In the Matter of:

JAMES SPEEGLE,

COMPLAINANT,

v.

STONE & WEBSTER CONSTRUCTION, INC.,

RESPONDENT.

ARB CASE NO. 11-029-A

ALJ CASE NO. 2005-ERA-006

DATE: January 31, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David J. Marshall, Esq., and Matthew S. Stiff, Esq.; ***Katz, Marshall & Banks,*** **LLP, Washington, District of Columbia**

For the Respondent:
Eugene Scalia, Esq., Jason C. Schwartz, Esq., and Porter Wilkinson, Esq.; ***Gibson, Dunn & Crutcher LLP,*** **Washington, District of Columbia**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; and Lisa Wilson Edwards,** ***Administrative Appeals Judge.*** **Judge Corchado,** ***concurring.***

FINAL DECISION AND ORDER ON REMAND

This case arises under the whistleblower provisions of the Energy Reorganization Act (ERA).[1] James Speegle filed a whistleblower complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Stone & Webster Construction, Inc. (S & W or company), violated the ERA when it suspended him and terminated his employment because he made nuclear safety complaints. After a

[1] 42 U.S.C.A. § 5851(a)(1) (West 2007).

hearing, a United States Department of Labor Administrative Law Judge (ALJ) determined that Speegle's suspension and termination did not violate the ERA. Speegle petitioned the Administrative Review Board (ARB) for review. On September 24, 2009, the ARB issued a Final Decision and Order of Remand (F. D. & O.)[2] determining that S & W's decision to terminate Speegle after he made safety complaints violated the ERA's employee protection provision.[3]

S & W petitioned the United States Court of Appeals for the Eleventh Circuit for review of the ARB's decision. On June 19, 2012, the court of appeals granted the petition.[4] The court held that the Board erred by reviewing the ALJ's fact findings de novo rather than for substantial evidence pursuant to 29 C.F.R. § 24.110(b) (2012), and that the Board failed to correctly apply the Eleventh Circuit's Title VII precedent when analyzing the ALJ's factual findings.[5] The court of appeals remanded the case for further review of Speegle's additional arguments that the Board did not consider in its original F. D. & O., stating that the "unresolved issues in the instant case are based on factual findings and will require the ARB to consider whether the ALJ's RDO was based upon substantial evidence."[6]

On remand, the Board granted Speegle's request for further briefing. The parties filed briefs addressing the Eleventh Circuit's mandate on remand, and how the case should be resolved in light of the court's decision. Because the ALJ's causation ruling was based on legal error and fact findings not supported by substantial evidence in the record, we again reverse the ALJ's Recommended Decision and Order (R. D. & O.) and remand for further proceedings.

---

2 *Speegle v. Stone & Webster Constr. Co.*, ARB No. 06-041, ALJ No. 2005-ERA-006 (ARB Sept. 24, 2009).

3 The Board remanded the case to the presiding ALJ to enter an order awarding damages and other relief consistent with the Board's F. D. & O. On remand the case was reassigned, and on February 9, 2011, a new ALJ issued a Decision and Order finding that Speegle was entitled to, among other remedies, reinstatement, damages for lost back pay, and a supplemental amount to the date of reinstatement. S & W appealed. The Board summarily affirmed the ALJ's order on damages, as the Secretary's final decision on damages, and the Board's September 24, 2009 F. D. & O., as the final agency decision on liability in this case. *Speegle v. Stone & Webster Constr. Co.*, ARB No. 11-029, ALJ No. 2005-ERA-006 (ARB Apr. 13, 2011).

4 *Stone & Webster Constr. Co. v. U.S. Dep't of Labor*, 684 F.3d 1127 (11th Cir. 2012).

5 *Id.*

6 *Id.* at 1137.

BACKGROUND

A. Facts

S & W is a construction contractor. Under a contract with the Tennessee Valley Authority (TVA), S & W provided paint coatings repair work at TVA's Browns Ferry Nuclear Plant in Alabama.[7] Speegle, a journeyman painter, worked for S & W.[8] In January 2004, Speegle was the foreman of a crew of painters, whose task was to remove old protective paint coatings and then prepare the surfaces for new paint coatings in the plant's Unit 1 Torus area.[9] The Torus is a donut-shaped vessel that surrounds the reactor core.[10] The function of the Torus is to enable water to be flushed into the reactor core to cool the core in the event of a nuclear emergency meltdown.[11]

Prior to May 2004, S & W had used only journeyman painters for the Torus painting project in accordance with the specifications mandated in the G-55, a TVA-issued General Engineering Specification manual.[12] The G-55 sets forth the requirements for the application of protective paint coatings at TVA nuclear plants.[13] In May 2004, S & W's Lead Civil Superintendent, Richard Gero, decided that in light of an unexpected increase in the scope of the Torus painting project, S & W would also certify apprentice painters to work in the Torus.[14]

According to the G-55, a protective paint coating failure, such as paint chips, could adversely affect the cooling of the reactor core if a nuclear accident occurred, as the paint chips could clog the water pumps.[15] Appendix A of the G-55 establishes how "journeyman painters"

---

7 R. D. & O. at 3; *Stone & Webster*, 684 F.3d at 1130; *see also* Respondent's Exhibit (RX) 46.

8 R. D. & O. at 3; *Stone & Webster*, 684 F.3d at 1130; *see also* Hearing Transcript (HT) at 39-41.

9 *Stone & Webster*, 684 F.3d at 1130; *see also* HT at 47-49.

