

In the Matter of:

BRENT DAVID GOLUB,

ARB CASE NO. 16-039

COMPLAINANT,

ALJ CASE NO. 2015-CPS-001

v.

DATE: November 9, 2017

F & E WORLDWIDE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Leslie Holland, Esq.; Law Office of Leslie Holland, North Miami Beach, Florida

For the Respondent:

Marc Edward Rosenthal, Esq.; Kenner and Cummings, PLLC; Fort Lauderdale, Florida

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Tanya L. Goldman, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the Consumer Product Safety Improvement Act, 15 U.S.C.A. § 2087 (Thomson Reuters 2015)(CPSIA), and its implementing regulations found at 29 C.F.R. Part 1983 (2016). Brent Golub filed a complaint alleging that Respondent F & E Worldwide, Inc. violated the CPSIA when it discharged him from employment. The Occupational Safety and Health Administration (OSHA) dismissed Golub's whistleblower complaint. Golub filed objections and requested a hearing. The Administrative Law Judge (ALJ) assigned to the case held a hearing and concluded that F & E did not violate the statute. Golub filed objections with the Administrative Review Board (ARB or Board). We affirm.

BACKGROUND

Respondent F & E Worldwide (F & E) is primarily in the business of buying, selling, and distributing beauty care products such as shampoo, conditioners, gels, hairspray, and nail polish; maintaining these products in its warehouse. Decision and Order (D. & O.) at 3. Complainant Brent Golub worked as F & E's warehouse manager for approximately 11 years before F & E terminated his employment. Complainant reported to F & E's owner, Evan Lefferts, who is also Golub's cousin. D. & O. at 3. The ALJ found that F & E "established, in large part through Complainant's admissions, that the Complainant had a history of issues with authoritative figures . . . includ[ing] Lefferts." *Id.* at 3. The ALJ also found that Golub "ha[d] a history of violence and had been fired previously for it." *Id.* at 10.¹

The incident that led to the employment termination at issue in this case involved a shipment of hairspray. On Monday, October 21, 2013, F & E received a large shipment of approximately 18,000 cans of hairspray that it planned to re-package and sell to a large vendor. The cans arrived in water-damaged red packaging and many of the cans were discolored from the dye in the packaging. Lefferts wanted the cans cleaned before they could be sold. He instructed Golub to manage the project and to use acetone to clean the cans.² Acetone was available at the warehouse for cleaning, in addition to soap and water, but not in quantities for a job of this scope. Golub picked up several five-gallon containers of acetone on Tuesday night.

On Wednesday morning, October 23, 2013, Golub directed several F & E employees to begin cleaning the cans of hairspray with the acetone. Golub sat at his desk, approximately three feet from the table where the cleaning took place. He was sick and not feeling well, which he attributed to his exposure to the acetone. D. & O. at 6 & n.7. Golub complained to Lefferts about use of the acetone. *Id.* at 5, 7.

A "heated altercation" ensued in which Golub was openly hostile, verbally abusive, and threatened violence. *Id.* at 8-10.³ The ALJ quoted Lefferts's testimony that Complainant "told me to go f--k myself," called Lefferts a "fat f--k," told Lefferts to fight him and dared Lefferts to fire him. *Id.* at 8 (quoting Tr. at 191). The ALJ also noted the testimony of other employees who overheard the altercation. The ALJ concluded that Complainant "did threaten his cousin, and whether or not he actually used the words "fat f--k," he verbally abused him." *Id.* at 9-10.

¹ Several witnesses, including Gunnar Johansson, F & E's Vice President, and employee Frank LaRuffa testified about these incidents, though the ALJ did not make any explicit findings about their testimony. *See, e.g.*, Hearing Transcript (Tr.) at 151-52, 172.

² OSHA subsequently cited Respondent for its use of the acetone, identifying it as a "hazardous or potentially hazardous substance." D. & O. at 5.

³ The ALJ did not make a specific finding of fact about what exactly led to Golub's verbal abuse, but found that Golub engaged in protected activity and quoted Lefferts's testimony that Golub was upset that two employees in the office were not helping to clean the cans. D. & O. at 7.

Lefferts sent Golub home and the next day, October 24, 2013, F & E terminated Golub's employment. *Id.* at 8.

Golub filed a complaint with OSHA the day F & E terminated his employment, alleging retaliation and additionally reporting F & E for safety violations involving acetone and lack of appropriate safety equipment. On or about October 30, 2013, OSHA investigated F & E for occupational safety and hazard violations, and on February 6, 2014, it cited F & E for improper hand protection for the use of acetone. OSHA also instructed F & E to implement a written hazardous materials program and to have proper certifications for the use of acetone. CX-12. On September 5, 2014, OSHA determined that the evidence did not corroborate Golub's claims of protected activity and F & E did not retaliate against Golub when it terminated his employment.

