for abuse of discretion. *Curtin v. OPM*, 846 F.2d 1373, 1378 (Fed. Cir. 1988). A "presiding official's credibility determinations . . . are virtually unreviewable." *Hambsch v. Dep't of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986).

II. Ms. Farrington Waived Her Current Challenge To The Board's Conclusion That Her Disclosures Were Not Protected – A Conclusion That, In Any Event, Was Not Arbitrary And Was Supported By Substantial Evidence

It is unnecessary for the Court to reach any of the issues raised by *amici curiae* and Ms. Farrington. Pet. Br. 7-44, 45-57; Corrected Brief of *Amici* (Amicus Br.) 3-31 (Oct. 18, 2023). This is because the substantial evidence supported the AJ's – and, by extension, the board's, – Appx34-45, conclusion that Ms. Farrington failed to make, by a preponderance of the evidence, the fundamental required showing that her disclosures were protected under 5 U.S.C. § 2302(b)(8).[4] *Ellison v. MSPB*, 7 F.3d 1031, 1034 (Fed. Cir. 1993). Ms. Farrington acknowledges that this is an "alternative[]" ground for the board's decision "even without the [board's] § 2302(f)(2) . . . disqualification" – that is, even if the board erred by applying 5 U.S.C. § 2302(f)(2)'s requirements to her. Pet. Br. 10-11

[4] The board did not "expressly modif[y]" in its decision the portion of the AJ's decision related to whether the disclosures were protected; thus, the board "affirm[ed]" it, Appx2 (capitalization omitted), as Ms. Farrington acknowledges. Pet. Br. 12. The Court should therefore treat these conclusions by the AJ as the board's decision. *Lentz v. Dep't of the Interior*, No. 2022-2009, 2022 WL 16705008, at *4 n.2 (Fed. Cir. Nov. 4, 2022) (unpublished) (citation omitted).

(addressing the AJ's conclusions related to the May 2003 disclosures). But Ms. Farrington waived any challenge to the board's adoption of the AJ's conclusions when she disputed those conclusions in her petition for review to the board, Appx162, in a single "perfunctory" sentence, failing to present any "developed argumentation." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006). Even if the Court finds no waiver, the AJ's conclusions are reasonable. Thus, the Court should affirm the board's decision on this alternative ground, regardless of Ms. Farrington's challenge to the board's other conclusions. *Petroski v. NASA*, 16 F.3d 419 (Fed. Cir. 1993) (table).

We note that Ms. Farrington disclosed actions by AirTran, not FAA or any other Governmental entity. The AJ pointed out that the board and this Court "have held that if the government's interests and good name are implicated in the alleged wrongdoing, a disclosure may be protected if the person making it has the requisite reasonable belief." Appx44 n.41; *see also Oram v. MSPB*, No. 2021-2307, 2022 WL 866327, at *2 (Fed. Cir. Mar. 23, 2022) (unpublished) (quotation omitted) (same). The AJ stated that she was not "addressing this issue" of whether the Government's interests and good name were implicated in the alleged wrongdoing – key to the issue of protection – because she "ha[d] found that [Ms. Farrington's] disclosures were not protected" for other reasons. Appx44 n.41.

A. The May 2003 Report (Disclosures 1 And 2)

Ms. Farrington asserts that, in her two disclosures of the May 2003 report, Appx34-35, she disclosed "that AirTran was violating safety regulations and jeopardizing passenger safety connected to emergency exit training for flight crews." Pet. Br. 10-11. The AJ's conclusion that her report did not contain protected disclosures is reasonable and is supported by substantial evidence. Indeed, Ms. Farrington raises no specific challenge to this conclusion, *id.* at 8, 28, 44-45, instead only making complaints about conclusions related to disclosure 3. *See* Section II.B, below. Thus, she waived such a challenge. *SmithKline*, 439 F.3d at 1319. In any event, the AJ's conclusion is supported, for the reasons below.

1. Alleged Violation Of Safety Regulations

First, substantial evidence supports the AJ's conclusion that Ms. Farrington did not assert, in her report (disclosures 1 and 2), any violation of law, rule, or regulation. Appx37.

Ms. Farrington stated, in the report, that she "began a review of Flight Attendant and cabin safety related content in required manuals" in 2000 and "found information that was approved/accepted by the CMU contained in these manuals that was contrary to regulations and FAA policy guidance." Appx101. Based on her statement that she then "coordinated with the Acting POI and worked with the carrier to correct these deficiencies," *id.*, the AJ reasonably

concluded that this alleged violation of regulations did not still exist as of the May 2003 report. Appx35 n.31 (quoting Appx101). Similarly, another mention of a "regulatory requirement that a carrier provide properly qualified Instructors" during a December 2001 meeting, Appx103, could not have existed as of the May 2003 report; this is because Ms. Farrington states as a result of her observation about that requirement, "an Instructor Qualification program was developed and implemented." Appx103.

Moreover, as the AJ found, the May 2003 "report contains no specific citations to the FAR, does not explain how Ms. Farrington believes the FAR is being violated, and only briefly states that regulatory requirements are not being met without elaboration." Appx37; *see* Appx97-107. The Court has concluded that the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat 16 (1989), "require[s] that an employee identify a *specific* law, rule, or regulation." *Griesbach v. Dep't of Veterans Affs.*, 705 F. App'x 962, 965 (Fed. Cir. 2017) (unpublished) (emphasis added). Although this "does not necessitate the identification of a statutory or regulatory provision by title or number," Ms. Farrington's "'statements and the circumstances surrounding the making of those statements'" do not "clearly implicate an *identifiable* violation of law, rule, or regulation.'" *Id.* (quoting *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001)). Because the report is "simply a chronology of events that did

not contain any allegation of wrongdoing, much less 'a violation of any law, rule, or regulation,'" it is "not a protected 'disclosure' under § 2302(b)(8)." *Fields v. Dep't of Just.*, 452 F.3d 1297, 1304 (Fed. Cir. 2006). Likewise, "[t]he vague nature of [the] alleged disclosures render them insufficient to demonstrate that any one of the statutory criteria for whistleblowing activities is met." *Bloom v. Dep't of Army*, 245 F. App'x 953, 955 (Fed. Cir. 2007) (unpublished).

2. Allegedly Inadequate Funding For Travel Resulting In A Safety Risk

Second, the AJ reasonably concluded that Ms. Farrington did not make a "disclosure" under 5 U.S.C. § 2302(b)(8) through her statement in her report (disclosures 1 and 2) alleging that she was provided with a "lack of management support and funding" for travel from Orlando "to effectively accomplish proper cabin safety surveillance and provide technical assistance" at AirTran's flight attendant training facility in Atlanta, purportedly jeopardizing safety. Appx35-38.

The AJ found that Ms. Farrington's complaint that "she was not being allowed to travel to Atlanta to do her job," creating a safety risk, was "not supported by the testimony and evidence," Appx36, that showed that Ms. Farrington "spent almost two months in Atlanta – July and September 2002 – observing and assisting AirTran with improving and redeveloping its initial flight attendant training program." *Id.* Additionally, the AJ made a factual finding that "as an FAA employee, [Ms. Farrington] *could* fly to Atlanta to observe training

and spot check issues *at any time*, at no cost to the agency;" "[o]nly overnight trips were limited due to the agency's budget issues." Appx36-38 (emphasis added). Ms. Farrington does not challenge such "fact finding on pure issues of fact" by the AJ. Pet. Br. 14. The AJ reasonably concluded that Ms. Farrington's claimed belief in a public safety risk "[wa]s not objectionably reasonable." Appx36.

