



In the Matter of:

JAMES SPEEGLE,

ARB CASE NO. 13-074

COMPLAINANT,

ALJ CASE NO. 2005-ERA-006

v.

DATE: April 25, 2014

**STONE & WEBSTER
CONSTRUCTION, INC.,**

RESPONDENT.

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 Edwards, *dissenting.***

FINAL DECISION AND ORDER OF 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

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

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 hearing, a United States Department of Labor Administrative Law Judge (ALJ) determined that while Speegle engaged in ERA-protected activity when he made his nuclear safety complaints, the ALJ concluded that Speegle's protected activity did not contribute to S & W's decision to suspend or terminate his employment. After Speegle petitioned the Administrative Review Board (ARB) for review, the ARB determined that S & W's decision to terminate Speegle's employment after he made safety complaints violated the ERA's employee protection provision.²

S & W filed a petition for review with the United States Court of Appeals for the Eleventh Circuit. The court of appeals granted the petition and remanded the case to the ARB to address additional arguments Speegle made that the Board did not consider in its original decision and for the ARB to consider whether the ALJ's factual determinations were based upon substantial evidence.³ On remand, the Board again reversed the ALJ's determination on the issue of causation and found that Speegle's protected activity contributed to S & W's adverse actions. The Board remanded the case for the ALJ to determine whether S & W demonstrated by clear and convincing evidence that it would have taken the same adverse action against Speegle absent his protected activity.

On remand, the ALJ ruled that the evidentiary record shows by clear and convincing evidence that S & W would have taken the same adverse action against Speegle absent his protected activity and, therefore, dismissed the complaint. Speegle appealed the ALJ's Decision and Order on Remand (D. & O. on Rem.) to the ARB. We vacate the ALJ's dismissal and remand the case for reconsideration consistent with this opinion.

² *Speegle v. Stone & Webster Constr. Co.*, ARB No. 06-041, ALJ No. 2005-ERA-006 (ARB Sept. 24, 2009). The Board remanded the case to the presiding ALJ to enter an order awarding damages and other relief consistent with the Board's decision. 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. Subsequently, the ALJ issued an Amended Decision and Order on Stipulated Damages on February 28, 2011, and on March 3, 2011. 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).

³ *Stone & Webster Constr. Co. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1137 (11th Cir. 2012).

BACKGROUND

A. *Facts*⁴

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.⁵ Speegle, a journeyman painter, worked for S & W.⁶ 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.⁷ The Torus is a donut-shaped vessel that surrounds the reactor core.⁸ The function of the Torus is to enable water to be flushed into the reactor core to cool the core if a nuclear emergency meltdown occurs.⁹

Prior to May 2004, S & W had used only journeyman painters for the Torus painting project as mandated by the specifications in the G-55, a TVA-issued General Engineering Specification manual.¹⁰ The G-55 sets forth the requirements for the application of protective paint coatings at TVA nuclear plants.¹¹ In May 2004, S & W's Lead Civil Superintendent, Richard Gero, decided that because of an unexpected increase in the scope of the Torus painting project, S & W would also certify apprentice painters to work in the Torus.¹²

⁴ Unfortunately, the initial ALJ provided no separate statement of findings of fact in the R. D. & O. Instead, the ALJ combined factfindings with the summary of evidence, making it often difficult to determine when the ALJ was simply summarizing evidence and when he was making a factfinding. Therefore, we gleaned the facts primarily from the express findings of fact and undisputed facts, and also by making reasonable inferences from the ALJ's summary of the evidence and credibility determinations.

⁵ ALJ's January 9, 2006 Recommended Decision and Order (R. D. & O.) at 3; *Stone & Webster*, 684 F.3d at 1130; *see also* Respondent's Exhibit (RX) 46.

⁶ R. D. & O. at 3; *Stone & Webster*, 684 F.3d at 1130; *see also* Hearing Transcript (HT) at 39-41.

⁷ *Stone & Webster*, 684 F.3d at 1130; *see also* HT at 47-49.