10 R. D. & O. at 3. *See also* HT at 70, 453, 479; Complainant's Exhibits (CX) 10-11.

11 *Id*.

12 *Stone & Webster*, 684 F.3d at 1130; *see also* RX 23 at 1; HT at 86, 139, 141, 589.

13 R. D. & O. at 5; *Stone & Webster*, 684 F.3d at 1130. *See also* RX 23 at 1; HT at 86.

14 *Stone & Webster*, 684 F.3d at 1130; R. D. & O. at 6-7. *See also* HT at 587, 590, 678-679.

15 R. D. & O. at 32-33 (finding that "a coatings failure could cause chips to clog the pumps or strainers, preventing safe shutdown and impeding water flow from the Torus in the event of an emergency," and that "G-55's requirements regarding the qualifications of coating applicators is based on the importance of the proper application of the coatings to nuclear safety."); *see also* RX 23 at 10; HT at 50, 54, 981-982.

qualify for the job of protective paint coating in areas like the Torus.[16] The main text of the G-55 refers to these workers as "coating applicators."[17] In light of the apparent discrepancy within the G-55 and Gero's decision to also use certified apprentice painters for the work, Gero and Sebourn Childers, Speegle's supervisor, requested that the TVA issue an Engineering Work Request (EWR) that would approve a change of the terminology throughout the G-55 to reflect that a certified "coating applicator" could perform protective paint coating work.[18]

Childers informed Speegle and his crew about the decision to use certified apprentices.[19] Speegle believed that using apprentice painters violated the G-55 and posed a nuclear safety risk because apprentices lacked the experience to safely apply protective paint coating.[20] Speegle told Childers about his concerns at three safety meetings in May 2004 and on one or two other occasions.[21] Speegle raised his concerns several times with Gero.[22]

At a May 22, 2004, safety meeting Speegle attended with other company staff, Childers asked one of the journeyman painters to read the EWR that would approve the change of the terminology in the G-55. After the reading, Speegle told Childers that "management can take

---

[16] RX 23 at 35-36.

[17] R. D. & O. at 6, citing RX 23 at 10.

[18] R. D. & O. at 6-7; *Stone & Webster*, 684 F.3d at 1130 ("Gero . . . learned that it was acceptable to designate his painters as coating applicators rather than journeyman painters, pursued proper procedures to revise the G-55's language, and began certifying experienced apprentice painters who could pass requisite TVA tests."). *See also* RX 13; HT at 321, 590-591, 594, 1035.

[19] R. D. & O. at 7 ("Childers testified that he told the journeymen about the pending certification of apprentices for Torus work in early May 2004."); *see also* HT at 96-97; 667-668.

[20] R. D. & O. at 33 (finding that "Speegle believed that Appendix A [of G-55] mandated that only journeymen painters were to apply safety-related coatings, and he based his belief on the terminology used in the G-55."); *see also* R. D. & O. at 8 ("Speegle believed that the language of the G-55 specifically mandated that journeymen, not apprentices, perform Service Level 1 work and additionally required the painter to be certified to apply the coatings."); *Stone &* Webster, 684 F.3d at 1130 ("Speegle objected [to the use of apprentices] because of nuclear safety."). *See also* HT at 97, 102-103.

[21] R. D. & O. at 8-9, 33; *Stone & Web*ster, 684 F.3d at 1130. *See also* HT at 126, 139, 604, 661-662.

[22] R. D. & O. at 33 (finding that "Gero . . . testified that Speegle communicated to [him] that he was concerned that apprentices were not capable of applying the coatings and that their certification would violate the G-55. Gero admitted that this type of concern is linked to nuclear safety."); *see also* HT at 1029-1030, 1059, 1082-1083.

that G-55" and "shove it up their ass."[23] At the hearing, Speegle testified that he "may" also have told Childers, "Thank you. You just gave all these people's jobs away."[24]

After the meeting, Childers and Joseph Albarado, a civil supervisor at the company, discussed Speegle's comment about the G-55, and called Gero.[25] Childers told Gero that he thought the remark was insubordination, and both Childers and Albarado recommended Speegle's termination.[26] Gero instructed them to suspend Speegle until Monday May 24, when he could further investigate the matter.[27] On May 24, Gero investigated Speelge by obtaining statements about the May 22 meeting from Childers, Albarado, and Speegle.[28] Later that same day, Gero "terminate[d] Speegle for insubordination."[29] Fran Trest, an S & W human resources manager, approved that decision, informed Speegle of his termination on May 24, and Speegle was formally terminated from the payroll as of June 1, 2004.[30]

On June 29, 2004, Speegle filed an ERA whistleblower complaint with OSHA.[31] OSHA conducted an investigation and dismissed the complaint on November 4, 2004. Speegle requested a hearing before an ALJ.