Moreover, the AJ reasonably concluded that Ms. Farrington did not disclose a danger to public safety caused by "her alleged travel restrictions" that was "sufficiently 'substantial and specific' to warrant protection," Appx37-38, considering "(1) 'the likelihood of harm resulting from the danger;' (2) 'when the alleged harm may occur;' and (3) 'the nature of the harm,' *i.e.*, 'the potential consequences.'" Appx37 (quoting *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010) (*Chambers IV*)). This Court has cited the statement, in the WPA's legislative history, that "'[g]eneral criticism by an employee of the Environmental Protection Agency that the Agency is not doing enough to protect the environment would not be protected under'" 5 U.S.C. § 2302(b)(8), but "'an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections.'" *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1368-69 (Fed. Cir. 2008) (*Chambers II*) (quoting S. Rep. 95-969, at 21 (1978), U.S.C.C.A.N 1978, at 2723, 2743). Ms. Farrington's criticism that she was allowed an allegedly

insufficient number of visits to the AirTran facility – implicitly coupled with an *assumption* that AirTran flight attendants were not adequately trained in her absence – is just such a general criticism. *Id.* at 1369.

In *Chambers IV*, the Court addressed an allegation that a disclosure of the United States Park Police budget and funding disclosed a danger to public safety. *Id.* at 1377-78. The Court concluded that, "[a]though it is true that the budget provided for law enforcement necessarily limits the extent of protection of public health and safety, Chambers alleged no substantial or specific danger to public health and safety in connection with her disclosure of budget numbers" and, thus, "the Board was correct in considering this statement to be unprotected." *Id.* at 1378. Applying the reasoning in *Chambers IV*, Ms. Farrington cannot have alleged a "substantial or specific danger to public health and safety," simply by disclosing her alleged lack of funding to travel to Atlanta. *Id.* at 1376. Ms. Farrington instead improperly speculates that her presence in Atlanta would have improved flight attendant training and prevented an unspecified danger. *See Ryan v. Dep't of Def.*, 760 F. App'x 990, 997 (Fed. Cir. 2019) (unpublished); *Chambers IV*, 602 F.3d at 1379 (rejecting "vague or speculative" "alleged danger[s]"); *Chambers II*, 515 F.3d at 1369 (no disclosure if the "disclosed danger could only result in harm under speculative or improbable conditions").

The AJ reasonably concluded that Ms. Farrington could not have had a reasonable belief that she was disclosing a substantial or specific danger to public health and safety. Appx38. The test for whether an employee "had a reasonable belief that her disclosures evidenced misconduct under the WPA is whether 'a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude" there was a danger. *Chambers IV*, 602 F.3d at 1379 n.7 (quotation omitted). As the AJ concluded, "a reasonable person with the facts objectively known to [Ms. Farrington] could not have believed that she could not adequately perform her duties for AirTran" given that she "could travel to Atlanta at any time to perform surveillance duties at AirTran – at no cost to the agency" – and simply lacked funding for overnight trips. Appx37-38. Thus, Ms. Farrington's assertion that the AJ did not "view objectively reasonable belief from [her] perspective" is not supported. Pet. Br. 44. In addition, Ms. Farrington had "spent almost two months in Atlanta" in 2002 performing such duties. Appx36. Substantial evidence, therefore, supports the AJ's conclusion that Ms. Farrington did not have a reasonable objective belief in a substantial danger to public safety. Appx34; Appx37-38.

Ms. Farrington, thus, did not make protected disclosures by providing her May 2003 report to either Mr. George or Mr. Walker.

B. Interview By Mr. George On May 22, 2003 (Disclosure 3)

The AJ also reasonably determined that Ms. Farrington's statements to Mr. George (disclosure 3) were not "disclosures."

1. Ms. Farrington Contradicted Her Current Claim Of Violation Of Regulation

Ms. Farrington alleged that, during her May 22, 2003 interview by Mr. George, "she disclosed that flight attendants were being trained" by AirTran "on a DC-9 tail cone mock up instead of on a B-717 mock up and that this was in violation of 14 C.F.R. § 121.417." Appx41; Appx19 (explaining that AirTran conducted the training of flight attendants); Appx123. However, the NTSB Survival Factors Group's April 11, 2004 Chairman's Factual Report of Investigation (ROI), Appx116, summarizing Ms. Farrington's interview indicates – to the contrary – that she "said that the AirTran training program is *'in compliance' with the FARs*." Appx126 (describing Ms. Farrington as the "Cabin Safety Inspector" (CSI)) (emphasis added); Appx39. The AJ "f[ou]nd that the NTSB's summary of [Ms. Farrington's] interview" in its report "is the best indicator of what she actually told Mr. George during her 2003 interview because it was written contemporaneous to the interview itself." Appx38. Ms. Farrington's statement that AirTran was in compliance with the FARs supports the AJ's conclusion that she could not reasonably believe that AirTran was also violating 14 C.F.R. § 121.417. Appx43.

2. Ms. Farrington's Claim Of A Violation Was Not Objectively Reasonable And Not A "Disclosure"

Even putting aside Ms. Farrington's contemporaneous statement, the AJ reasonably concluded that her views regarding the tail-cone mock-up did not constitute "disclosures" and were not objectively reasonable.

The AJ explained that 14 C.F.R. § 121.417 states that "training programs must provide emergency training for 'each airplane type, model, and configuration, each required crewmember, and each kind of operation conducted, insofar as appropriate for each crewmember and the certificate holder," including training in the operation of "[e]mergency exits in the emergency mode with the evacuation slide/raft pack attached (if applicable), with training emphasis on the operation of the exits under adverse conditions." Appx41 (quoting 14 C.F.R. § 121.417(a), (b)(2)(iv)). As the AJ noted, the regulation further provides that "'[e]ach crewmember must accomplish the following emergency training during the specified training periods, using those items of installed emergency equipment for each *type* of airplane in which he or she is to serve'" and "that such training must be on each '*type* of emergency exit in the normal and emergency modes.'" Appx41 (quoting 14 C.F.R. § 121.417(c)(2)(A)) (emphasis added). The regulations provide that the term "[t]ype, as used with respect to the certification of aircraft, means those aircraft which are similar in design." Appx42 (quoting 14 C.F.R. § 1.1).

The AJ found, citing the AirTran training manual, that FAA had approved AirTran to train its flight attendants on the DC-9 tail cone mockup. Appx43 (citing Appx96 ("Authorized Equipment[:]" "Aft Exit Door / Tail Cone Trainer – DC-9")). The AJ found that the POI, Mr. Polomski, made the ultimate decision with regard to changes to such training manuals and "was responsible for ensuring the safety and regulatory compliance of AirTran" for "anything related to the operation of the airplane." Appx19. When Ms. Farrington told Mr. Polomski in 2000 that the mockup was not adequate because it was not a B-717, Appx39, Mr. Polomski informed Ms. Farrington that "AirTran did not need a mock up for the B-717 because it had the same *type* rating as the DC-9, so it could use the DC-9 mockup." Appx40 (emphasis added); Appx127-128. The AJ noted that, as explained by Mr. Polomski in a response to the NTSB, Appx43; *see generally* Appx112-114, "[t]he aircraft were deemed by the FAA to be of the same 'type'" because they were both "approved in accordance with Type Certificate Number A6WE" and "the two aircraft had the same types of exits: Type I, Type II, and Tail cone." Appx42 (citing Appx113). The AJ found that FAA "provided a similar response with respect to the slide pack," Appx43; FAA explained that the slide packs for each aircraft "did not differ in function and the operating instructions are identical." Appx114. The AJ noted that "at the time [Ms. Farrington] was raising th[e] issue" about the DC-6 mockup in her May 22, 2003 disclosure, "the agency's official

position was that AirTran was in compliance with the regulation as later explained by Mr. Polomski in his response to the NTSB." Appx43; Appx127-128.

