



**Issue Date: 13 June 2013**

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

**In the Matter of:**

**JAMES SPEEGLE,**  
Complainant

vs.

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

## **DECISION AND ORDER ON 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> I conducted a teleconference during which the parties agreed that there was no basis for reopening the record and after which they submitted briefs.<sup>8</sup>

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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> I informed the parties that, given the narrow scope of the remand, I did not intend to review the entire record and they must therefore cite me in their briefs to the specific pages of the exhibits or transcript that they believed were relevant.

## **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 reasonably believed the certification of apprentices constituted a violation of nuclear safety standards and engaged in protected activity when he complained to Childers about it. He also found that Respondent was aware of that protected activity when it terminated Complainant.<sup>9</sup>

Addressing the specific conduct on 22 May 04, the ALJ found the safety meeting was in a room full of subordinates and “included a reading of a document reflecting the official change of the terminology of the G-55, which allowed the certification of apprentices. Discussion and complaints from the painters ensued.”<sup>10</sup> He also found Complainant “rose from his chair, walked to his locker, turned to face Childers and said in a loud voice, ‘you and management can take that G-55 and you can shove it up your ass.’”<sup>11</sup> The ALJ additionally found that Complainant’s insubordinate remarks were impulsive and in part motivated by union concerns. The ALJ 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>12</sup>

Nonetheless, having found that “Complainant engaged in protected activity, known to Respondent, only when he made internal and informal complaints regarding the certification of apprentices to Childers and Gero,”<sup>13</sup> the ALJ examined whether Complainant’s protected activity was a contributing factor in his termination. Noting the limited direct evidence on the question, he weighed the circumstantial evidence.

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<sup>9</sup> *ALJI* at 32-33 (citations omitted).

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *Id.* at 35.

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

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

The ALJ began with what Complainant offered as evidence of Childers' and Gero's hostility against Complainant, finding "Childers had addressed the apprentice certification issue numerous times to the full extent of his authority throughout an extensive two to three week period. He told the journeymen he could do nothing further and they should pursue higher avenues of complaint."<sup>14</sup> He also found that since Childers was allowed to consider the full context of the insubordinate act, his "testimony that [Complainant'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."<sup>15</sup> The ALJ concluded Childers' behavior was that of irritability and impatience rather than animus.<sup>16</sup> Moreover, he noted that Gero's belief that [Complainant] was trying to lead the group into not following procedures was simply his interpretation of the events and not evidence of animus.<sup>17</sup> He additionally found that Gero alone made the decision to terminate and had no hostility toward Complainant.<sup>18</sup> His ultimate conclusion was that Respondent had no retaliatory animus.<sup>19</sup>

The ALJ next considered Complainant's argument that disparate treatment provided circumstantial evidence of animus. For various reasons (including less serious circumstances, different supervisors, and no suspicion of intent to not follow procedures) he found that the comparator employees offered were not similarly situated and did not constitute circumstantial evidence of retaliatory motive.<sup>20</sup>

Finally, the ALJ considered Complainant's argument that Respondent's shifting explanations for the termination were evidence of pretext and the real reason was retaliation for the protected activity. He did not find Respondent's report to OSHA that it terminated Complainant for insubordinate attitude and foul language incompatible with a later statement to the NRC and TVA that foul language had nothing to do with it, since Gero testified that he wrote only "insubordination" on the paperwork and stated several times that Complainant's refusal to follow the G-55 was egregious enough to warrant termination. The ALJ's essential factual finding was that Respondent's reasons for Complainant's termination were neither false nor shifting and were not circumstantial evidence of pretext.<sup>21</sup>

Having considered the circumstantial evidence in the case, the ALJ found the record failed to establish that the protected activity was a contributing factor to the termination and dismissed the complaint.

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<sup>14</sup> *Id.* at 36.

<sup>15</sup> *Id.* 36-37.

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

<sup>17</sup> *Id.* at 37.

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

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

<sup>20</sup> *Id.* at 38.

<sup>21</sup> *Id.* at 40.

### *The First ARB Decision*

The Board determined the record clearly supported the ALJ's findings that Complainant engaged in protected activity with his internal and informal complaints to Childers and Gero about the certification of apprentices, that Respondent knew about the protected activity, and that Respondent took adverse employment action against Complainant. The Board did not address or disturb the ALJ's finding that Complainant's actions at the safety meeting did not qualify as protected activity, although it did note that "the ALJ correctly held that the May 22 'shove it' comment operated as a significant intervening event that could have caused the adverse action and therefore compromised the inference of causation."<sup>22</sup>

The Board then reviewed the ALJ's decision as it related to the circumstantial evidence linking the protected activity and the adverse action. It began with the issue of animus and found substantial evidence supported the findings that Childers was irritated and impatient with the constant complaints about the certification issue, rather than hostile toward the protected activity, and that Gero's description of the painters as arrogant did not demonstrate hostility toward Complainant. Thus, the Board did not disturb the ALJ's assessment of the circumstantial evidence and determination that any hostility toward Complainant was not a function of retaliation for his protected activity.<sup>23</sup>

However, the Board then turned to Complainant's argument that Respondent's "concoction" of shifting and false reasons for terminating him was circumstantial evidence that the reason given for the termination was pretextual and that his protected activity was a contributing factor to the adverse action. It found "... substantial evidence in the record as a whole demonstrates that [Respondent] did indeed invent different reasons for terminating [Complainant]...."<sup>24</sup> The Board assessed the evidence differently than the ALJ. It found that the initial explanation of insubordination and foul language changed to a concern that Complainant would refuse to follow the G-55. The Board then observed that "at the 22 May meeting [Complainant] never said anything about not following or obeying procedures"<sup>25</sup> and found it significant that none of Respondent's managers confronted the Complainant to ask what he meant when he told them to shove the plan. Citing with favor Complainant's testimony that he never intended to not follow the procedures and the absence of any disobedience in his work history, the Board found that Respondent had given shifting and false reasons for the adverse action, and that the insubordination was a pretext.<sup>26</sup>

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<sup>22</sup> *ARB I* at 10.

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

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

<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* at 12-13.

The Board then reevaluated the question of whether there was disparate treatment that would provide circumstantial evidence that Complainant's protected activity contributed to the adverse action. The Board restated the legal test, but did not find that the ALJ committed legal error. Instead, the Board reassessed the evidence and determined that the record did not support his findings that the offered comparator employees were not similarly situated. The Board cited its earlier determination that Respondent could not have been concerned about Complainant disobeying the G-55 in ruling that such a concern could not be a basis for distinguishing between Complainant and other disciplined employees. Finally, the Board ridiculed the ALJ's finding that the Complainant's insubordination could be distinguished from that of two other employees and accused him of trying to reach a specific result.<sup>27</sup>

Having found pretextual justification for the adverse action and disparate treatment, the Board ruled that "this record contains substantial evidence that [Complainant's] protected activity likely played a role in—i.e., contributed to—[Respondent's] decision to suspend and terminate [him]."<sup>28</sup> It then ruled that since "substantial evidence shows that its reason for suspending and terminating [Complainant]—insubordination—was a pretext for unlawful retaliation," 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.

#### *The Circuit Court*

The Circuit found that the Board should have reviewed the ALJ's factual findings for substantial evidence, but instead showed little deference to the ALJ's findings with which it disagreed, and disregarded ALJ conclusions that were supported by substantial evidence in the record.<sup>29</sup> As to the issue of shifting and pretextual explanations, the Circuit noted that the ALJ's findings were supported by substantial evidence and in disagreeing with those findings and instead substituting its own interpretation of the evidence (even if supported by substantial evidence) the Board's decision was not in accordance with law.<sup>30</sup> The Circuit reached essentially the same conclusion as to the disparate treatment issue, although it also noted that even if the Board had found an insufficiency of substantial evidence to support the ALJ decision, it also applied the wrong legal standard.<sup>31</sup>

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<sup>27</sup>"The ALJ reasoned that since subordinates heard [Complainant's] comment, his insubordination was therefore 'considerably more serious' than Jones and Chiodo's. 'Considerably' more serious? Here we think perhaps the ALJ parses the record to find evidence that [Complainant] was not similarly situated to Jones and Chiodo." *Id.* at 15.

