**In the Matter of:**

**JAMES SPEEGLE,** **ARB CASE NO. 14-079**

**COMPLAINANT,** **ALJ CASE NO. 2005-ERA-006**

**v.** **DATE: December 15, 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 Jim Ligtenberg, 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*.**

## FINAL DECISION AND ORDER

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

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

him and terminated his employment because he raised nuclear safety concerns. After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) determined that Speegle engaged in protected activity under the ERA when he raised his nuclear safety concerns, but further determined that Speegle's protected activity did not contribute to S & W's decision to suspend or terminate his employment. Speegle petitioned the Administrative Review Board (ARB) for review, and the ARB determined that S & W's decision to terminate Speegle after he raised safety concerns violated the ERA's employee protection provision.[2]

The United States Court of Appeals for the Eleventh Circuit granted S & W's petition for review and remanded the case to the ARB to consider whether the ALJ's factual determinations were based upon substantial evidence.[3] On remand, the Board reversed the ALJ's determination 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 the protected activity.[4]

On remand, the ALJ determined there was 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 on remand and the Board vacated the ALJ's dismissal because the ALJ did not discuss the significance of some material facts and did not discuss what facts would have changed absent the protected activity. Thus, the Board remanded the case for reconsideration of whether S & W demonstrated by clear and convincing evidence that it would have taken the same adverse action against Speegle absent the protected activity.[5]

The ALJ determined on remand that there was clear and convincing evidence that S & W would have taken the same adverse action against Speegle absent his protected activity and,

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[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 a new ALJ issued a Decision and Order awarding damages and other relief. S & W appealed and 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. *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).

[4] *Speegle v. Stone & Webster Constr. Co.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013).

[5] *Speegle v. Stone & Webster Constr. Co.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014).

therefore, dismissed the complaint. Speegle appealed the ALJ's Decision and Order on Third Remand (D. & O. on Third Remand) to the ARB. We affirm the ALJ's decision and dismissal of the complaint.

## BACKGROUND

*Facts*

Given that the questions of protected activity and contributory factor have been resolved, we focus on the settled facts regarding Speegle's non-protected conduct relevant to determining whether S & W demonstrated by clear and convincing evidence that it would have taken the same adverse action against Speegle absent the protected activity. S & W is a construction contractor that had a contract with the Tennessee Valley Authority (TVA) to provide paint coatings repair work at TVA's Browns Ferry Nuclear Plant in Alabama. Speegle worked for S & W as a journeyman painter and he was a supervisor. In January 2004, Speegle was the foreman over a crew of painters under the direction of a general foreman, Sebourn Childers. Prior to May 2004, S & W had used only journeyman painters for the painting repair work, but in May 2004 S & W announced that it was going to also certify apprentice painters to perform that work.

Both Speegle and other journeyman painters repeatedly voiced their opposition to S & W management about the plan to also certify apprentice painters to perform the painting repair work and their concerns that it posed a nuclear safety risk because apprentices did not have the requisite experience. Their opposition included protected activity concerns and concerns about union issues. Various workers and management personnel discussed these concerns frequently over the course of some days, causing tension in the workplace. Management reached a final decision about these concerns and, at a May 22, 2004 safety meeting, management announced that it approved the plan to certify apprentice painters to perform the painting repair work. At that meeting, Speegle stood up and told Childers in a loud voice in front of other members of his crew of journeyman painters that S & W management could take the plan and "shove it up their ass" and Speegle testified that he "may" also have told Childers, "[t]hank you; you just gave all these people's jobs away." Childers walked out of the meeting.

After the meeting, but on the same day, Childers and Joseph Albarado, another supervisor at S & W, discussed Speegle's comment with S & W's Lead Civil Superintendent, Richard Gero. Childers told Gero that he thought the remark was insubordination, and both Childers and Albarado recommended Speegle's termination. Gero instructed them to suspend Speegle until he could further investigate the matter. Speegle was immediately suspended on May 22, 2004, and escorted off the premises. On May 24, Gero investigated Speegle by obtaining statements about the May 22 meeting from Childers, Albarado, and Speegle. Gero understood Speegle's verbal outburst to mean that he would not comply with management's decision. Later that same day, Gero "terminate[d] Speegle for insubordination." Fran Trest, an S & W human resources manager, approved that decision, based on Gero's reasons, and informed Speegle of his termination.