Golub filed objections and the case was assigned to an ALJ. The ALJ held a hearing and on February 11, 2016, he issued a Decision and Order in which he determined that F & E fired Golub for legitimate reasons unrelated to any of Golub's complaints about acetone and dismissed his complaint. Golub appealed the case to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the authority to issue final agency decisions under the CPSIA to the ARB. *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1983.110. Pursuant to the CPSIA and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1983.110(b). The ARB reviews an ALJ's conclusions of law de novo. 5 U.S.C.A. § 557(b) (Thomson Reuters 2015); *Saporito v. Publix Super Markets, Inc.*, ARB 12-109, ALJ No. 2010-CPS-001 (ARB Apr. 30, 2013). The ARB will uphold an ALJ's factual finding where supported by substantial evidence "even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

DISCUSSION

1. Statutory and Regulatory Background

Section 219 of the amended CPSIA provides for whistleblower protection. That section provides in relevant part:

- (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the

employee's initiative or in the ordinary course of employee's duties (or any person acting pursuant to a request of the employee)

—

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

...

(4) objected to, or refused to, participate in any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under such Acts.

15 U.S.C.A. § 2087; 29 C.F.R. § 1983.102(a), (b)(1), (4); *see also Opela v. Wausau Window & Wall*, 17-cv-124, 2017 WL 3836058 (W.D. Wis. Aug. 31, 2017) (defining “consumer product” under the CPSIA).

The CPSIA whistleblower statute sets forth the same elements of a claim as other whistleblower statutes. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(iv); 29 C.F.R. § 1983.109(a); *compare* 49 U.S.C.A. § 42121(b)(2)(B); 29 C.F.R. § 1979.109(a). To prevail on his whistleblower complaint, Golub must prove by a preponderance of the evidence that (1) he engaged in activity protected by CPSIA; (2) that an unfavorable personnel action was taken against him; and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against him. A “contributing factor” is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017). If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected activity. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(iv).

2. F & E's Affirmative Defense

The ALJ concluded that Golub engaged in protected activity, that F & E knew of that protected activity, and that it contributed to his termination. F & E did not appeal these findings.⁴ The ALJ further concluded that F & E proved by clear and convincing evidence that it

⁴ The ALJ held that Golub engaged in protected activity when he complained about the dangerous use of acetone within the F & E facility and that this was a contributing factor in his termination. D. & O. at 5-7. The ALJ relied upon OSHA's after-the-fact finding of a safety violation to support these findings. D. & O. at 7. F & E does not appeal the ALJ's holdings and therefore we draw no conclusions about them, addressing only whether Respondent proved its affirmative defense.

would have terminated Golub's employment in the absence of protected activity. Golub appeals this finding, and we therefore proceed directly to this issue and affirm the ALJ.

a. The clear and convincing standard

If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action in question. *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014). "Convincing" evidence is that which demonstrates that a proposed fact is "highly probable." *Id.* Clear and convincing evidence "denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain." *Id.*; see also *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 9-10 (ARB Sept. 30, 2015) (*DeFrancesco II*).

In assessing Respondent's burden, the Board uses a case-by-case balancing of three factors: (1) how "clear and convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity. *Speegle*, ARB No. 13-074, slip op. at 12 (internal citations omitted). In *DeFrancesco II*, the ARB further elaborated that:

[A]nalysis of the employer's affirmative defense should also carefully assess the employer's asserted lawful reasons for its action. Such an assessment requires not only a determination of whether there exists a rational basis for the employer's decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer's decision is "so powerful and clear that [the personnel action] would have occurred apart from the protected activity."

ARB 13-057, slip op. at 10 (quoting *Henderson v. Wheeling & Lake Erie RR*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 14-15 (ARB Oct. 6, 2012)).

b. Substantial evidence supports the ALJ's findings

The ALJ agreed with F & E that it would have fired Golub for insubordinate and abusive behavior even if Golub had not engaged in protected activity. D. & O. at 8-11. On appeal, Golub contends that the ALJ's finding is not supported by substantial evidence. We disagree and find that the ALJ's conclusion is supported by substantial evidence and that the facts of this case are distinguishable from a situation in which the protected activity is inextricably intertwined with the alleged adverse action. Here, the supporting context and testimony regarding Golub's history separates Golub's outbursts from his protected complaints concerning the use of acetone.