---

23 *Stone & Webster*, 684 F.3d at 1130-1131, citing "R. 88 at 606;" *see also* R. D. & O. at 34 (crediting company witnesses that Speegle faced Childers and made this comment "in a loud voice."). *See also* HT at 712, 945-946.

24 R. D. & O. at 16; HT at 319.

25 *Stone & Webster*, 684 F.3d at 1131; R. D. & O. at 18. *See also* RX 3-4; HT at 607.

26 R. D. & O. at 18; RX 4; HT at 726-728, 950, 974.

27 R. D. & O. at 18: *Stone & Webster*, 684 F.3d at 1131. *See also* HT at 606-608.

28 R. D. & O. at 20.

29 *Stone & Webster*, 684 F.3d at 1131; R. D. & O. at 20. *See also* HT at 1026-1027, 1037; RX 1, 3-4.

30 *See* R. D. & O. at 20; *see also* RX 2; CX 48 – Exhibit C. When Trest terminated Speegle's employment, Speegle was formally on the payroll of Shook & Fletcher, a sub-contractor of S & W, but S & W officials made the determination to terminate Speegle. HT at 888; CX 48 – Exhibit C.

31 *See* RX 18 (Nov. 29, 2004 OSHA Determination).

B. Prior Proceedings

1. ALJ's January 9, 2006, Recommended Decision and Order

The ALJ conducted an evidentiary hearing on Speegle's complaint. On January 9, 2006, the ALJ issued a recommended order dismissing the complaint.[32]

The ALJ found that Speegle's internal and informal nuclear safety complaints to Childers and Gero regarding the certification of apprentices to perform the protective paint coating work constituted protected activity under the ERA and that the company knew about the protected activity.[33] The ALJ, however, determined that Speegle failed to show that his protected activity contributed to the adverse action that the company took against him.

The ALJ determined that Speegle failed to show "direct evidence of retaliatory animus."[34] The ALJ stated that "neither Gero nor Childers made a declaration showing they sought to retaliate against Speegle for his protected activities."[35] The ALJ further found that Speegle failed to show circumstantial evidence of causation.[36] The ALJ determined that specific comments made by Childers to Speegle "do not raise an inference of causation," and that other comments or actions by company managers do not show a causal relationship between the protected activity and any adverse action Speegle suffered.[37] The ALJ further found that the temporal proximity of events did not "raise the initial inference of causation" because Speegle's "shove it" comment was an "intervening event of significant weight" and gave the company an independent reason for terminating Speegle's employment based on insubordination.[38]

The ALJ also rejected Speegle's disparate treatment claim, based on disciplinary treatment. The ALJ found that the comparator employees Speegle offered "were not similarly situated" because they "were not supervised by Childers or Gero," and that the "difference in supervisors is a significant factor due to the fact that insubordination encompasses a wide range of actions."[39] The ALJ held that "it is highly likely that different supervisors will react

---

32 *Speegle v. Stone & Webster Const., Inc*., 2005-ERA-006 (ALJ Jan. 9, 2006).

33 R. D. & O. at 32.

34 *Id*. at 36.

35 *Id*.

36 *Id*. at 36-37.

37 *Id*.

38 *Id*.

39 *Id*. at 38.

differently to varying acts of insubordination, which is a legitimate explanation for differential application of discipline."[40] The ALJ also rejected Speegle's remaining arguments establishing causation.[41]

Speegle petitioned for review.

2. ARB's September 24, 2009 Decision and Order of Remand

On September 24, 2009, the ARB entered an order reversing and remanding the ALJ's recommended decision.

The ARB determined that substantial evidence supported the ALJ's rulings that Speegle's conduct was protected, and that the adverse actions he suffered were within the scope of the Act.[42] The ARB, however, reversed the ALJ's ruling on causation. The ARB determined, contrary to the ALJ's findings, that substantial evidence in the record as a whole demonstrated that S & W provided shifting explanations or reasons for terminating Speegle and treated Speegle more harshly than other similarly situated insubordinate employees.[43] Thus, the Board found that S & W's suspending and terminating Speegle for insubordination was a pretext for unlawful retaliation and, therefore, substantial evidence shows that Speegle's protected activity contributed to S & W's decision to suspend and terminate Speegle.[44]

3. Court of Appeals Decision

S & W petitioned the court of appeals for review. Speegle intervened. On June 19, 2012, the court granted the petition and remanded to the ARB for further proceedings.[45]

The court of appeals observed that in 2007, the Department of Labor revised the ARB's standard of review in ERA cases from de novo to substantial evidence review.[46] The court determined that the Board erred by failing to analyze the ALJ's factual findings for substantial evidence. The court observed that the "question for the ARB . . . was not whether the ARB

---

40 *Id*.