*ARB's Prior Decision and Order of Remand*

In the Board's prior Decision and Order of Remand, regarding the affirmative defense, the majority held that the express terms of the whistleblower statute require the employer to prove by "clear and convincing evidence" that it "would have" taken the same adverse action in the "absence of" protected activity. We explained that this statutory mandate requires adjudicators of whistleblower cases 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;[6] (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse action; and (3) the facts that would change in the "absence of" the protected activity.[7] *Speegle,* ARB No. 13-074, slip op. at 11-12.

The majority noted that the "employer may have direct or circumstantial evidence of what it 'would have done'" and that 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 situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions." *Id*. at 11.

Because the majority determined that it needed additional explanation of some material facts and the ALJ's view of the facts that would have changed absent the protected activity, the majority vacated the ALJ's dismissal and remanded the case for reconsideration of whether S & W demonstrated by clear and convincing evidence that it would have taken the same adverse action against Speegle absent the protected activity. *Id*. at 13.

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[6] "Clear" evidence means the employer has presented evidence of "unambiguous explanations" for the adverse actions in question and "convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." *Speegle*, ARB No. 13-074, slip op. at 10 (citations omitted).

[7] "[T]he factfinder must determine as best as possible, which material facts necessarily would have changed in the absence of protected activity, meaning facts directly connected to the protected activity, not every fact that hypothetically might change or facts tangentially connected to the protected activity." *Benjamin v. CitationShares Mgmt., LLC,* ARB No. 14-039, ALJ No. 2010-AIR-001, slip op. at 3 (ARB July 28, 2014).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the ERA.[8] The ARB reviews the ALJ's factual findings for substantial evidence, and legal conclusions de novo.[9]

## DISCUSSION

*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.[10] 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."[11] When that is shown, the whistleblower statute prevents the Secretary from ordering relief where a respondent demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity."[12]

*ALJ's Decision and Order on Third Remand*

While the ALJ noted that the facts that would change absent Speegle's protected activity, the ALJ determined that the other journeyman painters' complaints about apprentices performing the painting repair job would remain even absent Speegle's protected activity. Thus, the ALJ found that "the clear and convincing evidence" established that it was "highly probable" that the tension between the journeyman painters and management would still have occurred even absent Speegle's protected activity and, therefore, S & W would still have made the same decision to terminate Speegle due to his outburst. D. & O. on Third Remand at 8-11.

Specifically addressing the relevant circumstantial evidence of what S & W "would have done" absent the protected activity, the ALJ noted the temporal proximity between Speegle's outburst and his termination indicated that S & W had not terminated Speegle's employment for

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8 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.

9 29 C.F.R. § 24.110(b); 5 U.S.C.A. § 557(b) (Thomson Reuters 2011).

10 42 U.S.C.A. § 5851.

11 29 C.F.R. § 24.109(b)(1).

12 *Id.*

raising his previous safety concerns or protected activity, but only after his outburst. *Id*. at 11. In addition, the ALJ found "clear and convincing evidence of the significance" of Speegle's outburst telling his supervisor that management could "shove it" from the "unique" context of Speegle responding as a "leader" at a "public" meeting where management announced a new policy to the journeyman painters, as opposed to merely "joking," to find that S & W considered Speegle "insubordinate" or that he did "not intend to "complete the task." *Id*. at 12-13.

The ALJ also considered the S & W policy that employees may be fired for insubordination, but gave no weight to the lack of any specific company definition of insubordination because employers want to retain some discretion with such decisions. *Id*. Moreover, the ALJ found no comparator employees existed with the same set of "unique" circumstances, having a good work record and then having a sudden insubordinate outburst. While the ALJ noted that Childers and Gero were aware that Speegle had a good work record and that he may have deserved some leeway for an "impulsive" outburst regarding his safety concerns or protected activity, Speegle did not express anything regarding safety with his outburst, but only his journeyman union job concerns that "you just gave all these people's jobs away." Further both Childers and Gero stated that protected activity played no role in their termination decision. *Id*. at 13. Thus, the ALJ found that S & W established by clear and convincing evidence that it would have still terminated Speegle absent his protected activity and, therefore, dismissed the complaint.