While whistleblower protections should be broadly construed consistent with the remedial purposes of the Statute, protected activity does not provide immunity from all forms of insubordination. *Cf. Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1296 (6th Cir. 1998) (concluding complainant was fired for “interpersonal problems,” not safety complaints); *Gonzalez v. Bolger*, 486 F. Supp. 595 (D.D.C. 1980), *aff'd*, 656 F.2d 899 (D.C. Cir. 1981) (Title VII case). Where an employee’s whistleblowing involves outrageous or improper conduct, the whistleblowing may lose its statutory protection. The outrageous activity can constitute an independent justification for the employer’s adverse employment action.

Nevertheless, appellate court authority and ARB precedent require that we carefully scrutinize Respondent’s claimed factual basis for an adverse employment action and ensure that insubordination is not serving as a pretext for retaliation. In *Am. Telephone & Telegraph v. NLRB*, 521 F.2d 1159 (2d Cir. 1975), the Second Circuit noted this challenge in a case arising under the National Labor Relations Act. “A certain amount of salty language or defiance will be tolerated in bargaining sessions with respect to grievances However, if the employee’s conduct becomes so flagrant that it threatens the employer’s ability to maintain order and respect in the conduct of his business, it will not be protected.” *Id.* at 1161 (internal citations omitted). The same concerns and balancing are required in the whistleblower context, where the line between insubordination and whistleblowing may be thin or even nonexistent. *See, e.g., Kenneway v. Matlack*, No. 1988-STA-020, at 6-7 (Sec’y June 15, 1989) (noting that intemperate language, impulsive behavior, and even alleged insubordination are often associated with protected activity). In *Kenneway*, the Secretary stated that “[t]he right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer’s right to maintain order and respect in its business by correcting insubordinate acts.” *Id.* at 3. Factors the Secretary considered included whether the conduct was private, or “on the floor of the plant.” *Id.* at 5 (quoting *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970)). Ultimately, in determining “whether an employee’s actions are indefensible-under the circumstances,” the analysis “turns on the distinctive facts of the case.” *Id.* at 3 (internal citations omitted).

Federal appellate courts have affirmed the Secretary’s determination that the respondent legitimately discharged an employee despite his participation in protected activity where the conduct included “[a]busive or profane language coupled with defiant conduct or demeanor.” *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986) (“an otherwise protected ‘provoked employee’ is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct”). In *Dunham*, the employee’s insubordinate conduct included “foul language and disdainful conduct,” uttering “an obscene expletive,” and informing a manager to “walk him to the gate.” The ALJ concluded that this behavior, which was interpreted as informing the supervisor “to ‘take his job and shove it,’ provided a genuine overriding impetus for Dunham’s termination.” *Id.* at 1039. *See also Kahn v. United States Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (affirming Secretary’s determination that auditor’s abusive and inappropriate manner while making protected complaints was the legitimate, nondiscriminatory reason for his firing).

There is substantial evidence in this record to support the ALJ's conclusion that F & E would have terminated Golub's employment absent any protected activity.⁵ Johansson and Lefferts consistently testified F & E terminated Golub's employment because of his profanity-laced tirade against his supervisor, Lefferts, in front of other staff. Lefferts testified that Golub had fought with other employees, but never screamed at him like that "in all the years he worked for me." D. & O. at 9 (citing Tr. at 192-93). The ALJ specifically found that Golub "did threaten his cousin," and "verbally abused him" and quoted Lefferts's testimony that "[i]f the cans were never there and I walked out and he started screaming like he did at me . . . he would have been fired for the exact same thing." D. & O. at 9 (citing Tr. at 192-93), 10 ("Given the insults and the perceived threat of violence, termination would have taken place in the 'absence of' the protected activity."). Like the employee's conduct in *Dunham*, the ALJ's finding that Golub's abusive behavior rose to the level of insubordination is supported by substantial evidence in the record. Additionally, the conduct took place in public, a factor the Secretary considered relevant in *Kenneway*. We therefore uphold the ALJ's factual findings as supported by substantial evidence on this record as a whole.

CONCLUSION

The ALJ's finding that F & E established by clear and convincing evidence that it would have terminated Golub's employment for his abusive and threatening language had he not engaged in protected activity is supported by the substantial evidence of record and in

⁵ For this reason, the case is distinguishable from *Speegle*, where the ARB noted that "removing the protected activity necessarily means that there would be no context to understand [the outburst]." ARB No. 13-074, Slip. op. at 13. Here, removing the protected activity still leaves in place the ALJ's findings that Golub "appeared to be very emotional," "that there was a confrontation between the cousins," and consistent testimony that Golub's tirade began after Lefferts refused to assign two office workers to assist in cleaning the cans. D. & O. at 8-10.

accordance with applicable law. Accordingly, the Board **AFFIRMS** the ALJ's dismissal of Golub's complaint.

SO ORDERED.

TANYA L. GOLDMAN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge