



**Issue Date: 09 July 2014**

**Case No.: 2005-ERA-6**

**In the Matter of:**

**JAMES SPEEGLE,**  
Complainant  
**vs.**

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

**DECISION AND ORDER ON THIRD REMAND**

**Procedural History**

This case arises under the whistleblower provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA)<sup>1</sup> and the implementing regulations thereunder.<sup>2</sup> The matter was referred to the Office of Administrative Law Judges (ALJ) for a formal hearing that was held on June 21-24, 2005, in Huntsville, Alabama. On 09 Jan 06, the presiding Administrative Law Judge issued an order recommending the claim be dismissed.<sup>3</sup> The claim was appealed to the Administrative Review Board (ARB), which reversed the finding as to liability and remanded for appropriate relief on the issue of damages.<sup>4</sup> As the previous ALJ had retired, the case was subsequently assigned to me. The parties stipulated to damages and I issued a corresponding order.<sup>5</sup> That order was summarily affirmed by the ARB and appealed to the Circuit Court, which vacated the finding of liability and remanded the case to the ARB.<sup>6</sup> The ARB in turn remanded the case to me.<sup>7</sup> The parties submitted briefs and I issued a decision dismissing the complaint.<sup>8</sup> That decision was appealed to the Administrative Review Board (ARB), which vacated the finding as to liability and remanded for reconsideration.<sup>9</sup> The parties once again filed briefs.

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<sup>1</sup> 42 U.S.C. §§ 5851 *et seq.*

<sup>2</sup> 29 C.F.R. Part 24.

<sup>3</sup> *Speegle v. Stone & Webster Constr. Co.*, 2005-ERA-6 (ALJ Jan. 9, 2006) (*ALJ I*).

<sup>4</sup> *Speegle v. Stone & Webster Constr., Inc.*, No. 06-041 (ARB Sept. 24, 2009) (*ARB I*).

<sup>5</sup> *Speegle v. Stone & Webster Constr., Inc.*, 2005-ERA-6 (ALJ, Feb. 9, 2011) (*ALJ II*).

<sup>6</sup> *Stone & Webster Constr. Co. v. U.S. Dep't of Labor*, 684 F.3d 1127 (11th Cir. 2012).

<sup>7</sup> *Speegle v. Stone & Webster Constr., Inc.*, No. 11-029-A (ARB Jan. 31, 2013) (*ARB II*).

<sup>8</sup> *Speegle v. Stone & Webster Constr., Inc.*, 2005-ERA-6 (ALJ Jun. 13 2013) (*ALJ III*).

<sup>9</sup> *Speegle v. Stone & Webster Constr., Inc.*, No. 13-074 (ARB Apr. 25, 2014) (*ARB III*).

## **Substantive History**

### *Relevant Factual Background*

Complainant was a journeyman painter hired by Respondent to work on repairing the paint coatings inside a vessel surrounding a reactor core. He was a foreman over a crew of painters under the direction of a general foreman, Sebourn Childers. In May 2004, when Respondent announced that it was going to begin certifying apprentice painters to perform that work, Complainant raised concerns to Childers that apprentices did not have the requisite knowledge and experience. On 22 May 04, at a safety meeting during which the issue was discussed, Complainant told Childers that Respondent could take the plan and “shove it up your ass.” Complainant was subsequently terminated.

### *Initial ALJ Decision*

Following a lengthy hearing and consideration of a voluminous record, the ALJ found that Complainant engaged in protected activity when he complained to Childers. He also found that Respondent was aware of that protected activity when it terminated Complainant.<sup>10</sup> However, he concluded that Complainant’s “comment at the May 22, 2004 safety meeting is not protected activity under the Act” and that “Respondent had justification for disciplining [Complainant] for this comment in the interest of maintaining order.”<sup>11</sup> He then examined whether Complainant’s protected activity was a contributing factor in his termination, ultimately deciding that it was not. He therefore dismissed the complaint.

### *The First ARB Decision*

The Board reversed the ALJ’s finding that the protected activity did not contribute to the decision to suspend and terminate Complainant. It then ruled that, as a matter of law, Respondent could not prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. It remanded the case for a hearing on damages only.