41 *Id*. at 39-41.

42 *Speegle*, ARB No. 06-041, slip op. at 8-9.

43 *Id.* at 9-16.

44 *Id.* at 16.

45 *Stone & Webster*, 684 F.3d 1127 .

46 *Id.* at 1132, *citing* 29 C.F.R. § 24.110(b).

could support alternative factual findings with substantial evidence, but whether the ALJ could support its original findings with substantial evidence."[47] Based on this standard, the court determined that the ALJ's determination that S & W did not offer shifting explanations for terminating Speegle was supported by substantial evidence.[48] The court further determined that substantial evidence also supported the ALJ's finding that Jones and Chiodo were not comparators for purposes of Speegle's disparate treatment claim.[49] The court held that in analyzing disparate treatment, the ARB failed to correctly identify the court's Title VII precedent.[50]

The court of appeals further held that the ARB erred in discrediting Gero's testimony.[51] The court determined that the ALJ found Gero credible in stating that he believed Speegle would not comply with the company's new policy and procedure.[52]

The court remanded the case to the ARB to afford the agency the "opportunity to review the RDO in light of [the court's] decision," and allow the ARB to consider Speegle's three other arguments that the agency did not consider previously and that Speegle proffered as additional circumstantial evidence showing pretext.[53] The issues Speegle raised, as noted by the court, were: (1) that Childers "essentially admitted that Speegle's history of making nuclear safety complaints influenced his recommendation to terminate Speegle ; (2) that after Speegle filed his whistleblower complaint, Childers attempted to intimidate fellow employee painters who supported him; and (3) that the TVA and the Nuclear Regulatory Commission eventually validated Speegle's safety concerns.[54] The court of appeals remanded because "[t]he ARB never considered these arguments after it agreed with Speegle that the record substantiated Speegle's arguments on shifting explanations and disparate treatment."[55]

---

47 *Id.* at 1133, *citing* 28 C.F.R. § 24.110(b).

48 *Id.* at 1133-1134.

49 *Id.* at 1134.

50 *Id.* at 1135

51 *Id.* at 1136.

52 *Id.*

53 *Id*. at 1136-1137; *Speegle,* ARB No. 06-041, slip op. at 10, n.63.

54 *Stone & Webster,* 684 F.3d at 1136-1137.

55 *Id*. at 1137.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the ERA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378-69380 (Nov. 16, 2012); 29 C.F.R. §§ 24.100(a), 24.110. The ARB reviews the ALJ's factual findings for substantial evidence, and legal conclusions de novo. 29 C.F.R. § 24.110(b); 5 U.S.C.A. § 557(b) (Thomson Reuters 2011). In this case, we are precluded from reviewing issues decided by the court of appeals' June 19, 2012 decision that is before us on remand.[56]

DISCUSSION

A. Statutory Framework And Burden Of Proof

The ERA's employee protection provision prohibits an employer from taking an adverse action against an employee because the employee has engaged in protected activity.[57] Under the ERA, complainants must demonstrate "by preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint."[58] When that is shown, a respondent can avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity."[59] The court of appeals has recognized that the ERA "is a tough standard [for employers], and not by accident," as "Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves."[60]

In light of the agency's prior holdings that the court of appeals left undisturbed on remand, it is law of the case that Speegle proved by a preponderance of evidence that his safety complaints to the company about the certification of apprentice painters at the nuclear facility were activities that the ERA protects and that his employer took an adverse action against him.[61]

---

56 *See Saqr v. Holder*, 580 F.3d 414, 420 (6th Cir. 2009) ("where a court has considered the merits and remanded on certain issues, an agency . . . is not permitted to review anew those issues already addressed by the reviewing court if they are not part of the remand because issues addressed on the merits and not within the scope of remand become the law of the case.").

57 42 U.S.C.A. § 5851.

58 29 C.F.R. § 24.109(b)(1).

59 *Id.*

60 *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

61 *See* R. D. & O. at 31-35; *Stone & Webster*, 684 F.3d at 1131; *Saqr*, 580 F.3d at 420 ("issues addressed on the merits and not within the scope of remand become law of the case").

The central issue in this case is whether Speegle's protected activity was a contributing factor in S & W's decision to suspend or terminate his employment. The ALJ concluded that Speegle's protected activity did not contribute to the adverse action. The ALJ erred, as that determination rests on legal error and facts unsupported by substantial evidence.