Ms. Farrington does not dispute the AJ's conclusion that this was the agency's official position and did not do so before the board, Appx138-164; thus, she has waived any challenge to the AJ's factfinding on this issue. *SmithKline*, 439 F.3d at 1319 (waiver of issues not raised in opening brief); *Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000) (waiver of issues not raised before the board). Ms. Farrington's assertion that AirTran was violating the regulation by using the DC-9 mockup was, therefore, a disagreement with FAA's policy decision to allow the use of this mockup, grounded in Mr. Polomski's interpretation of that regulation.

The AJ concluded that Ms. Farrington's "insistence that AirTran was violating the regulation . . . at most amounts to a policy disagreement over the agency's application of its own regulation that is not entitled to protection." Appx43-44. As this Court has noted, "[e]ven assuming" that FAA's determination regarding the application of 14 C.F.R. § 121.417 "was subject to disagreement, an exercise of discretionary authority is not a 'violation of the law.'" *O'Donnell v. MSPB*, 561 F. App'x 926, 930 (Fed. Cir. 2014) (unpublished). The Court has agreed with the board that an agency's "orderly administration . . . requires that, for better or for worse, supervisors and managers have the final say" in decisions

regarding the application of agency criteria. *Id.*; *id.* at 927. Thus, "an employee," like Ms. Farrington, "who discloses general philosophical or policy disagreements with agency decisions or actions should not be protected as a whistleblower." *Id.* at 930 (quoting S. Rep. 112-155, at *7).

The AJ also reasonably concluded that Ms. Farrington's assertion that AirTran's use of the DC-9 mockup, approved by the FAA and Mr. Polomski, violated 14 C.F.R. § 121.417 "was not objectively reasonable." Appx43-44. This is because Ms. Farrington acknowledged that Mr. Polomski provided the "final FAA approval of [AirTran's] training program," which "certificate holder[s]" like AirTran "must obtain." 14 C.F.R. § 121.401(a)(1). Ms. Farrington informed Mr. George "that she did not have direct approval authority on the AirTran CMO," including the flight attendant manual and training program, "but rather made recommendations to the POI for approval,"[5] Appx39 (citing Appx125) – which, at least for the flight attendant manual, were "reviewed and accepted by the . . . POI without [her] knowledge." Appx125. Further, "a reasonable person would have simply checked the [] requirements" of 14 C.F.R. § 121.417, "discovered" that they required training on "types" of aircraft and equipment – not the *specific* aircraft and equipment involved – "and, thus, known there was no" violation of 14

[5] The regulations also provide the FAA Administrator with discretion, for example, to "determine[]" whether aircraft with "the same or different type certificates" have "commonality." 14 C.F.R. § 121.400(c)(2).

C.F.R. § 121.147, given Mr. Polomski's view of the aircraft types. *Ferrell v. Dep't of Hous. & Urb. Dev.*, No. 2022-1487, 2023 WL 1846231, at *4 (Fed. Cir. Feb. 9, 2023) (unpublished).

3. Ms. Farrington's Challenges Are Unsupported

Ms. Farrington's challenges to the AJ's conclusions related to this disclosure are unpersuasive. Ms. Farrington first asserts the board "erroneously accorded" a "role" to "findings by the NTSB" after Ms. Farrington's disclosure, arguing that reasonableness "'is based on what the employee knew at the time of the disclosure.'" Pet. Br. 45 (quoting *Reardon v. Dep't of Homeland Sec.*, 384 F. App'x 992, 994 (Fed. Cir. 2010) (unpublished)); *see id.* at 22-23 (quoting Appx38 n.33, related to the NTSB report, and citing Appx22). In the footnote in the initial decision referenced by Ms. Farrington, the AJ simply noted that Ms. Farrington's testimony at the hearing before the AJ on December 18 and 19, 2013, Appx17, on an unrelated issue – that "the flight attendant responsible for opening the tail cone door did not know how to operate it and could not get the tail cone door open" – was "contrary to the findings in the NTSB report . . . that found the flight attendant opened the tail cone door but had problems getting the slide to manually inflate." Appx38 n.33. The AJ did not use those findings in evaluating the reasonableness of Ms. Farrington's belief *at the time of her interview* on May 22, 2003, about a separate issue – that the tailcone mock-up was not "sufficient" because it was for a

DC 9, not a B-717. Appx126. This testimony was also plainly unrelated to Ms. Farrington's May 22, 2003 statements to Mr. George, given that she "did not testify in detail about what she said during her interview with Mr. George, other than to say that she answered his questions about flight attendant training and told him about her previous findings." Appx38-39.

Second, Ms. Farrington contends that the POI, Mr. Polomski, "specifically testified it was a difference of opinion" – presumably referring to the sufficiency of the tailcone mock-up. Pet. Br. 44. That contention is not supported by the AJ's description of Mr. Polomski's testimony. Appx40-41. The AJ found that Mr. Polomski "disagreed with [Ms. Farrington] over how [additional training] should be done" related to differences between "the tail cone cover that protected the emergency slide pack cover" on the DC-9 mockup as opposed to that actually on the B-717 aircraft. Appx41. In any event, the Court has concluded that it is "irrelevant" whether "[o]ther employees[] agree[]" with the purported whistleblower "because the test for 'reasonable belief' is not subjective." *Coppens v. Dep't of Def.*, 117 F. App'x 110, 113 (Fed. Cir. 2004) (unpublished). This means that those employees' subjective beliefs cannot demonstrate that the purported whistleblower's belief was objectively reasonable. For this reason, it is irrelevant whether any witness did or did not testify that Ms. Farrington's beliefs about violations of law were not implausible, Pet. Br. 44, or, in Ms. Farrington's

characterization, a differing opinion. The board, thus, correctly concluded that the May 22, 2003 disclosure was not protected.

C. Conversation With Mr. Walker On June 17, 2003 (Disclosure 4)

The board noted that "[t]here are no detailed notes taken during the meeting" that Ms. Farrington had with Mr. Walker on June 17, 2003, but that Mr. Walker "took some handwritten notes during [this] meeting." Appx44 (citing Appx109). Ms. Farrington "did not specifically testify about what she told Mr. Walker during the meeting" in disclosure 4. Appx44-45. Mr. Walker "testified that [Ms. Farrington's] concerns centered on cabin safety and oversight responsibilities" and recalled that she "rais[ed] the issue of hands on training . . . with the B-717 simulator that was really a DC-9." Appx45.