*The Record Supports the ALJ's Dismissal*

Speegle contends on appeal that the ALJ erred in considering only the facts that would have changed absent Speegle's protected activity and not absent the other journeyman painters' complaints as well. Alternatively, Speegle argues he was entitled to be insubordinate and not comply with the new policy as he believed it was unsafe.

Though not the strongest case for clear and convincing evidence, the ALJ provided sufficient rationale for dismissing this case after considering the three factors in determining whether S & W proved by "clear and convincing evidence" that it "would have" taken the same adverse action in the "absence of" Speegle's protected activity. The ALJ explained that the reason for the termination was "clear," that S & W considered Speegle's outburst regarding the new policy, telling management it could "shove it," was insubordinate.[13] The ALJ found the grounds for termination "convincing" because (1) Speegle made his outburst, as a "leader" before other journeyman painters at a "public" meeting announcing the new policy; (2) Gero understood that Speegle would not comply with management's directive; and (3) Speegle made his outburst after tension had built up and management made clear that it had reached a final decision and the matter was resolved.

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[13] *See Speegle*, 684 F.3d at 1135 ("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").

In considering the evidence that proves that S & W still "would have" terminated Speegle, the ALJ found that S & W had not terminated either Speegle or any other worker before that meeting for raising previous concerns or expressing safety concerns or protected activity, but suspended and terminated Speegle after his outburst. Finally, considering the facts that would change in the "absence of" Speegle's safety concerns or protected activity, the ALJ found that Speegle did not express anything regarding safety with his outburst, but only his journeyman union job concerns. Thus, there is no need to engage in hypothetical analysis because, assuming Speegle had not expressed any safety concerns, the ALJ sufficiently explained that the other concerns not ERA related also created tension that led to the May 22, 2005 meeting, and Speegle's outburst would have been just as insubordinate and unacceptable to management in the manner that it occurred, leading to immediate suspension and termination.

The ALJ's factual findings must be affirmed if supported by substantial evidence, even if the Board might reach a different conclusion. *Speegle,* 684 F.3d at 1133. Because the ALJ sufficiently considered and explained the combined effect of the three factors, we affirm the ALJ's finding that S & W established by clear and convincing evidence that it would have still terminated Speegle's employment absent his protected activity.

## CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order on Third Remand dismissing the complaint is **AFFIRMED.**

**SO ORDERED.**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**
**Administrative Appeals Judge**

**Judge Edwards, *concurring*.**

I fully concur with the majority's decision to affirm the ALJ's July 9, 2014, D. & O. on Third Remand, dismissing Speegle's complaint. The ALJ determined that "Respondent established by clear and convincing evidence that it would have still fired Complainant in the absence of his protected activity." D. & O. on Third Remand at 15. Substantial evidence supports that determination.

The record evidence shows that at the May 22, 2004, safety meeting, Speegle raised his voice and used profane language. ALJ Jan. 9, 2006 Recommended Decision and Order (R. D. & O.) at 16, citing HT at 164 (Speegle); HT at 606 (Childers). Childers testified that:

> Speegle got up from his seat and walked around to his locker, turned around to look at him, and said, 'You and management can take that G-55 and you can shove it up your ass.' TR 606. Childers stated that there was a ripple effect of laughter. TR 712. Childers testified that he then stopped the meeting in order to diffuse the situation, and he left the trailer. TR 606, 716-717. Childers testified that nothing like Speegle's comment at the safety meeting had ever happened in his experience at Brown's Ferry. He described it as 'overwhelming' and 'shocking.' TR 609. He described Speegle's voice as a loud, raised voice, rating it an eighty on a scale of one hundred. TR 714-715.

ALJ Jan. 9, 2006, R. D. & O. at 16-17. After conferring with Childers, Gero made the decision to terminate Speegle's employment for insubordination due to Speegle's indication that he intended not to follow procedures. *Id*. at 20, citing HT at 1026. 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."); *Harrison v. Admin. Review Bd. of U.S. Dep't of Labor*, 390 F.3d 752, 759 (2d Cir. 2004). 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). The record evidence of Speegle's outburst at the May 22, 2004, staff meeting and apparent refusal to comply with company procedures clearly falls within the realm of insubordination. *See, e.g., 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."). Because the ALJ's ruling in support of the company's affirmative defense is fully supported by the record evidence, the ALJ correctly dismissed Speegle's complaint.

**LISA WILSON EDWARDS**
**Administrative Appeals Judge**