B. The ALJ erred in its contributing factor analysis

The ALJ held that protected activity did not contribute to the adverse action Speegle suffered. In support of that holding, the ALJ determined that "Childers' testimony that Speegle's history of complaints regarding the G-55 influenced his interpretation of the statement that management could 'shove it' *does not implicate* a causal relationship between his protected activities and termination."[62] The ALJ reasoned that Childers "*is not disallowed* from considering Speegle's complaints in discerning the context of his insubordinate act."[63] This kind of analysis in the context of causation was error. The ARB relies on the interpretation of "contributing factor" specified by the court of appeals in *Marano v. Dep't of Justice*.[64] In *Marano*, the court of appeals interpreted "contributing factor" in the Whistleblower Protection Act of 1989,[65] to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[66] The term was intended to "overrule existing case law, which require[d] a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."[67] "*Any* weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test."[68] The federal courts have also consistently applied this definition of "contributing factor."[69] In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution.[70]

---

62 R. D. & O. at 36-37 (emphasis added).

63 *Id*. (emphasis added).

64 2 F.3d 1137, 1140 (Fed. Cir. 1993). *See Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 6-7 (ARB June 20, 2012).

65 Pub. L. No. 101-12, 5 U.S.C. 1221(e) (1).

66 *Marano*, 2 F.3d at 1140.

67 *Id.* at 1140 (emphasis added), quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

68 *Marano*, 2 F.3d at 1140. *See Addis v. Dept' of Labor*, 575 F.3d 688, 691 (7th Cir. 2009), *citing Frobose v. American Sav. & Loan Ass'n of Danville*, 152 F.3d 602, 612 (7th Cir. 1998) ("We have acknowledged that a 'contributing factor' is something less than a substantial or motivating one.").

69 *See, e.g., Addis*, 575 F.3d at 691; *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep't of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998).

Here, the ALJ employed the contributing factor analysis in a way that exceeds the burden the law imposes on Speegle. Contrary to the ALJ's holding, the contributing factor proscribes that protected activity be given "any weight" as a basis for an adverse action.[71] Indeed, in this case there is no evidence of unprofessional conduct or insubordinate conduct by Speegle that is unrelated to his protected activity. The ALJ noted evidence that Speegle was well regarded as an industrial painter, followed company procedures, and that his suspension and subsequent termination following his protected activity was the first serious discipline he had ever received in his career.[72] Moreover, the ALJ observed Childers's testimony that Speegle was a good worker, one of the better foremen at Browns Ferry, and was known to follow company procedures.[73] The ALJ determined, however, that the reason for Speegle's termination was a profane statement made at the May 22 meeting, which was ultimately characterized as insubordination.[74] While Speegle's use of the word "ass" at the May 22 meeting may have been a predominant factor in his suspension and termination, the facts inherent in this finding establish that Speegle's protected activity *contributed* to the termination as well since the profane word was used in the context of complaining about the use of apprentice painters in the G-55, and indeed the evidence in the record bears this out.[75]

---

[70] *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12-13 (ARB Sept. 30, 2011).

[71] *Marano*, 2 F.3d at 1140 (contributing factor is "*[a]ny weight* given to the protected disclosure." (emphasis added)).

[72] *See* R. D. & O. at 25-26; *see also* HT 169-170, 173, 384-385, 507.

[73] R. D. & O. at 25-26; *see also* HT 88-89, 767-768.

[74] R. D. & O. at 36.

[75] Childers's deposition testimony, which was read into the administrative hearing record, reflects that the company's decision to suspend and terminate Speegle was at least in part due to Speegle's safety complaints about the G-55 requiring the use of apprentice painters. Childers stated that Speegle's "history" of complaining about the change made in the G-55 made Childers believe Speegle had no "intention of complying" with the change. Childers testified as follows:

> A (Childers): The history, just like I've stated before is, when it was first put out I told the painters, Mr. Speegle and other painters exactly what Engineering and management had said. They refused to accept that . . . .
> Q: And does that include Mr. Speegle's complaints to you that you testified today that he made that the apprentices were not qualified or experienced enough to do the work? That includes that comment that he was raising, right?
>
> A (Childers): I would say that and various.

The ALJ's summary of the evidence indicates that Speegle's complaint about the G-55 (and a change that would permit the use of apprentice painters in the Torus) was the inherent reason for any profane remark he made on May 22, and indeed any insubordinate acts that Speegle may have even committed that day were "inextricably intertwined" with protected activity.[76] Witnesses testified that Speegle's inappropriate remark was made in the context of complaining about the G-55.[77] After the meeting, it is undisputed that Childers and Albarado telephoned Gero and told him about Speegle's statement about the G-55 – statements that continued to be protected based on the ALJ's holdings, *supra* at 5.[78] Based on the information from Childers and Albarado, Gero suspended Speegle.[79] The next day Speegle went to the Human Resources Office and wrote a statement "describing what happened."[80] "His written statement included that he asked about the PER regarding the certification of apprentices and the G-55 and that when the meeting was over, he said, '[They] should stick the G-55 up [there] [sic] ass.'"[81] He was terminated that day.[82] Gero's termination decision was based on insubordination.[83]