The board concluded that Ms. Farrington's "discussion with Mr. Walker did not raise any new issues not previously raised in her discussion with Mr. George [on May 22, 2003] and [] f[ou]nd, for the same reasons . . . that it [wa]s not entitled to protection." Appx45. For the same reasons discussed in Section II.B, above, the board correctly concluded that this disclosure was not protected.

The Court should, thus, affirm the board's judgment on the ground that Ms. Farrington's four disclosures were not protected under 5 U.S.C. § 2302(b)(8).

III. Even If The Disclosures Were Protected, The Court Should Affirm The Board's Judgment With Regard To At Least One Alleged Personnel Action Because It Is Not A "Personnel Action"

Even assuming that any of Ms. Farrington's disclosures were protected, the Court should affirm the board's judgment with regard to one of the four alleged personnel actions (threatened removal during the July 11, 2003 counseling), Appx31, because, based on factual findings by the AJ, it does not constitute a "personnel action" under 5 U.S.C. § 1221(e)(1).[6]

With regard to her claim that FAA threaten to remove her during the July 11, 2003 counseling, the AJ "f[ou]nd that [Ms. Farrington's] assertions that she was repeatedly threatened with removal is not supported by the facts," and that "[she] was not threatened with termination during this meeting" with Mr. Ellison. Appx55. The AJ "f[ou]nd it improbable that someone in Mr. Ellison's position – at the time a Supervisory Labor Relations Specialist – would overtly threaten the appellant with removal during the [counseling] meeting," as Ms. Farrington claimed. Appx55. The AJ "credit[ed] [Mr. Ellison's] testimony that he did not do so," also concluding that his testimony was "supported by the testimony of other

[6] Ms. Farrington does not challenge the AJ's conclusion that other actions – "being forced to sign a voluntary disclosure form by her supervisor" and "two actions involving a failure to accommodate her for a medical condition" – were not "personnel actions." Appx31; Appx31 n.27.

agency employees that emphasized that they were not out to get rid of [Ms. Farrington]." Appx55.

Consequently, the AJ found that Ms. Farrington "was not threatened with termination during this meeting" – that is, that the alleged personnel action did not occur. Appx55. Ms. Farrington expressly states that she does not challenge the AJ's factfinding related to this issue. Pet. Br. 14. Therefore, the issue of whether Ms. Farrington met her burden to show that the purported personnel action was taken in reprisal for her alleged disclosures does not come into play. The Court should, thus, conclude that Ms. Farrington cannot establish entitlement to corrective action with regard to the alleged threatened removal.

IV. Assuming That Ms. Farrington Made Protected Disclosures, The Board's Denial Of Corrective Action Was Not Arbitrary And Was In Accordance With The Law

Even if the Court rejects the board's conclusion that Ms. Farrington did not make protected disclosures, and/or that the alleged threatened removal was not a personnel action, the board nonetheless (1) correctly determined that Ms. Farrington was an employee described in 5 U.S.C. § 2302(f)(2); (2) correctly determined that Ms. Farrington had the burden of demonstrating, by a preponderance of the evidence, that FAA took the personnel actions in reprisal for the alleged disclosures; and (3) correctly concluded that she failed to carry that burden. The Court should, therefore, affirm the board's judgment.

A. Substantial Evidence Supports The Board's Conclusion That Ms. Farrington Made The Disclosures During The Normal Course Of Her Duties

The AJ reasonably concluded that Ms. Farrington made her disclosures within the normal course of her duties – which Ms. Farrington refers to as engaging in "duty speech." Pet. Br. 32-33.

For years, disclosures made in the normal course of duty were deemed not protected by the WPA. *See*, *e.g.*, *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). The WPEA, enacted in 2012, changed the treatment of disclosures made in an employee's normal course of duty. The Court has noted that the WPEA "clarified that disclosures made in the normal course of one's duties *may* qualify as protected disclosures," citing 5 U.S.C. § 2302(f)(2). *Heath v. Dep't of the Army*, 640 F. App'x 989, 990 (Fed. Cir. 2016) (unpublished) (emphasis added). For such disclosures, the WPEA provided protection only if the agency engaged in reprisal for the disclosure. *See* 5 U.S.C. § 2302(f)(2) (effective through 2017). The board reasonably concluded that Ms. Farrington made her disclosures within the normal course of her duties.

1. The Board's Conclusions

The AJ pointed out that the AJ previously assigned to the appeal "found," in a September 10, 2010 decision, "that [Ms. Farrington's] alleged disclosures were made in the normal performance of her duties." Appx27 (citing Appx84-86). This

conclusion in the 2010 decision was based on the AJ's finding that "it was [Ms. Farrington's] job to investigate violations of the [FAR], in particular, in relation to flight attendant training and her responsibility to suggest changes or modifications to a flight attendant training program, with the overall goal to remedy the violation and promote aviation safety." Appx85. The AJ also noted, based on the position description for Ms. Farrington's position as a Cabin Safety Inspector, that she

> (1) served as a resource and technical authority on cabin safety requirements as they relate to work activities affecting civil aviation in the Orlando Field Office; (2) provided technical support regarding cabin safety for assigned air carriers and air operators; and, (3) ensured assigned operators comply with applicable [FAR] , FAA policy and guidance and approved programs.

Appx84. In addition, the AJ pointed out that Ms. Farrington's position description included the following duties and responsibilities:

> (1) Periodic surveillance of training instructors, company training programs and all phases of air carrier operations;
> (2) Surveillance and investigation to ensure that the training facilities conduct flight attendant training as required by the FAR and FAA approved training programs;
> (3) Technical advisor to the POI on assigned areas of the company's training program and coordinates technical instructions, policy orders and procedures through the POI and related FAA personnel to ensure standardization of training activities;
> (4) Investigations of public complaints, congressional inquir[i]es, aircraft incidents and accidents;
> (5) Enforcement investigations and prepare final reports and recommendations on dispositions;
> (6) Testimony at court trials and formal hearings;

> (7) Monitor and evaluate air carrier training programs for flight attendants to ensure compliance with the FAR and evaluate cabin simulators, training devices and other training aid;
> (8) Participate in cabin safety related incident/accident investigations of air carriers and air operators within her geographic area of responsibility or other areas as assigned.

Appx85. Ms. Farrington does not challenge this fact finding by the AJ; instead, she only declines to accept findings of fact "characterizing her 'normal' duties." Pet. Br. 14.

The AJ concluded, based on job elements 2, 4, 7, and 8, that Ms. Farrington had a responsibility to "perform surveillance and conduct inquiries or investigations into training for flight attendants," "conduct inquiries or investigations into such matters and prepare reports, give interviews and/or provide testimony regarding the results of her inquiries or investigations" – as she did to the NTSB in her May 22, 2003 disclosure (disclosure 4). Appx86. The AJ concluded that her June 2003 disclosure to Mr. Walker "falls squarely within [the same] job duties." Appx87. The AJ also determined that her May 2003 report was within her "responsibilities to perform surveillance and conduct inquiries or investigations into training for flight attendants." Appx86.