### *The Circuit Court*<sup>12</sup>

The Circuit vacated the Board’s reversal of the ALJ’s decision on liability, but declined to reinstate the dismissal. It remanded the case to the Board to consider other arguments raised by Complainant but not addressed in its decision reversing the ALJ.

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<sup>10</sup> *ALJI* at 32-33 (citations omitted).

<sup>11</sup> *Id.*

<sup>12</sup> After the parties stipulated to damages before the ALJ, the case was once again appealed to the Board and then to the Circuit.

### *The Second ARB Decision*

On remand from the Circuit, the Board ruled that the ALJ's initial findings were based on legal error and not supported by substantial evidence. It held that any insubordinate acts were "inextricably intertwined" with protected activity, since the insubordination was directly tied to complaints about the G-55 and the ALJ had found those complaints to be protected activity. The Board then remanded the case to me for the sole purpose of determining whether Respondent showed by clear and convincing evidence that it would have taken the same action against Complainant absent the protected activity.

### *The Third ALJ Decision*

My mandate upon that remand was 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. In doing so, my fact-finding was limited to those facts necessary to issue a finding that complied with the order of remand and that were not already established as the law of the case.<sup>13</sup> In that regard, I found as binding the original ALJ's specific factual findings that the safety meeting remarks were not protected activity and were interpreted by the Lead Superintendent, Richard Gero, as manifesting an intent to depart from approved procedures.

I therefore found the following factual predicate for my decision: Respondent decided to implement a new procedure that would expand the number of painters eligible for a specific task. A number of the current painters repeatedly expressed concerns that the program did not adequately account for proper training and experience and created an unsafe situation. Complainant was one of that group and was very upset about the proposal. Respondent considered the complaints, but elected to proceed with the plan anyway. It conducted a meeting in which the plan was read, a period of discussion ensued, and the painters were told that the discussion was over and the issue was closed. Complainant then stood up and made profane and confrontational remarks, which Respondent's managers understood to communicate his intent to refuse to comply with the plan. Respondent initially suspended and then fired Complainant.

Upon that factual background, I had to determine if the clear and convincing weight of the evidentiary record establishes that Respondent would have still taken the same adverse actions if Complainant had never voiced the earlier complaints, but instead suddenly loudly announced to Childers in front of a group of employees that Respondent could shove the program up its ass. To that end, I held that Respondent had the burden to show by clear and convincing evidence that Respondent would have reacted to that circumstance, however unlikely it might have been, by firing Complainant.

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<sup>13</sup> See, e.g., *Friedman v. Market St. Mortg. Corp.*, 520 F.3d 1289, 1294 (11th Cir. 2008).

I noted that the actual facts of the case clearly show (1) Complainant's protected activity alone would not have resulted in termination, and (2) his protected activity and unprotected profane outburst did result in termination. The critical question, however, was still whether clear and convincing evidence shows that his outburst without the protected activity would have resulted in the same adverse actions. I found the most probative evidence on that question to be the credible testimony of the two central witnesses involved in the decision to terminate Complainant. I then determined that the clear and convincing evidence of record shows it is highly probable Childers would have reached the same conclusion and recommended termination had Complainant been silent amid the context of his coworkers' complaints to Respondent and made the profane statement his first complaint on the issue. I found the same to be true of Gero's decision to terminate.

Accordingly, I 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 and I dismissed the complaint. That decision was appealed once again to the Board, which once again vacated the dismissal and remanded the case.

### *The Third ARB Decision*

On appeal, the Board focused solely on whether I correctly found that Respondent established by 'clear and convincing' evidence that it would have taken the same actions against Speegle 'in the absence of protected activity.'<sup>14</sup> It then observed that "without further findings we cannot determine whether the ALJ analyzed the clear and convincing defense consistent with the law."<sup>15</sup>

After summarizing my findings, the Board confirmed its previous ruling that Complainant's acts at the 22 May 04 meeting were "inextricably intertwined" with his protected activity, but also emphasized that did not preclude the application of the "clear and convincing" defense. The Board then noted it had "more closely examined the legal requirements for the 'clear and convincing' defense," and concluded that my analysis was "materially incomplete, and the findings in [my] decision ultimately fail to demonstrate that S & W met its high burden of proof."<sup>16</sup>