While the company terminated Speegle for insubordination, it is undisputed that the acts for which he was suspended and terminated were directly tied to Speegle's complaint about the G-55 that he made at the May 22 meeting and nothing else. Speegle's remarks, which the ALJ deemed protected by the ERA, were a factor in the adverse action (suspension and termination)

HT at 773-774. Childers testified at the hearing that the "history" of Speegle's complaints were not part of why he viewed Speegle as "insubordinate" and had "nothing to do with his termination." HT at 770-771, 774-775. Childers nonetheless further testified that "part" of what he considers insubordination is "when a person just acknowledges that they totally reject the program." HT at 779, 781. However, there is no evidence in the record reflecting that Speegle had engaged in conduct refusing to follow the G-55; the record reflects only his statements complaining about the G-55 in the context of safety complaints that the ALJ found were protected.

[76] *See* R. D. & O. at 16-18; *see also Marano*, 2 F.3d at 1143; *Smith*, ARB No. 11-003, slip op. at 6-7.

[77] *See* R. D. & O. at 17-18; HT at 532, 1018.

[78] R. D. & O. at 18.

[79] *Id*. ("Childers told Gero that he thought the comment was insubordination." HT at 726-727, 730.).

[80] R. D. & O. at 19.

[81] *Id*.

[82] *Id*.

[83] R. D. & O. at 20 ("Gero indicated to her that he had decided to terminate Speegle's employment for insubordination." HT at 822-823.).

that he suffered. While Gero testified that he thought that Speegle would not comply with the G-55,[84] this testimony is contradicted by Speegle's testimony that he "never had any intention of disobeying procedures, and he did not say anything about disobeying procedures."[85] There is no evidence that Speegle did, or was conspiring to, not comply with the G-55.[86] Thus the ALJ's finding that Speegle's protected complaints about the G-55 (which the ALJ found to be protected under the Act) as some form of insubordination and a basis for recommending his suspension and termination, establish that the protected activity that Speegle engaged in contributed to the company's decision to fire him.[87] Moreover, the fact that the ALJ determined that Childers did, and could, give weight to Speegle's protected complaints[88] further establishes that Speegle satisfied his burden of proving that his protected activity contributed to the adverse actions he suffered.

The company argues that Speegle failed to show contributing factor because Childers (who was at the May 22 meeting) was not responsible for firing Speegle. This contention is meritless. Gero authorized Speegle's suspension based on Childers's account of Speegle's comments at the May 22 meeting.[89] Moreover, the ALJ noted evidence pertaining to Gero's one-day investigation of Speegle that centered on "written statements of Childers and Albrado," the two individuals who recommended Speegle's termination for insubordination.[90] Gero also "talked to one painter who indicated that he believed Speegle's comments *did not* reflect that he would not follow precedent."[91] "Gero did not obtain statements from other painters present at the meeting."[92] Gero testified that Speegle was terminated for insubordination, and "profanity had nothing to do with Speegle's termination."[93] Again, contributing factor is met when "*any weight* is given to the protected activity." *See supra* at 10. Because Gero admitted that

---

84 R. D. & O. at 20.

85 R. D. & O. at 16, citing TR 169-170.

86 R. D. & O. at 16, *citing* HT at 169-170.

87 *See*, *e.g.*, *Smith*, ARB No. 11-003, slip op. at 8 (*citing Marano*, ARB holds that a complainant's protected disclosure was "'inextricably intertwined' with the investigation that led to his termination; thus, the content of his disclosure "gave [his managers] the reason for its personnel action.").

88 R. D. & O. at 36-37.

89 *See* R. D. & O. at 18.

90 R. D. & O. at 20.

91 *Id*. (emphasis added).

92 *Id*.

93 *Id*.

Speegle's termination was based on his insubordination (and not profanity), and the insubordination was directly tied to his complaints about the G-55, Speegle's protected activity contributed to Gero's termination decision since Gero was well aware of Speegle's activity (and Childers's characterization of that activity as insubordination) prior to firing him.

Under the law of contributing factor and the facts of this case, protected activity contributed to Speegle's suspension and termination.[94] We remand so that the ALJ can determine in the first instance whether the company can show, by clear and convincing evidence, that they would have taken the same action against Speegle absent the protected activity.[95]

CONCLUSION

The ALJ's ruling on causation is **REVERSED,** and the case is **REMANDED** for further proceedings consistent with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Corchado *concurring*:

I concur with the majority's decision to remand this matter to the Administrative Law Judge (ALJ). Given the ALJ's findings, the majority reasonably infers that the ALJ decided the issue of "contributory factor" in Speegle's favor. The remand mandate from the 11th Circuit Court of Appeals (Circuit Court) does not preclude the majority from addressing the contributory factor issue. As the majority aptly describes, the Circuit Court only addressed the Administrative Review Board's (ARB) standard of review and a few evidentiary issues, reversing the ARB's stated reasons for its 2009 decision. The Circuit Court expressly remanded this matter to the

[94] Because we find that the ALJ erred and that circumstantial evidence of Childers's statements at the administrative hearing establish that Speegle's protected activity contributed to his suspension and termination, we need not address other issues of circumstantial evidence raised by Speegle and cited to by the court of appeals in the remand order. *Stone & Webster*, 684 F.3d at 1136-11237.