The board, reviewing the AJ's conclusions in 2012, agreed with the AJ's findings as to Ms. Farrington's normal duties. Appx72. In the 2023 decision on appeal, the board concluded that the AJ, in her 2016 decision, implicitly found that

each of Ms. Farrington's four disclosures were made during the normal course of her duties and "supplement[ed] the initial decision to explicitly find that the appellant made her disclosures in the normal course of her duties." Appx4-5. Although Ms. Farrington argues that the normal course of duties should not be determined "solely by [an employee's] position description but by evidence of the duties they actually perform on a regular basis," Pet. Br. 33; *see also* Amicus Br. 5, the board correctly grounded its conclusions in a decision of this Court "rel[ying] upon position descriptions to determine whether disclosures were made as part of an employee's normal duties." Appx72 (citing *Kahn v. Dep't of Justice*, 618 F.3d 1306, 1313 (Fed. Cir. 2010)); *Kahn*, 618 F.3d at 1313 (discussing the employee's "official job description").

The board also correctly rejected Ms. Farrington's assertions that "'normal duties' must be "performed on a day-to-day basis," rather than "sporadically or on a one-time occasion," noting that "the frequency with which an employee is called upon to perform a stated duty has not been identified as a relevant consideration." Appx72. Indeed, there is no authority limiting the board's consideration of duties in this way.

The Court should conclude that substantial evidence supports the board's findings that Ms. Farrington made her disclosures in the course of her normal duties.

2. Ms. Farrington's Arguments Based On The First Amendment And Legislative History

Ms. Farrington's remaining arguments related to her normal course of duties do not demonstrate any error in the board's decision.

First, Ms. Farrington asserts that Ms. Farrington's disclosures relate to "matters of public concern" and "enjoy[]" protection under the First Amendment because "she [wa]s not compelled to disclose [wrongdoing] as part of her normal job duties or outside of her normal reporting channels." Pet. Br. 32; *id.* at 54. This is irrelevant to whether her disclosures are protected under 5 U.S.C. § 2302(b)(8) or whether subsection (f)(2) applies. There is no reason for the Court to consider whether Ms. Farrington's disclosures are protected by the First Amendment, Pet. Br. 53, or whether the board should have done so or reached the related conclusions that Ms. Farrington asserts it should have. *Id.* at 54. *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006), on which Ms. Farrington and *amici* rely, did not involve a claim under 5 U.S.C. § 2302(b)(8), but instead a claim by a government employee, Mr. Ceballos, under 42 U.S.C. § 1983, alleging that his employer violated the First and Fourteenth Amendments by retaliating against him for a memorandum that he wrote pursuant to his job duties. *Id.* at 415. Certainly, *Garcetti* does not indicate that a disclosure is made in the normal course of an employee's duties *only* when his employer "specifically commissioned the disclosures." Amicus Br. 5; *id.* at 8. Rather, *Garcetti* points out that an employer

can, without violating the First Amendment, "exercise [] control over [speech] the employer itself has commissioned or created," like Mr. Ceballos's memorandum, by restricting such speech. 547 U.S. at 421-22.

Second, Ms. Farrington asserts that Congress intended "to reverse . . . restrictive decisions," such as *Willis*, excluding from protection under 5 U.S.C. § 2302(b)(8) disclosures made in the normal course of duties, Pet. Br. 33, presumably relying on legislative history in the Senate report accompanying the bill that was enacted as the WPEA. S. Rep. 112-155, at *4-6. However, 5 U.S.C. § 2302(f)(2)'s plain language shows that Congress, in the WPEA, retained the requirement that the board consider whether the disclosure occurred during the employee's normal course of duties, in order to determine whether that employee was required to show that the challenged personnel action was taken in reprisal for the disclosure. Ms. Farrington acknowledged, in her petition for review by the full board, that, "[b]y including section 2302(f)(2) in the WPEA, Congress intended that certain employees . . . offer 'extra proof.'" Appx161. Ms. Farrington's argument based on legislative history is inapposite because she does not allege any misinterpretation of 5 U.S.C. § 2302(f)(2) by the board.

3. Ms. Farrington's Arguments Related To "Disclosure Channels"

Ms. Farrington's arguments related to "disclosure channels," Pet. Br. 34-43, do not support reversal of the board's judgment.

"Disclosure channels" is not a term used within WPEA – as Ms. Farrington concedes. Pet. Br. 35. Contrary to Ms. Farrington's assertion, the WPEA does not provide sweeping "protection" for the "use" of "disclosure channels," nor does it "foreclose[] the Board from denying full protection based upon the disclosure channel selected by a whistleblower." Pet. Br. 34. Instead, 5 U.S.C. § 2302(f)(1) simply lists *certain* grounds on which "disclosure[s] shall not be excluded from subsection (b)(8)," including that the disclosures are verbal, made off-duty, or made to specific persons, such as a supervisor believed to have participated in the alleged wrongdoing. 5 U.S.C. § 2302(f)(1); *see* Pet. Br. 35-36. The Senate report accompanying the bill that was enacted as the WPEA only discussed "channels" in a situation not at issue here – when disclosures of "classified information or material" are made "through confidential channels to maintain protection." S. Rep. 112-155, at *4-5.

Ms. Farrington also asserts that the board erred by considering whether her disclosures were made through "normal reporting channels," Appx8; *see also* Appx11, and thereby "weakened" such channels. Pet. Br. 34, 41. But, as noted above, Congress did not specifically forbid such a consideration. Ms. Farrington asserts that, in the WPEA, Congress "legislatively overruled," Pet. Br. 7, 40, *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), which held that disclosures made in the normal course of duties through normal

reporting channels were not protected disclosures.[7] *Id.* at 1350. However, this does not lead to the conclusion that reporting channels, and *Huffman's* analysis of them, are wholly irrelevant to the question of whether a disclosure was made in the normal course of duties – which is key to 5 U.S.C. § 2302(f)(2)'s application.

Even assuming that the "normal channels of reporting" were not a relevant or necessary consideration after the WPEA's passage, the board's ultimate decision – that "all of [Ms. Farrington's] disclosures were made in the normal course of her duties" – did not hinge on it. Appx8. The board did not exclude Ms. Farrington's alleged disclosures from protection based on the persons to whom they were made. Indeed, although the board mentioned "normal channels of reporting," Appx5, it did so simply in the context of describing statements that predated the WPEA's passage on November 27, 2012, made in the board's July 16, 2012 decision, Appx5 (citing Appx72), and Ms. Farrington's 2009 deposition testimony. Appx7 (citing Appx440); Appx165 (date of testimony); Appx28. Although Ms. Farrington asserts that the board should have found her disclosure to Mr. George of the NTSB (disclosure 3) to be protected because it was made through an "external reporting channel" to the NTSB, Pet. Br. 42, the board's decision did not turn on the "channel" discussed in the 2012 board decision. Rather, the board concluded

[7] The Court has described *Huffman* as "superseded by statute" in *Nasuti v. MSPB*, 504 F. App'x 894, 896 (Fed. Cir. 2013) (unpublished).

based on substantial evidence that "[p]articipat[ing] in cabin safety related incident/accident investigations of air carriers and air operators" – including NTSB investigations – was among the duties in Ms. Farrington's position description; thus, her disclosure in an interview with NTSB was "made within the normal course of duties." Appx5. In addition, the board reviewed the circumstances of Ms. Farrington's conversation (disclosure 4) with the Division Manager, Mr. Walker, to reach the conclusion that it was *both* within the normal course of her duties *and* within normal disclosure channels. Appx8.

In this situation, even if the Court determined that the reference to reporting channels was an error, the Court should conclude that it was a "harmless error" that "'do[es] not affect the substantial rights of the parties.'" *Valles v. Dep't of State*, 17 F.4th 149, 152 (Fed. Cir. 2021) (quoting 28 U.S.C. § 2111). Ms. Farrington has not carried her burden of showing a "likelihood that the result [of her appeal] would have been different" without the consideration of reporting channels, *id.* – and cannot do so for the reasons described above. And, because the board's decision is nonprecedential, Appx1, it should not "have a chilling effect on whistleblowing" or "[u]ndermine the NTSB" as a "[c]hannel" for disclosures. Pet. Br. 41-42.

B. The Board's Analysis Of Ms. Farrington's Principal Job Function Was Unnecessary, But, In Any Event, Was Neither Arbitrary Nor Capricious And Is Supported By Substantial Evidence

As noted above, in 2018, Congress amended 5 U.S.C. § 2302(f)(2) to require a "demonstrat[ion]" of reprisal for disclosures in the "normal course of duties" only from employees with a "principal job function of . . regularly investigat[ing] and disclos[ing] wrongdoing." 5 U.S.C. § 2302(f)(2). *Amici* assert that the board decision "contains no finding that Farrington's 'principal job function' was 'to regularly investigate and disclose wrongdoing.'" Amicus Br. 20; *see id.* at 6. To the contrary, the board, noting that an employee's "principal job function" must be "to regularly investigate and disclose wrongdoing" for the employee to fall within 5 U.S.C. § 2302(f)(2), cited the AJ's finding that Ms. Farrington, "as an Aviation Safety Inspector who was responsible for ensuring compliance with Federal Aviation Administration regulations and investigating and reporting wrongdoing, was covered by 5 U.S.C. § 2302(f)(2)." Appx4.

However, the board's conclusion on her principal job function was unnecessary to determining whether 5 U.S.C. § 2302(f)(2) applies because the 2018 NDAA's amendment is not retroactive. If the Court disagrees, the board's conclusion was supported by substantial evidence.

1. The 2018 NDAA's Amendment Is Not Retroactive

The board concluded that the 2018 NDAA's amendment "clarified the prior version of [5 U.S.C. § 2302(f)(2)] enacted in the WPEA" and thus "applies retroactively to appeals pending at the time the statute was enacted." Appx4 (citing *Salazar v. Dep't of Veterans Affs.*, 2022 MSPB 42, at *3-6 (2017)). However, this conclusion is at odds with the Court's holding in *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed. Cir. 2005).

In considering whether the 2018 change should be given retroactive effect, the board in *Salazar* considered the factors set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). The board noted, first, that Congress did not expressly define the temporal reach of the 2018 change. *Salazar*, 2022 MSPB 42, at *4. The board grounded its retroactivity conclusion in its determination that the "intent of Congress in adopting the relevant language at issue here was to *clarify* 5 U.S.C. § 2302(f)(2)." 2022 MSPB 42, at *5 (emphasis added). The board relied on the only statement in legislative history, *id.* at *3, related to the amendment – that it "'*clarifies* that an employee with a principal job function of investigating and dis closing wrongdoing will not be excluded from whistleblower protection laws if the employee can demonstrate that a personnel action taken against him or her was in reprisal for a disclosure." S. Rep. No. 115-74, at *8, 2017 WL 2211489 (May 18, 2017) (emphasis added).

But the Court in *Princess Cruises* explained that such

> [m]ere[] categoriz[ation] of rules or applications of rules as "clarifications" . . . provides little insight into whether a retroactive effect would result in a particular case. . . . [A] clarification, in fact, "changes the legal landscape," because "a precise interpretation is not the same as a range of possible interpretations."

397 F.3d at 1363. Contrary to the board's conclusion in *Salazar*, 2022 MSPB 42, at *4, the 2018 NDAA's amendment did "alter the parties' respective rights or liabilities" and "impose new duties to past transactions when compared to the earlier version" of subsection (f)(2). *Landgraf*, 511 U.S. at 280. The WPEA's plain language applied the heightened burden to demonstrate reprisal to *all* employees making disclosures in the normal course of their duties. *See*, *e.g.*, *Benton-Flores v. Dep't of Def.*, 121 M.S.P.R. 428, 431, 437 (2014) (applying the burden to a Department of Defense schoolteacher); *Acha v. Dep't of Agric.*, 841 F.3d 878, 879, 882, 886 (10th Cir. 2016) (describing the board's application of the reprisal burden to Forest Service purchasing agent in a decision vacated on other grounds). The 2018 amendment, however, removes that requirement for all employees *other than* those with a specific "principal job function" and newly extends protection to their disclosures – and, by extension, possible liability to agencies and corrective action against them.

The Court should, therefore, apply the "presumption against retroactive legislation," *Landgraf*, 511 U.S. at 265, conclude that a determination of Ms.

Farrington's principal job function is unnecessary, and that the fact that her disclosures were in the normal course of her duties alone requires her to demonstrate reprisal.

2. If The 2018 Change Applies To Ms. Farrington's Appeal, The Board's Conclusion About Her Principal Job Function Is Not Arbitrary And Is Supported By Substantial Evidence

If the Court instead finds the 2018 change to be retroactive and to apply to Ms. Farrington's appeal, the board's conclusion that her principal function was to regularly investigate and disclose wrongdoing is reasonable.

To begin, Ms. Farrington's assertion that Congress intended, generally, for disclosures "made as part of an employee's job duties" to be protected, Pet. Br. 43, cannot undermine the exception to such protection that Congress created in 5 U.S.C. § 2302(f)(2). Ms. Farrington's attempt to refocus attention on the general provision in subsection (b)(8) is contrary to the "'commonplace'" canon of statutory construction "'that the specific governs the general.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quotation omitted). That canon is particularly applicable where, as here, "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solution.'" *Id.* (citation omitted).

Substantial evidence supports the board's conclusion. As noted above, the AJ, in 2010, concluded, based on Ms. Farrington's position description, that it was

her "*job* to *investigate* violations of the [FAR], in particular, in relation to flight attendant training and her responsibility to suggest changes or modifications to a flight attendant training program." Appx85 (emphasis added). Given her position description, *see* Section IV.A.1, above, there is no support for Ms. Farrington's assertion that her "job position" was limited to "critiquing common carrier performance." Pet. Br. 41. The board's decision is supported by the AJ's fact-finding, in the 2010 initial decision, related to Ms. Farrington's duties in her position description. Appx84-85. These duties include "investigation," as well as "surveillance" and "monitor[ing]" – also forms of investigation. Appx84-85; Appx5 (concluding that investigations were part of Ms. Farrington's surveillance duties); Appx94-95. And her position description also makes clear that such investigations may result in disclosures, through "final reports and recommendations," "testi[mony]," and "[p]articipat[ion]" in "investigations," like NTSB investigations. Appx94-95. And the AJ concluded, in the 2016 initial decision, that Ms. Farrington "could perform spot checks and surveillance regularly," Appx36, and was doing so by "observ[ing] [two] month long initial flight attendant training sessions" in 2002. Appx19; Appx36.

Based on the plain language of 5 U.S.C. § 2302(f)(2), Ms. Farrington was not required to have "regular investigative duties to ferret out and disclose wrongdoing by agency employees at the Orlando MCO" to fall within its coverage.