Conceding that the "clear and convincing" defense is not thoroughly explained by statute or case law, the Board next addressed the conjunctive nature of the word "and" by explaining that "clear and convincing" evidence means evidence that is "clear" as well as "convincing." It further explained that "clear" evidence means evidence of an unambiguous explanation for the adverse actions in question, and "convincing" evidence means evidence demonstrating that a proposed fact is "highly probable." It emphasized that the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard and requires that the thing to be proved is highly probable or reasonably certain. The Board ruled that for the purposes of its application of the ERA whistleblower provision, "clear and convincing evidence" is evidence

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<sup>14</sup> *ARB III* at p. 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10.

that suggests a fact is “highly probable” and “immediately tilts” the evidentiary scales in one direction.<sup>17</sup>

Again emphasizing the very high bar set for employers who assert the defense, the Board underscored that the employer must prove what it “would have done,” not simply what it “could have” done. Turning to this case, the Board observed that Respondent must show that it would have suspended and fired a longtime employee, based on a single outburst in a staff meeting. The Board included as examples of evidence that might sustain that burden (1) the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee’s work record; (3) office policies; (4) similarly situated employees; and (5) the proportional relationship between the adverse actions and the bases for the actions.<sup>18</sup>

Turning to the “thorny” problem of the hypothetical nature of the analysis, the Board observed that I had only captured part of its significance and too narrowly applied this factor by only excising the protected activity without also removing the facts “logically connected” to the protected activity. It pointed out that I should have also considered the facts that would have changed in the absence of the protected activity, giving as examples (1) that 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 and (2) that if the protected activity gave meaning and clarity to an outburst, then the absence of the protected activity means the absence of context to the outburst.<sup>19</sup>

The Board then identified at least three factors that must be applied flexibly on a case-by-case basis when considering the “clear and convincing” defense: (1) how “clear” and “convincing” is the independent significance of the non-protected activity; (2) the evidence that proves or disproves whether the employer “would have” taken the same adverse actions; and (3) the facts that would change in the “absence of” the protected activity. It found that although I had touched on each of these three factors to some degree, material findings are missing, preventing it from reviewing if my ruling complied with the law.<sup>20</sup>

The Board then examined each factor in terms of the facts of this case. It began with the first factor, agreeing with my finding that the outburst was a serious matter, but then noting that there was no clear evidence of the significance of the “profanity” because Gero dismissed it as insignificant while Fran Trest included it as a factor in Respondent’s response to OSHA.<sup>21</sup>

The Board was equally troubled by the second factor, which relates to evidence of what Respondent would have done. It found I did not seem to consider several essential facts, explaining that it saw no clear evidence in the record of a policy defining insubordination or of other individuals who were fired for a single outburst. It also noted that I had failed to explain what significance I placed on the fact that Complainant was a longtime employee with a clean record. It conceded that I had suggested it was unlikely that a good worker like Complainant

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<sup>17</sup> *Id.* at 11 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

would have made an outburst without a “festering dispute,” but thought it curious that I did not expressly consider how unlikely it would be for Respondent to fire such an employee. The Board directed me to explain the significance I placed or did not place on these facts, cautioning me, once again, that the factors are not weighed to determine whether it would be proper for Respondent to fire Complainant, but whether it is clear and convincing Respondent would have done so.<sup>22</sup>

The Board then addressed the third element, which is the presumed effect that the absence of protected activity would have had on the facts and ultimate decision to fire Complainant. It refused to rule that the “clear and convincing” defense is impossible in this case, but determined that there are facts Respondent may not use to prove what it “would have” done in the absence of the protected activity.<sup>23</sup>

First, it excluded the profane nature of Complainant’s outburst, since it had found that was not an issue for Gero. It also noted that Childers said Complainant’s history of complaints regarding the G-55 influenced his interpretation of the statement. It then ruled that by removing the protected activity, the statement would be a random outburst without context and would give Respondent no reason to conclude that Complainant was communicating his insubordinate intent to refuse to comply. The Board went on to say it was aware of no other evidence that demonstrated Complainant’s intent not to comply, and ordered me to make further findings on the point.<sup>24</sup>

The Board also similarly addressed my finding 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.” It noted that the history would be gone in the absence of Complainant’s protected activity and the outburst would have been the first instance of his objection over the new policy. The Board concluded that “[t]he lack of context materially diminishes the ability to determine what S & W ‘would have’ done.”<sup>25</sup>

The Board then identified other facts that change in the “absence of” the protected activity: “[o]ther 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.”<sup>26</sup> It ordered me to explain how the nightmare preceding the outburst would have existed without the protected activity.