[95] 42 U.S.C.A. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b).

ARB "first, to afford it the opportunity to review the [ALJ's Decision] in light of" the Circuit Court's decision. *Stone & Webster Constr. Co. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1136 (11th Cir. 2012). However, I prefer that we remand this issue for the ALJ to resolve some critical ambiguities in his findings that thwart my review of the causation issue, particularly the ALJ's rulings about Richard Gero's proffered non-discriminatory reasons for suspending and firing Speegle. Because the ALJ's resolution of the majority's remand mandate may smooth out these ambiguities, I briefly highlight the most essential.

As stated in the majority opinion, for whistleblower claims brought under the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851, the causation question is whether protected activity in any way contributed to an unfavorable employment action.[96] In this case, reviewing the causation issue presents the additional challenge of protected activity intertwined with the basis for the adverse actions.[97] The Respondent Stone & Webster Construction, Inc., asserted that it suspended and fired Speegle because of his one-sentence comment, "You and management can take that G-55 and you can shove it up your ass" (the "Comment"). Recommended Decision and Order (R. D. & O.) at 20, 34, 40. The parties agree that the G-55 issue was a safety concern about the certification of apprentices. *Id.* at 32. Accordingly, the ALJ expressly found that the Comment was "incidental, in part, to [Speegle's] protected activity regarding apprentice certification." *Id.* at 35. Then the ALJ determined that the Comment was "not protected" because the Comment (1) also included "union concerns," and (2) was "clearly vulgar and disrespectful" made "in the presence of a room full of subordinates." *Id.* "Vulgarity" and "disrespect" may constitute a legitimate basis for discipline, as the ALJ noted, but they do not erase the protected aspect of conduct. I infer that the ALJ actually meant that the Comment had an unprotected aspect to it. Given that the ALJ found the Comment included protected activity, and that the ALJ found no whistleblower discrimination, it is essential for our review that the ALJ sufficiently explain his causation analysis so that we understand how he ruled out protected activity as a cause for discipline where the Comment was the sole basis for discipline.

---

[96] "In 1992, Congress amended § 5851 to codify a particular framework regarding burdens of proof where no statutory guidance existed before" and created a "free-standing evidentiary framework." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). For this reason, Title VII cases do not necessarily provide adaptable guidance for whistleblower cases. *See, e.g., Addis v. U.S. Dep't of Labor*, 575 F.3d 688, 690 (7th Cir. 2009)("ERA's contributing factor standard provides complainants a lower hurdle to clear than the bar set by other employment statutes"); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (ERA whistleblower statute is "distinct from the Title VII employment-discrimination burden-shifting framework").

[97] For other cases discussing evidentiary challenges presented when protected activity is intertwined with the reasons for adverse action, see *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003 (ARB Feb. 16, 2011)(alleged insubordination included the protected safety concerns); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)(protected disclosures exclusively led to the disciplinary investigation); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012)(termination letter referenced the protected activity).

As to Respondent's suspension of Speegle, I believe more fact findings are needed about the Respondent's reasons. The ALJ notes the following testimony:

> Childers explained the occurrence and Speegle's comment to Gero, telling him that "Speegle had said that me and management could take the G-55 and shove it up our ass." Childers testified that Gero inquired as to whether Speegle had used the word "ass" specifically. Gero indicated that he inquired to make sure the statement had not been blown out of proportion. Childers told Gero that he thought [Speegle's] comment was insubordination. Albarado voiced his opinion to Gero that the statement was one of total disrespect and that Speegle should be terminated. Gero advised them to suspend Speegle until Monday when he could further investigate.

Id. at 18. Given this testimony, it appears that Speegle was suspended before an investigation occurred. He was merely told that he was being suspended for "insubordination" based solely on the reports Albarado and Childers made to Gero. *Id.* at 19. Again, I prefer that the ALJ expand his findings of fact on this point before we decide the contributory factor issue on the suspension.