<sup>28</sup> *Id.* at 16. The Board also recognized Complainant's other proffered evidence: (1) That Childers admitted Complainant's history of making complaints "influenced" him to recommend termination; (2) That after the whistleblower complaint was filed, Childers attempted to intimidate painters who supported Complainant; and (3) TVA and the Nuclear Regulatory Commission eventually validated his safety concerns. However, since it had already found retaliatory motive, it declined to review those theories.

<sup>29</sup> *Stone & Webster Constr. Co.*, 684 F.3d at 1132-34.

<sup>30</sup> *Id.* at 1135.

<sup>31</sup> The Circuit also addressed the Board's focus on whether or not Complainant subjectively held or intended to communicate an intent to deviate from the G-55, noting that the relevant inquiry is whether Respondent subjectively believed he did. *Id.* at 1133-34.

Having vacated the Board's decision and reinstated the ALJ's findings as to shifting explanations and disparate treatment, the Circuit declined to reinstate the original dismissal. It instead remanded the case to the Board to consider Complainant's other arguments of circumstantial evidence of pretext.<sup>32</sup>

### *The Second ARB Decision*

On remand from the Circuit, the Board looked only at the first specified issue, ruling that the ALJ's initial findings were based on legal error and not supported by substantial evidence. It found legal error in the ALJ's ruling that because Childers is not disallowed from considering the complaints in discerning the context of the insubordinate act, his admission that Complainant's history of complaints influenced his interpretation of the safety meeting outburst does not implicate a causal relationship between his protected activities and termination.

The Board observed that there was no evidence of unprofessional conduct or insubordinate conduct that was not related to the protected activity, that Complainant was well regarded as an employee, and that the adverse action in the case was the first serious discipline he had ever received. The Board then noted that the ALJ nonetheless determined the reason for the adverse action was the profane statement at the safety meeting. Conceding that the profanity may have been a predominant factor in his suspension and termination, the Board found the facts established that the protected activity contributed to the termination since the profanity was used in the context of complaining about the use of apprentice painters in the G-55. The Board went on to say that any insubordinate acts were "inextricably intertwined" with protected activity, that although the termination was for insubordination, the insubordination was directly tied to complaints about the G-55, and that the ALJ had found the remarks protected activity.

The Board once again relied on Complainant's testimony that he never intended to disobey procedures and never said he was going to, discounting Gero's testimony that he thought Complainant would not comply with the G-55. Noting also that Gero relied on Childers' recommendation, the Board found meritless any argument that Childers was not responsible for the adverse action. The Board concluded that since "Gero admitted that [Complainant's] termination was based on his insubordination (and not profanity), and the insubordination was directly tied to his complaints about the G-55, [Complainant's] protected activity contributed to Gero's termination decision since Gero was well aware of [Complainant's] activity (and Childers' characterization of that activity as insubordination) prior to firing him."<sup>33</sup>

The Board then remanded the case for the sole purpose of determining whether Respondent can show by clear and convincing evidence that it would have taken the same action against Complainant absent the protected activity.

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<sup>32</sup> See n. 28.

<sup>33</sup> *ARB II* at 13-14.

## Discussion

### *Evidentiary Approach on Remand*

My consideration of the case is limited to the parameters of the remand order. Because of the nature of the legal standard that the Board has established for dual motive cases,<sup>34</sup> my task is not to find whether something was more likely than not to have happened as a historical matter of fact, but rather determine if the record shows by clear and convincing evidence what someone would have done, given a hypothetical premise. In other words, my mandate is 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.

There are two categories of evidence which are relevant to a determination of what someone would have done given a hypothetical situation. The first is direct evidence through their testimony. However, that requires that the hypothetical premise was specifically made part of the questioning.<sup>35</sup> Moreover, in testifying about what they would have done in different circumstances, even the most honest witness is subject to subconscious bias and can only give his or her best subjective guess. Consequently, the finder of hypothetical facts must also rely on circumstantial evidence and consider what a party did in similar circumstances to predict the likelihood of what it would have done in the hypothetical.

Because this case is on remand, there are limits to my consideration of the record. I can independently assess the credibility of the testimony and other evidence in weighing any direct evidence and in finding facts as circumstantial evidence. However, I must also accept the factual findings of the first ALJ's findings that survived appeal, along with the facts found by the Board to be true as a matter of law.

Given that the case is on remand after a lengthy evidentiary hearing and what the Circuit described as a "thorough" recommended decision and order,<sup>36</sup> my fact-finding authority is limited to those facts necessary to issue a finding that complies with the order of remand and not already established as the law of the case.<sup>37</sup> There are two specific issues that have been at least indirectly raised by the parties in that regard. The first is whether the safety meeting remarks were protected activity. The second is whether Respondent's managers believed, based on those remarks, that Complainant would refuse or was threatening to refuse to comply with the new procedures.

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<sup>34</sup> See, e.g., *Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36 (ALJ May 23, 1994).

<sup>35</sup> Or there is an inference from testimony that the hypothetically removed factor played no role in the act in the first instance.

<sup>36</sup> 684 F.3d at 1131.

<sup>37</sup> See, e.g., *Friedman v. Market St. Mortg. Corp.*, 520 F.3d 1289, 1294 (11th Cir. 2008).

### *Scope of Protected Activity*

The Board directed me to determine what would have happened in the absence of the protected activity. The original ALJ found Complainant engaged in protected activity and the Board affirmed that finding. However, because of the facts of the case and the nature of the conduct that Respondent cites as the non-retaliatory basis for the adverse action, it is critical to identify the specific limits of Complainant's protected activity.

In his decision, the original ALJ found Complainant engaged in protected activity when he made internal and informal complaints regarding the certification of apprentices to Childers and Gero. However, he also found that on 22 May 04, during a safety meeting in a room full of subordinates, Complainant "rose from his chair, walked to his locker, turned to face Childers and said in a loud voice, 'You and management can take that G-55 and you can shove it up your ass.'"<sup>38</sup> Applying the law relating to the making of safety complaints in an insubordinate manner, the ALJ found that Complainant's comment at the safety meeting was not protected activity.

On initial review, the Board simply stated that the record clearly supported the ALJ's finding that the complaints to Gero and Childers were protected activity. It did not discuss or vacate his findings that the safety meeting comments were not protected activity as unsupported by substantial evidence or the result of legal error. Consequently, the Circuit had no reason to address that finding and it should be the law of the case.

However, upon remand from the Circuit, the Board indirectly discussed the question of the safety meeting remarks as protected activity. It observed that the motivation behind Complainant's profanity was his disagreement with the G-55, noted that it occurred in the context of complaining about the G-55, and described it as inextricably intertwined with the protected activity. But once again, it did not rule that the ALJ had applied the wrong legal standard in finding Complainant's safety meeting remarks were beyond the protection of the Act, or that the finding was unsupported by substantial evidence.

Complainant cited the Board's language in arguing that his profanity and confrontational remarks at the safety meeting could not be distinguished or separated from his protected activity, and therefore must be considered part of it. On the other hand, Respondent spent a portion of its brief reviewing the law and arguing that the profane and insubordinate remarks are not protected activity.

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<sup>38</sup> *Id.* at 35.

The Board's opinion on remand from the Circuit includes language that could be interpreted to mean that it found as a matter of law that the safety meeting remarks were protected activity:

... any insubordinate acts that [Complainant] may have even committed that day were 'inextricably intertwined' with protected activity.<sup>39</sup>

...  
Thus the ALJ's finding that [Complainant's] protected complaints about the G-55 (which the ALJ found to be protected under the Act) as some form of insubordination and a basis for recommending his suspension and termination, establish that the protected activity that [Complainant] engaged in contributed to the company's decision to fire him.<sup>40</sup>

Nonetheless, there are three reasons that I find the original ALJ's specific factual finding remains binding. First, neither the Board nor the Circuit addressed it in the first iteration of appeal. Second, even if the Board, on remand from the Circuit, decided to vacate that finding and replace it with its own, it never actually said it was doing so. Third and most compelling is the fact that if the profane remarks at the safety meeting were protected acts, there would have been no reason for the Board to remand the case. Respondent specifically cites those remarks as the only reason for the adverse action. If they are determined to be protected activity, it would be impossible for Respondent to prove by any standard that it would have fired him in the absence of protected activity. Consequently, for the purposes of my analysis, the safety meeting remarks were not protected activity.<sup>41</sup>

#### *Safety Meeting Remarks and Noncompliance*

The other significant issue relates to what Respondent thought Complainant meant when he made his profane remarks. The ALJ addressed this matter in the context of his consideration of disparate treatment as circumstantial evidence of retaliation. He cited Gero's testimony that he immediately terminated Complainant because Complainant stated an intent to disobey the rules and noted that the evidence did not show an intent to disobey procedures by the alleged comparator employees. Although the Board vacated that finding, the Circuit reinstated it, ruling that the ALJ was entitled to give weight to Gero's testimony that Complainant's safety meeting remarks showed his intent to disobey procedures.

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<sup>39</sup> No. 11-029-A at 12.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> I also considered the possibility that the Board was not vacating the ALJ's finding and substituting its determination that the safety meeting remarks were themselves protected communications, but rather concluding that they were so connected with the previous protected communications that anyone considering the unprotected safety remarks would by definition also have to be considering the earlier protected complaints. While that contortion of logic might give Complainant's insubordinate profanity *de jure* protected status without having to actually vacate the ALJ's finding, it still would not explain the remand. I did not consider Respondent's argument that, insubordination and profanity aside, the safety meeting remarks would still not have qualified as protected communications because Respondent had heard those complaints from him and others, considered and investigated them, reached a contrary conclusion, and communicated that conclusion to him. However, the fact that he had expressed his concerns on multiple previous occasions would certainly be a factor in considering whether his safety meeting outburst was entitled to protected status. In any event, the previous ALJ found it was not.

Both Complainant and the Board (on initial consideration and on Remand from the Circuit) placed great emphasis on his testimony that he had no history of disobedience and meant nothing of the sort in his outburst. However, as the Circuit pointed out, the relevant issue is not what Complainant meant but what Respondent thought he meant. The Circuit then again noted that the ALJ had found credible Gero's testimony that Complainant meant he would not comply with the policy.

As a result, the previous factual determination that Complainant's remarks were interpreted by Gero as manifesting an intent to depart from approved procedures remains part of the binding record.<sup>42</sup>

### *Facts on Remand*

Thus, the previous ALJ's findings (with the exception of his determination that Complainant's previous communications to Gero and Childers did not contribute to the decision to terminate) remain in place. As a result, the facts of record are relatively straightforward in terms of what actually happened.

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.<sup>43</sup> 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.

### **ANALYSIS**

It is with that factual background that the Board has ordered me 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. The primary challenge in the case is the hypothetical circumstance that must be taken as a predicate: that there was no protected activity, only the conduct that Respondent cites as grounds for the adverse activity. Specifically in this case, I must assume that Complainant never mentioned any concerns about the G-55 program to Respondent before his safety meeting outburst. Instead, I

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<sup>42</sup> 2005-ERA-6 at 37 (*ALJ I*).

<sup>43</sup> The initial ALJ found that Complainant's prevalent concern was related to union and hiring issues and considered that fact in weighing whether the emotional outburst should be given more leeway as a further impulsive expression of his safety concerns. A primary concern about protecting jobs would also seem to make the remarks less "inextricably intertwined" with the previous safety complaints. However, for my purposes, whether his fundamental motive was an altruistic concern for public safety, anger over a threat to his and his coworkers' financial interests, or some combination of the two is not particularly relevant. His initial complaints remain protected activity and Respondent does not appear to be suggesting that it considered the insubordination more egregious and worthy of discharge because Complainant was really just worried about jobs rather than safety.

must assume that never having raised the subject directly or indirectly to Childers or Gero, Complainant suddenly loudly announced to Childers in front of a group of employees that Respondent could shove the program up its ass.

The hypothetical test for dual motive cases may work well where the Respondent cites as the reason for the adverse action conduct which is unrelated to the protected activity, for instance, where a whistleblower has a history of chronic absenteeism, or an assault on a coworker. It does not work particularly well here, where, as Complainant notes, the cited non-protected misconduct has a strong nexus to the protected activity. Nonetheless, I am bound to apply it.

It seems unlikely that an employee with a good work record and no significant history of disciplinary problems would feel so strongly about a festering dispute issue over a work change that he would tell his boss the company can shove the proposal without having ever previously mentioned his concerns. Nonetheless, it is a fiction required by the binding interpretation of the law and Respondent has no burden to show that hypothetical is a likely one. It does have the burden to show by clear and convincing evidence that, however unlikely that circumstance, Respondent would have reacted to it by firing Complainant.