⁸ R. D. & O. at 3. *See also* HT at 70, 453, 479; Complainant's Exhibit (CX) 10-11.

⁹ *Id.*

¹⁰ *Stone & Webster*, 684 F.3d at 1130; *see also* RX 23 at 1; HT at 86, 139, 141, 589.

¹¹ R. D. & O. at 5; *Stone & Webster*, 684 F.3d at 1130. *See also* RX 23 at 1; HT at 86.

¹² *Stone & Webster*, 684 F.3d at 1130; R. D. & O. at 6-7. *See also* HT at 587, 590, 678-679.

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.¹³ Appendix A of the G-55 establishes how “journeyman painters” qualify for the job of protective paint coating in areas like the Torus.¹⁴ The main text of the G-55 refers to these workers as “coating applicators.”¹⁵ Because 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.¹⁶

Sometime before May 22, 2004, Childers informed Speegle and his crew about the decision to use certified apprentices.¹⁷ 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.¹⁸ Speegle told Childers about his concerns at three consecutive safety meetings in May 2004 and according to Childers, “raised his concerns several times, almost daily.”¹⁹ Childers had even told Speegle to “keep his big fat mouth shut” because of Childers’s “irritability” and “impatience” towards Speegle. “Safety meetings were held at the

¹³ 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.

¹⁴ RX 23 at 35-36.

¹⁵ R. D. & O. at 6, citing RX 23 at 10.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ R. D. & O. at 8-9, 33; *Stone & Webster*, 684 F.3d at 1130. *See also* HT at 126, 139, 604, 661-662.

start of each shift and sometimes midday,” where workers were “encouraged to ask questions and voice opinions.”²⁰ Speegle also raised his concerns several times with Gero, who “was aware of Speegle’s strong opposition to the use of apprentices.”²¹ “Gero admitted that this type of concern is linked to nuclear safety.”²² At the May 21, 2004 safety meeting, the issue of certifying apprentices “was raised again,” there was a “heated debate” and “Speegle clearly voiced himself.”²³ Stated simply, the repeated complaints about the G-55 policy change became a “nightmare” for Childers before May 22, 2004.²⁴

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 that G-55” and “shove it up their ass.”²⁵ At the hearing, Speegle testified that he “may” also have told Childers, “Thank you. You just gave all these people’s jobs away.”²⁶

After the meeting, Childers and Joseph Albarado, a civil supervisor at the company, discussed Speegle’s comment about the G-55, and called Gero.²⁷ Childers told Gero that he thought the remark was insubordination, and both Childers and Albarado recommended Speegle’s termination.²⁸ Gero instructed them to suspend Speegle until Monday May 24, when he could further investigate the matter.²⁹ On May 24, Gero investigated Speegle by obtaining statements about the May 22 meeting from Childers, Albarado, and Speegle.³⁰ Later that same

²⁰ R. D. & O. at 13-14.

²¹ *Id.* 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.”); *see also* HT at 1029-1030, 1059, 1082-1083.

²² R. D. & O at 33. The ALJ specifically ruled that Gero’s testimony to the contrary was impeached by his deposition testimony. R. D. & O. at 9.

²³ *Id.* at 15.

²⁴ *Id.* at 13.

²⁵ *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.

²⁶ R. D. & O. at 16; HT at 319.

²⁷ *Stone & Webster*, 684 F.3d at 1131; R. D. & O. at 18. *See also* RX 3-4; HT at 607.

²⁸ R. D. & O. at 18; RX 4; HT at 726-728, 950, 974.

²⁹ R. D. & O. at 18; *Stone & Webster*, 684 F.3d at 1131. *See also* HT at 606-608.