As for the termination, it is unclear whether the ALJ rested his decision only on Gero's explanation of the reasons for the termination. The ALJ ruled that "[t]he record is clear that Gero alone made the decision to terminate Speegle . . . ." Gero testified that he terminated Speegle's employment "due to Speegle's indication that he intended not to follow procedures" and that "demotion was inadequate given that Speegle had flat out refused to follow the G-55." *Id.* at 20. Gero testified that "profanity had nothing to do with Speegle's termination" and that Gero's "refusal" was grounds for termination "regardless of whether Speegle was a foreman or a regular journeyman" and it was "irrelevant whether Speegle made his comment in front of a small group of employees or a large group of employees." *Id.* at 20, 22. "Gero believed that the comment alone was clear enough to show that Speegle had no intention of abiding by the letter of the law." *Id.* at 23. It is undisputed that Gero did not personally witness Speegle make this statement and that Gero "never asked Speegle what he meant by his comment." *Id.* Gero's testimony suggests that he terminated Speegle based on the allegedly self-evident refusal to obey the "letter of law."

Yet, the ALJ's fact findings about the Comment do not track Gero's testimony. While Gero described Speegle's one-sentence Comment only as a "flat out" and "self-evident" refusal to comply with the "letter of law," the ALJ found that Speegle's Comment was "impulsive," "incidental, in part, to his protected activity regarding apprentice certification," that "union concerns were also prevalent" in the comment, made in the "the presence of a room full of subordinates, in a manner that was clearly vulgar and disrespectful." *Id.* at 35. Also contrary to the ALJ's findings, Gero testified that "his decision to terminate Speegle was subject to the approval of a site manager" and that "Fran Trest ha[d] authority to recommend whether his decision should be approved or not." If the ALJ's finding meant that Gero's decision occurred without influence from anyone else, the record does not support such a finding, given the

involvement from several individuals noted by the ALJ and which is partly described above. The ALJ expressly relied on the testimony of Childers, Albarado, and Ballentine to find that "Speegle directed [the Comment] at Childers in a raised voice." *Id.* at 34. If others did influence Gero's decision, the ALJ's findings become less clear to me because the record reflects various reasons given by Childers, Gero, and Trest for suspending Speegle and terminating his employment. *Id.* at 17-20. In fact, Gero admitted that he could not define "insubordination" in the Respondent's policies because "it could mean different things to different people." *Id.* at 22. Without further clarification of the ALJ's fact findings and cohesion between those findings and the supporting witnesses, I cannot determine whether substantial evidence supports the ALJ's findings or whether I can affirm the ALJ's resolution of the causation issue. To be clear, the issue is not whether Gero credibly testified about his reasons for suspending and firing Speegle. The issue is understanding the ALJ's fact findings and then reviewing those findings in light of the record, as a whole. In my view, it seems that the ALJ's dismissal rests on more than Gero's testimony. If the ALJ's ultimate dismissal rests on the testimony of others besides Gero, then the testimony of those other witnesses becomes even more important in a substantial evidence review.[98]

Lastly, I summarily note two other issues needing clarification, the first involving the finding of an "intervening event." The ALJ describes Speegle's "comment at the May 22 meeting" as an intervening event between protected activity and adverse action sufficient to "compromise" the inference of causation created by temporal proximity. *Id.* at 37. However, as previously discussed, the ALJ's findings suggest that the one-sentence Comment was incidental, in part, to protected activity and therefore not separate from the intervening event. In addition, when analyzing the causation issue of contributory factor, an "intervening event" does not break a causal connection between protected activity and adverse action *simply* because the "intervening event" occurred after the protected activity.[99] As to the second issue, the ALJ accurately refers to his obligation to consider the evidence "as a whole," (*Id.* at 40), but it appears to me that he analyzed separately each piece of evidence pertaining to "animus" to determine whether it demonstrated animus. Then, the ALJ's decision seems to isolate the animus evidence from the temporal proximity evidence and other evidence. It is not clear whether the ALJ considered collectively the evidence pertaining to Childers (his "big fat mouth shut" comment, his admission that he considered protected safety complaints, and his threat to "take care of" those who helped Childers), temporal proximity, Speegle's employment history, the consistency of the witnesses' testimony, the "impulsive" aspect of the Comment, and other

---

[98] Determining whether evidence is substantial based on the record as a whole must "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). See also *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 8-9 (ARB June 24, 2011)

[99] *See, e.g., Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012)(protected activity can be a contributing factor even if the employer also had a legitimate reason for the unfavorable employment action against the employee). As I previously mentioned in footnote 1, in ERA cases, we must cautiously borrow tort law and Title VII concepts of causation after properly reviewing the meaning and application of such concepts.

circumstantial evidence. As discussed in other cases, fragmented focus on whether one reason or another demonstrated animus or pretext diverts attention from the single question of causation and may create a skewed view of the facts.[100] Upon remand, it is my hope that these factual issues will be resolved as the ALJ attempts to decide whether the Respondent proved by clear and convincing evidence that it would have suspended and fired Speegle in the absence of protected activity.

LUIS A. CORCHADO
Administrative Appeals Judge

[100] For a more comprehensive discussion about viewing of all circumstantial evidence as a whole, see *Bobreski*, ARB No. 09-057, at 13-17.