Pet. Br. 43; *see id.* at 37 (referencing an "agency's law violations or wasteful or dangerous or incompetent practices"). Given that the Court has found disclosures about a non-Governmental entity may be protected under 5 U.S.C. § 2302(b)(8), *see* Section II, above, investigation and disclosures related to such an entity, correspondingly, are ones covered by subsection (f)(2). Similarly, the plain language of 5 U.S.C. § 2302(f)(2) does not limit its reach to "auditors, law enforcement officers, and common carrier aviation accident investigators," as Ms. Farrington claims. Pet. Br. 43.

The Court should conclude that the board did not err in determining that Ms. Farrington fell within 5 U.S.C. § 2302(f)(2)'s coverage, requiring her to demonstrate reprisal in order for her disclosures to be protected.

C. The Board Correctly Concluded That Ms. Farrington Failed To Carry Her Burden To Demonstrate Reprisal

The board correctly assigned the burden to Ms. Farrington to demonstrate that the alleged personnel actions were taken in reprisal for her disclosures, and its determination that she failed to make the required showing is neither arbitrary nor capricious.

1. The AJ Correctly Assigned The Burden

Ms. Farrington fails to demonstrate any error, Pet. Br. 45-49, in the AJ's analysis of the burden placed on an employee under 5 U.S.C. § 2302(f)(2) to

"demonstrate that the personnel action was taken" or threatened to be taken "'in reprisal for that disclosure.'" Appx45.

To begin, Ms. Farrington waived her argument challenging the AJ's analysis of burdens by not raising them before the board. *Sargent*, 229 F.3d at 1091; Appx138-164. Indeed, as noted above, Ms. Farrington acknowledged, in her petition for review by the full board, that, "[b]y including section 2302(f)(2) in the WPEA, Congress intended that certain employees . . . offer 'extra proof'" regarding reprisal. Appx161.

If the Court nonetheless considers Ms. Farrington's argument, contrary to her claim, the plain language of section 2302(f)(2) shows that Congress requires employees falling within its scope to show more than (1) a personnel action occurring "just 'because' of" their disclosure or (2) a personnel action with a simple nexus or causal link to "that disclosure" – the minimum required by 5 U.S.C. § 2302(b)(8). Pet. Br. 30; *id.* at 46-49, 50. That the disclosure is "*a* motivating factor in the adverse action" is, likewise, not enough. Amicus Br. 25 (emphasis added); *id.* at 21-22. Instead, the disclosing employee must show that

> an[] employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee *in reprisal for* the disclosure.

5 U.S.C. § 2302(f)(2) (effective January 14, 2013, through June 13, 2017).

(emphasis added).[8] Thus, the plain language of subsection (f)(2) shows that, contrary to Ms. Farrington's assertion, it is not enough for an employee to show an "*inference* of retaliation," Pet. Br. 53 (emphasis added), and retaliatory motive is not considered solely in connection with the agency's required showing, under 5 U.S.C. § 1221(e)(2), that it would have taken the same personnel action(s) in the absence of the disclosures. Pet. Br. 47. Given that subsection (f)(2) delineates disclosures that are covered by subsection (b)(8), an employee logically has the burden of satisfying subsection (f)(2)'s requirements at the same time she has the burden to show she is covered by subsection (b)(8) (by making a protected disclosure), as the AJ concluded. Appx45. And, as the AJ found, *id.*, the same standard – preponderance of the evidence – logically applies to both burdens. This assignment of burdens "reads" subsection (f)(2) "in [its] context and with a view to [its] place in the overall statutory scheme." *Bennett v. MSPB*, 635 F.3d 1215, 1218 (Fed. Cir. 2011).

Further, Ms. Farrington's reading of 5 U.S.C. § 2302 is not a reasonable interpretation of that section as a whole because it renders void or useless the requirement in subsection (f)(2). *Id.* As noted above, Ms. Farrington's attempt to apply subsection (b)(8) is also contrary to the canon of statutory construction "'that

[8] The 2018 NDAA amended this language to require explicitly that the disclosing employee "demonstrate" such reprisal. 5 U.S.C. § 2302(f)(2).

the specific governs the general,'" particularly where "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX*, 566 U.S. at 645 (quotation omitted).

If the Court finds section (f)(2) to be ambiguous and considers Ms. Farrington's interpretation to be reasonable, legislative history (in the form of the Senate report accompanying the bill that became WPEA) shows that Congress intended to apply, in subsection (f)(2), a "slightly higher burden to show that the personnel action was made for the actual purpose of retaliating against the [employee]," S. Rep. 112-155, at *6 – that is, not just "'because of' the disclosure, but also . . . with an improper, retaliatory motive." *Id.* at *5. Thus, as *amici* note, Congress did not use the words "'because of' in 5 U.S.C. § 2302(f)(2)'" but, in fact, required a higher showing. Amicus Br. 24 (emphasis added).

That the Court and the board have considered "reprisal" in situations outside of those described in 5 U.S.C. § 2302(f)(2) and before that subsection was enacted, Pet. Br. 50-52, is not surprising, given that the term was used in the WPA and is included in the title of 5 U.S.C. § 1221 ("Individual right of action in certain reprisal cases"). The simple use of this term does not demonstrate that the burdens and "nexus" requirement described in 5 U.S.C. § 1221(e), Pet. Br. 51, apply *instead of* the specific burden set in 5 U.S.C. § 2302(f)(2) for certain employees – rendering that statutory provision inoperative. *Bennett*, 635 F.3d at 1218.

Further, with regard to Ms. Farrington's challenge regarding the shifting of burdens of proof, Pet. Br. 45-46, an agency's burden – to show that it would taken the personnel action even absent the protected disclosure – only comes into play when it attempts to show that the board should not order corrective action in a "case involving an alleged prohibited personnel practice as described under section 2302(b)(8)." 5 U.S.C. § 1221(e)(1). Given this language, plainly, Congress intended, in this statutory section, that a showing of reprisal and related consideration of whether a disclosure is excluded from 5 U.S.C. § 2302(b)(8) occur prior to the burden shifting to the agency in 5 U.S.C. § 1221(e)(2). Logically, the board should consider whether "the disclosure shall not be excluded from subsection (b)(8)" when considering whether the employee has "prove[n] by a preponderance of the evidence that he made a protected disclosure," *Smith v. GSA*, 930 F.3d 1359, 1365 (Fed. Cir. 2019) (citation omitted), and "establish[ed] a prima facie case." *Langer*, 265 F.3d at 1265.

Moreover, the application of the preponderant evidence standard to the 2018 NDAA amendment is supported by the reasoning in a recent board decision – *Williams v. Department of Defense*, No. PH-1221-18-0073-W-1, 2023 WL 5316700, at *3 (M.S.P.B. Aug. 17, 2023). The board noted that the amendment's plain language supports use of the preponderant evidence standard because "'[d]emonstrate'" (used in that subsection) "is defined as 'to show clearly,' and 'to

prove or make clear by reasoning or evidence.'" *Id.* (quoting Merriam-Webster's Collegiate Dictionary 307 (10th ed. 2002)). Furthermore, "the word 'demonstrates' in 5 U.S.C. § 2302(f)(2) is the same term used in another section of Title 5, 5 U.S.C. § 1221(e)(1) – which this Court has equated with "proves," *id.* (quoting *Watson v. Dep't of Justice*, 64 F.3d 1524, 1527-28 (Fed. Cir. 1995)) – and should be afforded the same meaning. *Id.* (quoting *Intel Corp. v. Qualcomm Inc*, 21 F.4th 784, 793 (Fed. Cir. 2021)). The Court should, thus, determine that the AJ correctly construed 5 U.S.C. § 2302(f)(2) to require Ms. Farrington to demonstrate by a preponderance of the evidence that the alleged personnel actions were taken in reprisal for her alleged disclosures.

The AJ, therefore, correctly assigned the burden in 5 U.S.C. § 2302.

2. The Board Did Not Err In Concluding That Ms. Farrington Failed To Demonstrate Reprisal

The board's conclusion that Ms. Farrington failed to demonstrate reprisal was neither arbitrary nor capricious and is supported by substantial evidence.

Ms. Farrington and *amici* fail to make a persuasive challenge to the evidence relied on by the board. Although Ms. Farrington asserts that she satisfied what she interprets as her burden – "prov[ing] an inference of retaliation," Pet. Br. 53 – she does not present a developed argument based on the evidence she purportedly provided. *SmithKline*, 439 F.3d at 1319. *Amici* assert that the board's conclusion related to reprisal was "arbitrary and contrary to law" because it "held that

Farrington suffered no reprisal" "[w]ithout considering any of the[] types of evidence" that amici believe should be considered, Amicus Br. 31 – namely, circumstantial evidence. *Id.* at 26, 29. *Amici* identify no particular evidence that the board failed to consider; even if they did, their argument would amount to a request that the Court "substitute [its] judgment for that of the Board as to the weight of the evidence or the inferences to be drawn therefrom" – something the Court cannot do. *Cross v. Dep't of Transp.*, 127 F.3d 1443, 1448-49 (Fed. Cir. 1997). The Court has, in fact, recognized that "circumstantial elements of [a] case" can "constitute substantial evidence" supporting a board decision. *Beverly v. U.S. Postal Serv.*, 907 F.2d 136, 138 (Fed. Cir. 1990) (citation omitted); *Naekel v. Dep't of Transp.*, 782 F.2d 975, 978 (Fed. Cir. 1986) (explaining that the board's findings of fact may be "supported directly or inferentially").

The board correctly concluded that Ms. Farrington failed to prove that FAA took the three agency actions found to be "personnel actions" in reprisal for her purported disclosures. Appx8 (agreeing with the AJ's conclusions); Appx45-56 (AJ's conclusions). Moreover, the AJ's factfinding was supported by credibility determinations, which "are virtually unreviewable by this court," *Brown v. U.S. Postal Serv.*, 217 F.3d 852 (Fed. Cir. 1999), and are not challenged by Ms. Farrington nor *amici*, in any event.

a. Ms. Farrington's Removal

First, the AJ found "*no evidence* that the [removal] action was taken in reprisal for any disclosures that she may have made." Appx50 (emphasis added). As the AJ noted, Ms. Farrington was removed after she had been absent from work "over 14 months with no projected return date." Appx49; Appx46. FAA had "g[iven] [her] advanced sick leave and approved her for placement in [FAA's] leave donor program, through which she received approximately 198 hours of donated leave." Appx46. Mr. Moyers testified that he "wanted [Ms. Farrington] to come back to work," but "needed a Cabin Safety Inspector and someone to do cabin safety surveillance of Air Tran." Appx46; Appx115. Mr. Ellison also "testified that [FAA] was 'absolutely not' trying to get rid" of Ms. Farrington and that "Ms. Stahlberg did not want to get rid of" her. Appx47. And Mr. Moyers, the deciding official, never saw Ms. Farrington's May 2003 report (which was the subject of two alleged disclosures) or discussed it with Mr. Walker and was not aware of Ms. Farrington's June 2003 conversation with Mr. Walker. Appx50. The AJ reasonably concluded that there was "no evidence that the [removal] was taken in reprisal for any disclosures that [Ms. Farrington] may have made." Appx50.

b. Counseling

Second, with regard to the counseling conducted by Mr. Ellison and Ms. Stahlberg, the board found that "[t]here is no evidence that Mr. Ellison saw the

May 2003 report or was aware of what was discussed at [Ms. Farrington's] meetings with Mr. George or Mr. Walker." Appx54. There was no hearing testimony from Ms. Stahlberg, who was "unable to testify," Appx24 n.16; Appx24, or Ms. Veatch, Appx51, who "could not be located to testify at the hearing." Appx54.

The AJ relied on the hearing testimony of Messrs. Ellison and Polomski to "find that a preponderance of the evidence supports that [Ms. Farrington] had issues with completing her work and issues with communicating with AirTran" and "credit[ed] the[ir] testimony . . . over that of [Ms. Farrington] on this issue." Appx54. The AJ relied on this testimony, a "letter [FAA] received from AirTran regarding issues with [Ms. Farrington,] and the agency's desire to deal with the airline through a more customer[-]oriented approach" (the Customer Service Initiative) – intended to "foster a more collaborative relationship with the airlines an[d] encourage self-disclosure of regulatory violations" – "all support the agency's decision to counsel [Ms. Farrington]." Appx54; Appx52-54. The AJ's conclusion that "a preponderance of the evidence does not support that the counseling was done in reprisal for any protected disclosures [Ms. Farrington] may have made," Appx54, is supported by substantial evidence – that described above, coupled with Mr. Ellison's lack of knowledge of Ms. Farrington's disclosures and no evidence that Ms. Veatch or Ms. Stahlberg were aware of them.

c. Moratorium

Third, the AJ reasonably concluded that Ms. Farrington did not demonstrate that the moratorium – the instruction "to immediately cease communications with AirTran" – was issued in reprisal for her disclosures. Appx55-56.

The AJ noted that FAA "had received complaints about [Ms. Farrington] from AirTran for some time, which seemed to culminate in the letter [FAA] received from Mr. Goersch [of AirTran] on July 17, 2003," and that Mr. Moyers had to "discuss" with her "how she was coming across towards AirTran during her surveillance activities" "as early as 2002." Appx56; Appx56 n.50. As noted above, the AJ also concluded that Ms. Farrington "was clearly resistant to the agency's" more collaborative "Customer Service Initiative approach to dealing with airlines," Appx56, which encouraged "self-disclosure of regulatory violations" by airlines. Appx52. This was evidenced by her resistance" to treating a disclosure that AirTran made to her "as a voluntary disclosure" of a violation, rather than an investigation. Appx56; Appx44 n.42. For these reasons, and based on another employee's "belie[f] [that] [FAA] was limiting [Ms. Farrington] interaction with AirTran to protect her," Appx56 n.51, the AJ determined that FAA's "counseling and moratorium on her conversations with AirTran seemed designed to assist her with her interaction skills." Appx56. Thus, substantial evidence supports the AJ's conclusion. Appx56.

In sum, the Court should affirm the board's decision that Ms. Farrington did not demonstrate that the personnel actions were taken in reprisal for her disclosures – assuming they were protected by 5 U.S.C. § 2302(b)(8) – as required by 5 U.S.C. § 2302(f)(2).

CONCLUSION

For these reasons, we respectfully request that the Court affirm the board's decision.

Respectfully submitted,

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March 27, 2024

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 27th day of March, 2024, a copy of the foregoing Corrected Brief of Respondent was served electronically to all parties by operation of the Court's electronic filing system.

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