The Board expressed some confusion with my finding that Complainant’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.” It again expressed its

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The Board starts by saying “Other facts that change” but ends by saying “arguably would not have occurred.” That language is unclear as to whether or not I am to assume the Board found those facts would not have happened as a matter of law and whether or not I am bound by that finding. However, it then directs me to further explain how one of the three facts would have changed.

inability to understand how Childers would have recommended termination and Gero would have decided on termination without the preceding nightmare and growing frustration over the protected activity.

The Board closed its review of the evidence by finding it significant that neither Gero nor Childers was directly asked what each would have done in the absence of the protected activity. It remanded the case to me for further findings consistent with its opinion to allow it to assess whether Respondent met the high burden of “clear and convincing” proof.<sup>27</sup>

### **Issue for Adjudication and Positions of the Parties**

The sole issue on this remand remains whether Respondent was able to carry its burden and show by clear and convincing evidence that, even in the absence of Complainant’s protected activity, it would have taken the same adverse action against him.

Complainant’s argument on remand essentially echoed the Board and expanded upon the language from the majority opinion in the remand decision. Complainant began by arguing that without Complainant’s protected activity, there would have been no accumulation of frustration and tension in Childers and Gero. Consequently, Complainant maintains, the outburst could not have been interpreted as a refusal to let a dead issue drop or an insubordinate announcement that Complainant was going to refuse to comply. Rather, it would have been a random, inexplicable, idiosyncratic event without any meaning or context.

Complainant then suggests that given the absence of any ongoing dispute or other explanation for the outburst, it is highly unlikely that Respondent would have terminated Complainant. In support of that position, Complainant, like the Board, cites his good work history, raises examples of how Respondent dealt with other employees, and notes the absence of any firm policy on insubordination.<sup>28</sup>

Respondent disagrees that taking Complainant’s activity out of the analysis means there would have been no ongoing dispute. It maintains that the other employees would still have been just as unhappy and created just as much tension and frustration. Consequently, Respondent insists that Complainant’s outburst would not have been random and unexplainable, but would have had the same context. However, even if the chronic frustration and tension is removed along with Complainant’s protected activity, Respondent maintains that the outburst would have not been without context, as Complainant was clearly manifesting his anger over the loss of jobs. Respondent argues that faced with the insubordinate outburst not about safety, but about union concerns, it is highly likely that it would have fired Complainant. Therefore, Respondent submits that even in the absence of any context and assuming the outburst was random and unexplainable, the nature of the outburst, combined with Complainant’s refusal to retract or apologize, would have been highly likely to lead to his termination.

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<sup>27</sup> *Id.*

<sup>28</sup> Finally, in his reply brief, Complainant appears to raise for the first time in the litigation of this case an alternative theory. He argues that even if his remarks at the safety meeting were reasonably construed to mean he was refusing to follow the policy, his refusal was a protected activity. That theory has not been properly alleged, litigated at hearing, or briefed and is not ripe for a decision on that basis.

## Analysis

### *What Facts Are Changed “In the Absence of” Complainant’s Protected Activity?*

The first step in executing the Board’s order of remand is to establish the hypothetical factual parameters of what would have happened in the absence of Complainant’s protected activity. A threshold question in that process is whether removing Complainant’s protected activity also means that there would have been no frustration, tension, or ongoing dispute. In my previous decision I specifically addressed that question:

The issue still would have been a highly contentious and public one. His 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. ... Moreover, the sum of the evidence suggests that if, as the hypothetical provides, Complainant had never engaged in the protected activity, the complaints of other journeymen painters would have still put Childers on edge and made it more likely that Complainant’s outburst led Respondent to believe he would not follow the new G-55 rules.<sup>29</sup>

However, the Board then ruled that I

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.<sup>30</sup>

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<sup>29</sup> *ALJ III* at 14-15.