³⁰ R. D. & O. at 20.

day, Gero “terminate[d] Speegle for insubordination.”³¹ 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, 2004.³²

B. Prior Proceedings

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

Originally, the ALJ found that Speegle had engaged in ERA-protected activity when he made internal and informal nuclear safety complaints to Childers and Gero regarding the certification of apprentices to perform the protective paint coating work. The ALJ found that S & W thus knew about this activity and took adverse action against Speegle when it suspended and then terminated him. But the ALJ found that Speegle did not prove that the suspension and termination were related to his protected activity. The ALJ therefore recommended that Speegle’s complaint be dismissed.³³

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

On appeal, the ARB initially 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.³⁴ The ARB, however, determined that substantial evidence in the record shows that Speegle’s protected activity contributed to S & W’s decision to suspend and terminate Speegle.³⁵ Thus the Board reversed the ALJ’s recommended decision on the merits and remanded the case to the ALJ to award the appropriate relief to which Speegle was entitled under the ERA.³⁶

3. Eleventh Circuit Court of Appeals 2012 Decision

After S & W appealed the ARB’s original decision, the Eleventh Circuit Court of Appeals determined that the Board erred by failing to analyze the ALJ’s factual findings for

³¹ *Stone & Webster*, 684 F.3d at 1131; R. D. & O. at 20. *See also* HT at 1026-1027, 1037; RX 1, 3-4.

³² *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.

³³ *Speegle v. Stone & Webster Const., Inc.*, ALJ No. 2005-ERA-006 (Jan. 9, 2006).

³⁴ *Speegle*, ARB No. 06-041, slip op. at 8-9.

³⁵ *Id.* at 9-16.

³⁶ *Id.* at 16-17.

substantial evidence pursuant to the 2007 Department of Labor revision of the ARB's standard of review in ERA cases from de novo to substantial evidence review.³⁷ Based on this standard, the court of appeals determined that the ALJ's determination that S & W did not offer shifting explanations for terminating Speegle was supported by substantial evidence.³⁸ 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.³⁹ Moreover, the court of appeals held that the ARB erred in discrediting Gero's testimony, as the ALJ found Gero credible in stating that he believed Speegle would not comply with the company's new policy and procedure.⁴⁰

The court of appeals 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 three other arguments Speegle proffered as additional circumstantial evidence showing pretext that the agency did not consider previously.⁴¹

4. ARB's January 31, 2013 Final Decision and Order on Remand

On remand, the ARB reversed the ALJ's determination that protected activity did not contribute to the adverse action Speegle suffered. Specifically, the Board held that the ALJ erred in concluding 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" because Childers "*is not disallowed* from considering Speegle's complaints in discerning the context of his insubordinate act."⁴² The Board determined that the ALJ employed a contributing factor analysis that exceeds the burden the law imposes on Speegle, as specified in *Marano v. Dep't of Justice*, which proscribes that protected activity be given "any weight" as a basis for an adverse action.⁴³

³⁷ *Stone & Webster*, 684 F.3d at 1132-1133 (citing 29 C.F.R. § 24.110(b)).

³⁸ *Id.* at 1133-1134.

³⁹ *Id.* at 1134.

⁴⁰ *Id.* at 1136.

⁴¹ *Id.* at 1136-1137; *Speegle*, ARB No. 06-041, slip op. at 10, n.63.

⁴² R. D. & O. at 36-37 (emphasis added).

⁴³ *Speegle v. Stone & Webster Constr. Co.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 10-11 (ARB Jan. 31, 2013) (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (contributing factor is "[a]ny weight given to the protected disclosure." (emphasis added)).) 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).

Contrary to the ALJ's holding, the Board concluded that "there is no evidence of unprofessional conduct or insubordinate conduct by Speegle that is unrelated to his protected activity" and "any insubordinate acts that Speegle may have even committed that day were 'inextricably intertwined' with protected activity."⁴⁴ The Board rejected the S & W argument that Speegle failed to show contributing factor because Childers was not responsible for firing Speegle, noting that Gero authorized Speegle's suspension based on Childers's account of Speegle's comments at the May 22 meeting.⁴⁵ Because Gero admitted that Speegle's termination was based on his insubordination, and the insubordination was "directly tied" to his complaints about the G-55, the Board determined that Speegle's protected activity contributed to Gero's decision to terminate Speegle's employment "since Gero was aware of Speegle's activity (and Childers's characterization of that activity as insubordination) prior to firing him."⁴⁶ Consequently, the Board held that protected activity contributed to Speegle's suspension and termination and remanded the case for the ALJ to determine whether S & W could show, by clear and convincing evidence, that they would have taken the same action against Speegle absent the protected activity.⁴⁷

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the ERA.⁴⁸ The ARB reviews the ALJ's factual findings for substantial evidence, and legal conclusions de novo.⁴⁹

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.⁵⁰ Under the

⁴⁴ *Speegle*, ARB No. 11-029-A, slip op. at 11-12; *see also Marano*, 2 F.3d at 1143; *Smith*, ARB No. 11-003, slip op. at 6-7.

⁴⁵ *Speegle*, ARB No. 11-029-A, slip op. at 13. *See R. D. & O.* at 18.

⁴⁶ *Speegle*, ARB No. 11-029-A, slip op. at 13.

⁴⁷ *Id.* at 14; *see* 42 U.S.C.A. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b).

⁴⁸ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012); 29 C.F.R. §§ 24.100(a), 24.110.

⁴⁹ 29 C.F.R. § 24.110(b); 5 U.S.C.A. § 557(b) (Thomson Reuters 2011).

⁵⁰ 42 U.S.C.A. § 5851.

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.”⁵¹ 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.”⁵² 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.”⁵³ The Board’s previous decision found that protected activity was inextricably intertwined with S & W’s decision to suspend and fire Speegle. We recognize that S & W asks that we reconsider our previous decision, but we respectfully decline to do so at this time. In this appeal, we focus solely on whether the ALJ correctly found that S & W established by “clear and convincing” evidence that it would have taken the same actions against Speegle “in the absence of protected activity.” As we explain below, without further findings we cannot determine whether the ALJ analyzed the clear and convincing defense consistent with the law. We remand for those additional findings.

B. ALJ’s Decision and Order on Remand

On remand, the ALJ initially noted that “the parties agreed that there was no basis for reopening the record.”⁵⁴ The ALJ characterized his “task” on remand as “determin[ing] if the record shows by clear and convincing evidence what someone would have done, given a hypothetical premise” or, more specifically, “to decide if the evidence is clear and convincing that, had Complainant never engaged in his protected activity, Respondent would have nonetheless taken the same adverse actions.”⁵⁵

Specifically, the “hypothetical” or “fiction” which the ALJ considered was “if Complainant had never voiced the earlier complaints” and if Speegle’s “profane outburst” at the May 22 meeting was the “first and only time” he had complained about the G-55 issue, would S & W still have terminated Speegle.⁵⁶ Noting that there was no relevant “direct evidence” on the issue, the ALJ considered relevant “circumstantial evidence.”⁵⁷

⁵¹ 29 C.F.R. § 24.109(b)(1).

⁵² *Id.*

⁵³ *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

⁵⁴ D. & O. on Rem. at 1.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 10-11, 13-14.

⁵⁷ *Id.* at 12.

The ALJ found that the “clear and convincing” weight of the relevant evidence of record shows that “it is highly probable” S & W would have terminated Speegle if his “profane outburst” at the May 22 meeting was the “first and only time” he had complained about the G-55 issue.⁵⁸ In particular, the ALJ noted that “Complainant was one of a group of employees who complained about the program, but that no adverse action was taken against any of the other employees” and that S & W officials believed that Speegle’s statement at the May 22 meeting meant that “he would refuse to comply with the G-55” and considered it “insubordination.”⁵⁹ In addition, the ALJ noted that Speegle’s statement was made after “the issue had already been addressed by a number of experts.”⁶⁰ Finally, the ALJ concluded that Speegle’s “statement would have still been profane, public, and made by a leader immediately following a ‘last word’ discussion and clear instructions that the substantive decision had been made and would be implemented, and any further objections should be made to higher levels of management.”⁶¹ Thus, the ALJ found that “the evidentiary record shows by clear and convincing evidence that Respondent would have taken the same action against Complainant absent the protected activity.”⁶²

C. *The ALJ failed to expressly discuss the significance of some material facts and the effect that the absence of protected activity would have on the material facts.*

Initially, Speegle contends on appeal that because the ARB previously determined that his statement at the May 22 meeting was “inextricably intertwined” with his protected activity, Speegle’s statement cannot form the basis of S & W’s affirmative defense. But the ALJ correctly concluded that the Board’s holding did not preclude the application of the “clear and convincing” defense when it found that “any insubordinate acts that Speegle may have” committed at the May 22 meeting were “inextricably intertwined” with his protected activity.⁶³ The question is whether the ALJ correctly considered the “clear and convincing” defense, admittedly not a term that the statute or prior case-law thoroughly explains. Having more closely examined the legal requirements for the “clear and convincing” defense, we find that the ALJ’s analysis of this defense is materially incomplete, and the findings in his decision ultimately fail to demonstrate that S & W met its high burden of proof.

To avoid paying damages in this case, the plain language of the ERA whistleblower statute makes clear that the employer must prove by “clear and convincing evidence” that it

⁵⁸ D. & O. on Rem. at 13-15.

⁵⁹ *Id.*

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 14-15.

⁶² *Id.* at 15.

⁶³ *Id.* at 8-9.

“would have” (not “could have”) suspended and fired Speegle in the “absence of protected activity.”⁶⁴ The plain meaning of the phrase “clear and convincing” means that the evidence must be “clear” as well as “convincing.” “Clear” evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. “Convincing” evidence has been defined as evidence demonstrating that a proposed fact is “highly probable.” The burden of proof under the “clear and convincing” standard is more rigorous than the “preponderance of the evidence” standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.⁶⁵ In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), the Supreme Court defined “clear and convincing evidence” as evidence that suggests a fact is “highly probable” and “immediately tilts” the evidentiary scales in one direction. We find that the Court’s description in *Colorado v. New Mexico* provides additional useful guidance for the term “clear and convincing” evidence, and we incorporate it into our application of the ERA whistleblower statute.

In addition to the high burden of proof, the express language of the statute requires that the “clear and convincing” evidence prove what the employer “would have done” not simply what it “could have” done. Therefore, it is not enough to show that Speegle’s conduct provided a sufficient independent reason to suspend and fire him, but that the employer would have done so in this case solely based on a single outburst in a meeting. There must be evidence in the record that demonstrates in a convincing manner why the employer “would have fired” Speegle, a longtime employee, for a single outburst in a staff meeting. The employer may have direct or circumstantial evidence of what it “would have done.” The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee’s work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated⁶⁶ employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.

The last factor, and thorniest in this case, of the “clear and convincing” defense focuses on what would have happened in the “absence of” the protected activity. This is another

⁶⁴ 48 U.S.C.A. § 5851(b)(3)(D) (“Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.”)

⁶⁵ *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

⁶⁶ In remanding this matter to the ARB, we appreciate that (1) the Eleventh Circuit Court of Appeals corrected the ARB’s explanation of the Eleventh Circuit’s use of the term “similarly situated” and (2) the Eleventh Circuit applied its standard because the ARB had not provided its own standard. *Stone & Webster*, 684 F.3d at 1134-1136. Because our adjudicatory process is an administrative process reviewed by various federal circuit courts, we should reconsider the meaning of the term “similarly situated,” but we reserve this issue for another day. We are hesitant to find the need for a bright-line rule in our administrative process, but rather permitting an ALJ to have the flexibility to weigh the significance of comparators case-by-case, depending on the level of similarity or lack of similarity among the comparators.

ambiguous term in the statute with which the ALJ understandably wrestled but only captured part of its significance. We think the ALJ too narrowly applied this factor by only excising the protected activity without also removing the facts logically connected to the protected activity. To properly decide what would have happened in the “absence of” protected activity, one must also consider the facts that would have changed in the absence of the protected activity. In other words, like this case, if the protected activity created tension and animosity before an employee was fired for a lawful reason, then the absence of the protected activity means the absence of the related animosity and tension. Similarly, if the protected activity gave meaning and clarity to an outburst, then the fact-finder must keep in mind that the outburst may become ambiguous in the “absence of” protected activity that provided context to the outburst. To sum up the factors that must be considered in applying the “clear and convincing” defense, we find that the statute requires us to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how “clear” and “convincing” the independent significance is of the non-protected activity;⁶⁷ (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. We find that the ALJ touched on each of these three factors to some degree in his order but that material findings are missing, preventing us from reviewing whether the ALJ’s final ruling complied with the law. As for the first factor, we understand the ALJ to find that the outburst was a serious matter and we agree. However, there was no clear evidence of the significance of the “profanity” because Gero dismissed it as insignificant⁶⁸ while Fran Trest included this factor in S & W’s response to OSHA.⁶⁹

As to the second factor, evidence of what S & W would have done, we find that the ALJ did not seem to consider several critical facts that must be included in the ALJ’s ultimate finding. We saw no clear evidence in the record of a policy defining insubordination. There is no evidence of other individuals who were fired for a single outburst. Nor did the ALJ explain what significance, if any, he placed on the fact that Speegle was a longtime employee with a clean record. Curiously, while the ALJ suggested that it was unlikely that a good worker like Speegle would have made an outburst without a “festering dispute,” he did not expressly consider how unlikely it would be to fire such an employee.⁷⁰ Again, these factors are not weighed to determine whether it would be proper to fire Speegle, but only how clear and convincing it is that he would have been fired. The ALJ must explain the significance he placed or did not place on these facts.

⁶⁷ We appreciate that we must consider these factors as adjudicators of whistleblower cases and not as a board reviewing employment personnel appeals. Consequently, our role is not to question whether the employer’s decision to suspend and fire Speegle was wise or based on sufficient “cause” under S & W personnel policies, but only whether all the evidence taken as a whole makes it “highly probable” that S & W “would have” fired Speegle.

⁶⁸ HT at 1038-1038, 1100.

⁶⁹ R. D. & O. at 23-24; HT at 828, 832; CX 42 at 297.

⁷⁰ D. & O. on Rem. at 11.

Next, we turn to the third element, the effect that the absence of protected activity had on the facts and ultimate decision to fire Speegle. We do not agree with Speegle that the “clear and convincing” defense is impossible in this case, but we agree that there are facts that necessarily become unavailable for S & W as it tries to prove what it “would have” done in the absence of the protected activity. The objection to Speegle’s outburst was that it was done loudly in a roomful of subordinates and, most importantly, that his statement was understood to mean that Speegle would not comply with the new policy. As we previously stated, profanity was not the issue for Gero. The problem is that removing the protected activity necessarily means that there would be no context to understand what Speegle’s statement meant. The first ALJ expressly noted that Childers said “Speegle’s history of complaints regarding the G-55 influenced his interpretation of the statement.”⁷¹ It would become a random outburst over the policy without understanding Speegle’s objection or intent. While there might be other evidence or testimony in the record that demonstrates Speegle’s intent not to comply, we are not aware of it and need the ALJ to make further findings on this point. Also, the ALJ expressly found that “part of what made Complainant’s actions so egregious was that the issue had already been addressed by a number of experts, but the Complainant was *still* trying to not follow the rules given him.”⁷² But this history would be gone in the absence of protected activity and the outburst would have been the first instance of an objection over the new policy. The lack of context materially diminishes the ability to determine what S & W “would have” done.

Other facts that change in the “absence of” the protected activity are the numerous days that Speegle repeated his concerns, Childers’s growing frustration, and the “nightmare for Childers” arguably would not have occurred.⁷³ It may be that we misunderstood the ALJ’s findings pertaining to Childers’s frustrations, but we need further clarification as to how the nightmare preceding the outburst would have existed without the protected activity. Again, without the preceding nightmare and growing frustration over the protected activity, without further findings and clarifications from the ALJ, it is not clear to us that Childers would have recommended termination and that Gero would have decided on termination. In fact, even in his closing sentences, the ALJ referenced the brewing controversy of the protected activity when he ruled that Speegle’s objectionable statement was “made by a leader immediately following a ‘last word’ discussion and clear instructions that the substantive decision had been made and would be implemented, and any *further* objections should be made to higher levels of management.”⁷⁴ Given that S & W carried the burden of proof on the clear and convincing defense, we find it significant that neither Gero nor Childers was directly asked what each would have done in the absence of the protected activity.⁷⁵

⁷¹ R. D. & O. at 36.

⁷² D. & O. on Rem. at 14 (emphasis added).

⁷³ *Id.* at 13.

⁷⁴ *Id.* at 15 (emphasis added).

⁷⁵ *Id.* at 14.

As for the suspension, we agree with the ALJ that clear and convincing evidence supports his finding that S & W would have suspended Speegle for some amount of time. The strongest evidence on this issue is the immediacy of the suspension following the outburst.

In the end, applying a fuller explanation of the term “clear and convincing” evidence, and as we explained above, we find that (1) the ALJ’s decision fails to factor into it material facts related to what S & W would have done, and (2) incorrectly considered the significance of the phrase “in the absence of” protected activity by relying on significant facts that would disappear “in the absence of” protected activity. We need further findings by the ALJ consistent with our opinion to allow us to assess whether S & W met the high burden of “clear and convincing” proof.

Consequently, we vacate the ALJ’s finding that the evidentiary record shows by clear and convincing evidence that S & W would have taken the same adverse action against Speegle in the absence of his protected activity and the dismissal of Speegle’s complaint and remand the case for reconsideration consistent with this opinion.

CONCLUSION

The ALJ’s finding that the evidentiary record shows by clear and convincing evidence that S & W would have taken the same adverse action against Speegle in the absence of his protected activity and the ALJ’s dismissal of Speegle’s complaint are **VACATED**, and the case is **REMANDED** for further proceedings consistent with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Judge Edwards, *dissenting*.

The majority remands this case for the ALJ to provide further findings to support the determination that the employer showed by clear and convincing evidence that it would have terminated Speegle even absent his protected activity. *Supra* at 13. Because I think that the ALJ fully considered sufficient evidence for determining that the company met its burden, I respectfully dissent.

In the Final Decision and Order on Remand (issued Jan. 31, 2013) in this case, we directed the ALJ “to 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.” *Speegle*, ARB No. 11-029-A, slip op. at 14. It is well established that the clear and convincing evidence standard is a high burden of proof for employers. The “purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *California ex. rel. Cooper v. Mitchel Bros. Santa Ana Theatre*, 454 U.S. 90, 92-93 (1981) (citations and internal quotation marks omitted).⁷⁶ The Explanatory Statement on Senate Amendment 20 to the Whistleblower Protection Act of 1989 explains Congress’ intent as to the interpretation of clear and convincing evidence as follows:

“Clear and convincing evidence” is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action — in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards — the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

135 Cong. Rec. H747-H748 (daily ed. Mar. 21, 1989). Evidence clearly and convincingly “supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.” *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (citing *Li Second Family L.P. v. Toshiba Corp.*, 231 F.3d 1373, 1381 (Fed. Cir. 2000) (“When determining whether [deceptive] intent has been shown by clear and convincing evidence, a court must weigh all evidence, including evidence of good faith.”). “[C]lear and convincing evidence denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain.” *Coryell v. Arkansas Energy*

⁷⁶ Indeed, when adopting the contributing factor analysis under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, *see* 5 U.S.C.A. § 1221(e) (1), Congress explained in the Explanatory Statement on Senate Amendment S. 20 that “this new test will not shield employees who engage in wrongful conduct merely because they have at some point ‘blown the whistle’ on some kind of purported misconduct.” 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989). “In such cases the agency will, of course, be provided with an opportunity to demonstrate that the employee’s whistleblowing was not a contributing factor in the personnel action.” *Id.* Congress further explained that “[i]f an employee shows by a preponderance of the evidence that whistleblowing was a contributing factor in a personnel action, the agency may be upheld only if the agency can demonstrate, by clear and convincing evidence, that it would have taken the same action in the absence of the whistleblowing.” *Id.* “This is the standard in last year’s bill and it is unchanged by the Senate amendment.” *Id.*

Servs., LLC, ARB No. 12-033, ALJ No. 2010-STA-042, slip op. at 4 (ARB Apr. 25, 2013) (quoting *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012)); *see also* 5 C.F.R. § 1209(e) (2013) (Merit Systems Protection Board regulations) (defining clear and convincing evidence as “that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than ‘preponderance of the evidence’.”).

The majority remands this case because of concern that the ALJ failed to fully substantiate its ruling with pertinent factual findings. I disagree. The ALJ considered and properly weighed sufficient evidence in the record, and reasonably determined that the employer met its burden as to its affirmative defense. For example, based on the record evidence, the ALJ knew that Speegle had a “good work record and no significant history of disciplinary problems.” *D. & O. on Rem.* at 11 and n.60, *supra*. However, the ALJ determined that under the circumstances, the company fired Speegle based on a reasonably held belief that he would refuse, or was threatening to refuse, to comply with the new procedures, and this factual determination was upheld by the court of appeals. *Speegle*, 684 F.3d at 1135 (court of appeals stating that “even if Speegle’s comment meant something else, or nothing at all, and even if Speegle never actually intended to disobey orders or procedures, Gero testified, and the ALJ found it credible, that he understood Speegle’s insubordinate comment to mean that Speegle would not comply with the new policy and procedures. We conclude from the record that the ARB erred in discrediting Gero’s consistent testimony about his interpretation of Speegle’s comment.”). In analyzing an employer’s affirmative defense, we must look at the circumstances that led to the adverse action in isolation of the protected activity, and on that basis determine whether the employer has presented clear and convincing evidence that the adverse action would have happened regardless of the protected acts. This is indeed a difficult review and to some extent, as the ALJ noted below, requires some element of fiction. *D. & O. on Rem.* at 11. However, this is the process that appears to be required in examining whether an employer has demonstrated “clear and convincing evidence that it would have taken the same unfavorable personnel action *in the absence of such behavior.*” 42 U.S.C.A. § 5851(b)(3)(B); *see also* 29 C.F.R. § 24.109(b)(1).

The ALJ’s determination on the affirmative defense in this case is fully supported by the record. It is well established that protected activity does not shield an insubordinate employee from discipline. *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (“We have consistently held that an employee’s insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination.”). The “right to oppose unlawful practices in the workplace does not grant a worker the right to engage in insubordination.” *Formella v. U.S. Sec’y of Labor*, 628 F.3d 381, 392 (7th Cir. 2010). Speegle’s disturbing outburst at a staff meeting falls squarely within the realm of conduct that can reasonably be found to be disturbing by employers. As we determined in our prior ruling on the “contributing factor” analysis, while Speegle’s outburst was indeed inextricably intertwined with his protected activity (as the outburst occurred in the context of his complaining about the new G-55 policy), *Speegle*, ARB No. 11-029-A, slip op. at 12, the outburst in isolation (*e.g.*, “in the absence of” protected activity) would reasonably serve as a basis for the adverse action that the company took against him. *See Sullair PTO, Inc. v. NLRB*, 641 F.2d 500, 502-504 (7th Cir. 1981) (stating that shouting vulgarities towards management warrants discharge, and holding

that “[w]e cannot condone Boyle’s use of such vulgarities directed at management and Sommers in front of other employees, causing three of them to leave the meeting.”); *see also Kiel v. Select Artifacts, Inc.*, 169 F.3d 1331, 1336 (8th Cir. 1999) (holding that anti-discrimination laws “do not insulate an employee from . . . disrupting the workplace.”). Based on the specific facts of this case, I think that the ALJ’s ruling that the employer proved by clear and convincing evidence that it would have terminated Speegle even absent the protected activity should be affirmed.

LISA WILSON EDWARDS
Administrative Appeals Judge