<sup>30</sup> *ARB III* at 12 (emphasis added). Again, I did specifically “consider the facts that would have changed in the absence of the protected activity.” However, it appears that my assessment of what else would have changed is markedly different from that of the Board. The question then becomes if that difference is based on an erroneous application of a legal principle or a ruling (consistent with its opinion in its first review of this case) that the record is insufficient as a matter of law to support a finding that Respondent was able to carry its burden by clear and convincing evidence.

While that language seems to direct me as a fact finder to identify and remove not just the Complainant's activity, but those facts that I find are "logically connected" to the protected activity, the Board went further and said:

[T]here are facts that necessarily become unavailable....The problem is that removing the protected activity necessarily means that there would be no context....It would become a random outburst over the policy without understanding Speegle's objection or intent....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." 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.

....Other facts that change in the "absence of" the protected activity are the numerous days that Spiegel [sic] repeated his concerns, Childers's growing frustration, and the "nightmare for Childers" arguably would not have occurred. 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.<sup>31</sup>

Most of that language seems to indicate the Board has concluded as a matter of law that the other employees' complaints are logically connected to Complainant's protected activity and that without it, there would have been no ongoing dispute or problem and Childers would not have had any reason to infer from Complainant's outburst that he would refuse to comply with the policy. On the other hand, the Board also noted that without the protected activity, the "nightmare for Childers" arguably would not have occurred. Moreover, it asked for further clarification as to how the nightmare preceding the outburst would have existed without the protected activity. Thus it is not clear if the Board's order of remand includes a binding finding that: the other employees' complaints are logically connected to Complainant's protected activity; without Complainant's protected activity, none of the other employees would have complained; there would have been no workplace dispute; Childers would have not been frustrated; and Complainant's outburst would have been without any of that as context. A fundamental question is whether removing Complainant's protected activity also removes the complaints of the other employees and the absence of the workplace dispute. Complainant insists

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<sup>31</sup> *Id.* at 13 (emphasis added). The task of going back in time to change facts and then deciding what would have happened is a daunting one. If, as the Board seems to suggest, Complainant's silence would have meant no other employees had complaints or had disputes, the issue might well not have even been mentioned at the May meeting. In other words, removing not just the protected activity, but all logically related events (even if not within a chain of causation) would send factual ripples through the future whose impact is impossible to discern. *See, e.g.*, Smith, Nicholas J.J., "Time Travel", *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/win2013/entries/time-travel/>; *See also*, Dr. Emmett Brown, *BACK TO THE FUTURE* (20<sup>th</sup> Century Fox 1985) ("According to my theory, you interfered with your parents' first meeting. If they don't meet, they won't fall in love, they won't get married and they won't have kids. That's why your older brother's disappearing from that photograph. Your sister will follow, and unless you repair the damage, you'll be next.").

(and the Board appears to assume) that is the case. Yet, there is no indication that Complainant was the leader without whose actions the rest of the employees would have never complained.

After considering and weighing the evidence, I previously found and continue to find that the record “immediately tilts” the evidentiary scales in favor of a finding that it is “highly probable” that: even in the absence of Complainant’s protected activity and assuming he stood quietly by, the G-55 issue would have remained a highly contentious one with other employees who were equally, if not more, unhappy and vocal about it. With that background, it is also highly probable that the “nightmare” would have still existed; Childers would have been in the same frame of mind, reached the same conclusion, and made the same recommendation. Similarly, Gero would have made the same decision. I find that the other employees’ complaints are not “logically connected” in a causal sense. Complainant’s protected activity and the complaints of the other employees were coincidental, related, and certainly all part of the same workplace dispute and environment. My finding is that the clear and convincing evidence is that the same workplace dispute and environment would have occurred even without Complainant’s protected activity.<sup>32</sup>

The “logically connected” standard announced by the Board does not necessarily imply a “but for” causation analysis. Indeed, the Board’s analysis can be interpreted that it found Complainant’s protected activity to be logically connected as a matter of law to the complaints of the other employees, and that any hypothetical assuming Complainant engaged in no protected activity requires an assumption that no one else complained either.<sup>33</sup>

The application of the logically connected standard is most likely what underlies the Board’s conclusion that I failed to adequately explain or even address the factors that support my dismissal of the complaint. My hypothetical removed only Complainant’s protected activity. I found that the rest of the complaints, the festering dispute, the frustration, and the nightmare would have remained. Applying the logically connected standard, the Board seems to have found as a matter of law (at least in the absence of an argument that convinces it to the contrary) that

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<sup>32</sup> The Board may also be seeking a specific discussion of the possibility that while others may have continued to complain even in the absence of Complainant’s protected activity, since the outburst would have been his first complaint or involvement in the dispute, Respondent would have had no reason to think he was intending to disobey the policy. I did specifically consider that possibility, but given the environment, the nature of his outburst (complaining that Respondent just gave away jobs), and his refusal to retract, I found it highly probable that Respondent would still have had concluded Complainant was intending to disobey the policy. It may also be that the Board is applying a type of joint and several analysis that would allow each member of a group to incorporate by membership the protected activity of the others. That would certainly change the predicate facts applying to the termination recommendation and decision. However, it would also introduce an entirely new theory of liability that was neither alleged nor litigated and require a finding that his coworkers engaged in protected activity.

<sup>33</sup> On the other hand, such an interpretation would appear to change the standard for the clear and convincing defense, which requires only that the employer show what it would have done in the absence of the complainant’s protected activity, not the absence of his activity and all contemporary and related facts, even if those facts are not causally related and would have occurred in any event. Such a logically-connected standard would in many ways simply be once again applying the contributing factor standard. In addition to changing established law, abandoning a causation test in favor of a logically connected analysis presents an unwieldy standard. For example, in this case, the entire G-55 program itself is logically connected to some degree to the protected activity. Assuming there was no G-55 program means there would have been no protected activity.

the hypothetical must remove not only Complainant's protected activity, but the rest of the complaints, the festering dispute, the frustration, and the nightmare.

Indeed, there is an inherent tension in the application of the two analytical prongs to this issue. In a case where an employer cites unprotected activity as the basis for taking adverse action against an employee who also engaged in protected activity, it may avoid liability if it shows by clear and convincing evidence that it would have taken the same adverse action, even in the absence of the protected activity. The Board interprets that to mean in the absence of not only the complainant's protected actions, but all logically connected activities.

In this case, it has become an accepted premise that Complainant's unprotected activity was "inextricably intertwined" with his protected activity. It would seem a fair and logical conclusion that two inextricably intertwined things would also be logically connected and that as a result, "in the absence of Complainant's protected activity" would also mean "in the absence of his inextricably intertwined unprotected activity."

However, the Board specifically rejected that logic, holding that an inextricably intertwined relationship between the protected and unprotected activity does not, *per se*, rule out the defense. That raises the question of exactly what "inextricably intertwined" and "logically connected" mean.

To clarify, I found that Complainant's earlier protected activity (and the entire workplace dispute) was contextually inextricably intertwined with his unprotected outburst. I also found that because of that contextual relationship, it would be unlikely that he would have been totally silent, but then explode at the meeting. However, I held that Respondent had no burden to show the likelihood of the hypothetical occurring, just the likelihood of what it would have done in the event of the hypothetical. Moreover, I found it was highly probable that the relevant contextual circumstances (other employees' complaints, festering dispute, etc.) would have remained even in the absence of Complainant's protected activity. Thus, I found that the events were contextually intertwined, but not linked in causation.

Therefore, since the logically connected standard is a new expression, particularly as applied to inextricably intertwined protected and unprotected activity, and subject to likely appeal, I will address the factors identified by the Board.

#### *Temporal Proximity*

One factor the Board identified as evidence that would help an employer meet its burden is the temporal proximity between the non-protected activity and the adverse action. In this case that is a substantial factor, since the adverse action took place not after the protected activity, but in direct response to and immediately following the non-protected activity. The temporal proximity factor does not change whether or not I apply the Board's logically connected standard and discount the other complaints and associated events.

### *Significance of the Outburst and Its Obscene Nature*

The Board also looked to whether there was clear and convincing evidence of the independent significance of the non-protected activity. It agreed that the outburst was a serious matter, but noted that there was no clear evidence of the significance of the profanity Complainant used. The Board noted that Gero did not think it was significant, even though Respondent later relied on it in its OSHA response. Based on that, the Board went on to exclude the profane nature of Complainant's outburst from the "what would Respondent have done" analysis.

My assessment of the evidence apparently once again diverges from that of the Board. I did not read the testimony to mean that Childers and Gero did not place any significance on Complainant's use of a profane statement. I read the testimony to mean that the simple and isolated use of an obscenity by an employee, without any other aggravating factor or context, would not be grounds for termination. It would be naïve and contrary to common sense to assume that in Respondent's workplace there was not an accepted level of use of at least an occasional vulgarity or obscenity. For example, if in response to a question about whether he was going to take a vacation for the Fourth of July, Complainant had replied "You bet your sweet ass I am," that response would not have been grounds for discipline. That Childers and Gero would not be offended by that response does not mean that Complainant's use of the same obscenity in an entirely different situation and context carries no significance.

Moreover, even accepting the premise that Gero and Childers gave no weight to the obscene nature of Complainant's outburst, it is unclear how much must be excised in the hypothetical. Taking out just the word "ass" leaves "take the G-55 and shove it," which still implies the excised vulgarity. Excising the entire phrase essentially excises the non-protected activity. One clear and obvious conclusion that can be drawn when a supervisor is told by an employee that he or she can take a task and shove it up his or her ass is that the employee does not intend to complete the task.<sup>34</sup> I find clear and convincing evidence of the significance of the non-protected activity.

### *Respondent's Policy on Insubordination, Other Employees, and Complainant's Work Record*

The Board additionally looked to evidence of other essential factors for consideration: the absence of a specific definition of insubordination in its work rules making insubordination to supervisors a basis for termination; how Respondent had dealt with other employees who had a single outburst; and Complainant's good record and its impact on the likelihood that Respondent would terminate him.

Respondent's policy makes it clear that employees may be fired for insubordination toward supervisors. It does not mandate dismissal and it does not go on to define insubordination. Obviously, if Respondent had a written policy that mandated termination in the event of a single incident of insubordination and included as a specific example telling a

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<sup>34</sup> Of course, it is not enough in this case that the inference could have been drawn. Very credible testimony establishes, however, that it was exactly the inference that Complainant's supervisors drew.

supervisor to shove a new work plan “up his ass,” Respondent’s burden would be much easier to sustain. However, I do not find the absence of such specificity to be particularly probative, given that employers generally want to retain some discretion and not be forced by their own rules to fire an employee they think deserves a second chance. Complainant wasn’t joking when he said what he said and I found that his actions fell squarely into what would commonly be interpreted as insubordinate. I gave the absence of any further detailed definition of that term no weight.

That Respondent gives its supervisors discretion to decide what to do with an insubordinate employee raises the question in this case of whether they would have exercised it to fire Complainant in the absence of his protected activity. As the Board noted, it can be helpful to look at what the supervisors did in similar cases. The probative value of the other cases, however, is a direct function of their similarity to Complainant’s situation. The most probative case would be an employee with a work record like Complainant’s who never said a word about the G-55 until the safety meeting, when he then had an outburst like Complainant’s. That ultimate comparator case does not exist. Moreover, I found the circumstances of Complainant’s insubordination to be so unique that the proffered examples of other insubordinate employees had very little, if any, probative value.

I did consider the fact that the record showed that Complainant had a history as a good employee. It does not appear that anyone ever suggested otherwise and Respondent does not attempt to justify the termination by citing a course of conduct or recidivistic insubordination. I also considered the impact of that work record on the probability that his supervisors would have fired him nonetheless. Childers and Gero were clearly aware of Complainant’s work record, and testified credibly that they decided to terminate him anyway.

In that regard, I note that the initial ALJ found Complainant’s prevalent concern was related to union and hiring issues. He considered that fact in weighing whether the emotional outburst should be given more leeway as a further impulsive expression of his safety concerns. It was happenstance that Complainant’s union concerns coincided with protected activity in the first instance. While not relevant to the determination of whether Complainant initially engaged in protected activity, I do find that his motive was a relevant factor in the insubordinate actions that prompted his supervisors to fire him. Complainant did not say “You just put the plant at risk” or “lives and property are in danger.” He said, “Thank you, you just gave all these people’s jobs away.”

The Board also addressed the issue of the exercise of supervisor discretion by noting that it had found it significant that neither Gero nor Childers were directly asked what they would have done in the absence of the protected activity. This is another instance of a divergent assessment of the evidence. I did not find the absence of that question to be particularly troublesome or peculiar, since both had already said that the protected activity played no role in the decision to terminate. If someone says that a certain fact played no role in a decision, they are implicitly also saying that if the fact did not exist, the decision would be the same. I also note

that, although the burden is on Respondent, Complainant apparently saw no point in asking that specific question in his extensive cross examinations of both witnesses.<sup>35</sup>

### **Conclusion**

The sole question in the current setting of the case is whether Respondent proved by clear and convincing evidence that it would have fired Complainant even in the absence of his protected activity. I previously found that it did, but the Board vacated that decision and remanded the case because of its concern that I had incorrectly identified the scope of what must be included in the process of removing the protected activity from the hypothetical analysis. The Board directed me to use a logically connected standard and not only remove from the hypothetical the protected activity, but also include in the hypothetical all other facts that would have changed with the absence of the protected activity. Once I had done that, it asked me to explain how the nightmare preceding the outburst would have existed without the protected activity.

If removing Complainant's protected activity indeed requires assuming no other complaints, no workplace frustration, and no "nightmare" Complainant's unprotected activity (if it happens at all) becomes an idiosyncratic outburst with no context. Respondent argues that even in that instance, it would have still fired Complainant. While that might be the case, it becomes virtually impossible for Respondent to prove it by clear and convincing evidence. Therefore, if that circumstance was what the Board wanted me to evaluate, Complainant would prevail.

The Board is clear that in evaluating the "we would have fired him anyway" defense, a fact finder must disregard not just the protected activity, but also any "logically connected" activity. Given the expansive interpretation of "logically connected" as based on the examples given by the Board in this case, that would mean disregarding the profane safety meeting outburst itself.

However, the Board also clearly stated that the fact that the outburst was inextricably related to the protected complaints did not preclude the application of the defense. Thus, it allowed the unprotected activity to remain, but stripped it of all meaning and context.<sup>36</sup> It then directed me to explain how it would be possible for Respondent to carry its burden. Respondent's argument to the contrary notwithstanding, it could not. Indeed, if the logically connected standard requires the hypothetical as suggested by the Board, a strong argument could be made that there was no need to remand and the Board could have returned to its original holding that the record was insufficient as a matter of law to support the affirmative defense and reinstated the damages. If I were to delete from my hypothetical analysis not only Complainant's individual protected activity, but also the complaints of the others and the associated work place tensions, there would be only an unexplainable, almost after the fact, outburst from an employee who seems to be primarily concerned about the consequences of the G-55 to union jobs. On such a record, I would not find that Respondent had sustained its burden in that case.

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<sup>35</sup> It is true that the when the supervisors testified about whether the protected activity played a role in the decision, they were in all probability not applying the "logically connected facts standard" and including as part of Complainant's protected activity all of the facts the Board appears to.

<sup>36</sup> Although modified in that the Board discounted the obscene nature of the outburst.

However, the Board did remand the case and I will once again clarify my evidentiary assessment and hypothetical factual findings. Consistent with my discussions earlier in this ruling and in my last decision, I find that Respondent established by clear and convincing evidence that it would have still fired Complainant in the absence of his protected activity.

Again, I do think that the hypothetical the law demands is an unlikely one, but note Respondent bears no burden to establish it. Based on the credible evidence, I find that even if Complainant had said nothing and quietly stood by, the G-55 would still have been a highly contentious and public issue and the source of frustration for Childers and Gero. If Complainant had elected to break his silence at the safety meeting it still would have 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. With that predicate, I find the clear and convincing evidence shows that the Respondent would have responded the same way.<sup>37</sup>

The Complaint is dismissed.

**ORDERED** this 9<sup>th</sup> day of July, 2014, at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

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<sup>37</sup> If the predicate is faulty either for an insufficiency of evidence or incorrect application of law, my decision would be to reinstate the finding of fault and damages.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).