That inquiry starts with the identification of who was actually responsible for making the decision to fire Complainant. Although the original ALJ found that Gero alone made the decision, the Board subsequently pointed out that any retaliatory intent by Childers' would be relevant to the extent it impacted any communications from Childers to Gero and to the extent Gero relied on the communication in making the termination decision. However, that ruling does not by implication vacate the ALJ's ruling that Gero was the sole decision maker in Complainant's termination.

It does, however, add a second layer of hypothesis, since it presents the question of whether Childers would have made the same recommendation if the safety outburst would have been the first and only time Complainant had spoken out. Even the answer to that question is not necessarily dispositive, since Respondent would still have the opportunity to prove by clear and convincing evidence that Gero would have still fired Complainant even in the absence of any previous complaints by Complainant or a recommendation from Childers to fire him. However, It is difficult to imagine how Gero would have come to fire Complainant without some sort of report or recommendation from Childers, much less determine that it was very likely that he would have done so.

Consequently, the ultimate question is whether there is clear and convincing evidence that, had Complainant's only complaint to Respondent about the G-55 issue been his profane outburst, Childers would nonetheless still have recommended termination and Gero still would have acted on the recommendation and fired Complainant.

In its brief on remand, Respondent cited a number of things it believed provided clear and convincing evidence that it would have terminated Complainant based on the safety meeting outburst alone. It 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 the adverse action against Complainant came only (and immediately) after his profane and public challenge, which he never retracted, apologized for, or attempted to qualify in his subsequent meetings with Respondent, leaving it to believe his language meant he would refuse to comply with the G-55. Respondent pointed out that its disciplinary policies provided for termination in cases of insubordination and that Complainant anticipated being fired for his action. Finally, Respondent offered the testimony of both Childress and Gero, who testified that the previous protected communications played no role in their decisions.

In response, Complainant discussed the clear and convincing standard Respondent must meet and emphasized how difficult it is to satisfy. He then returned to his argument that because of the nature of the case, it is impossible to distill what he did at the safety meeting from his earlier protected communications, because they were all about the same thing, his concern that the G-55 would create a significant risk. He next argued that Respondent's use of its reaction to other complaining painters as circumstantial evidence of what it would have done to him is misplaced because the other painters were not similarly situated. In that regard, he noted his excellent work record and suggested he was the most vocal of the complaining painters. Moreover, he suggested that even if they were alike for those purposes, Respondent may well have simply picked him out to use as an example. Finally, Complainant offered a new argument: that even if he did intend to communicate his intent to refuse to comply with the G-55, because of the substantive correctness of his position, that communication would be protected.<sup>44</sup>

There is no direct evidence of what Respondent would have done about Complainant's safety outburst in the absence of any prior protected communications. What it did with other employees is circumstantial evidence of some relevance, but the best comparable employee would have been someone who fit the hypothetical parameters, i.e., one who never said a word about the G-55 to his bosses, but then told them to shove it at a safety meeting. Naturally, no such comparator employee exists and instead the record contains only evidence that Respondent did not take action against other painters who voiced complaints, but did not profanely confront a supervisor in a safety meeting.

Complainant argues that he was the most vocal of the painters and that rather than his outburst was the reason for his termination. I do not find that the evidence supports his suggestion that he was significantly more vocal than a number of the other painters. Childers testified that a number of painters were unhappy and complaining. Barbara Smith testified that Complainant was no more vocal than the other painters. The evidence shows that he was one of a group of painters who were upset about the G-55 and repeatedly told their bosses about it. Nothing happened to any of them. It was only after he went on to make a profane and insubordinate statement in front of a safety meeting that he immediately was fired.

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<sup>44</sup> I did not consider this final argument, as the ALJ's initial finding that the safety meeting outburst was not protected activity was not vacated and is the law of the case.

Thus, 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. That is circumstantial evidence weighing in Respondent's favor, but is certainly not dispositive, since the question the Board specified is whether the unprotected profane outburst alone would have resulted in termination. The most probative evidence on that question is what the previous ALJ found to be the credible testimony of the two central witnesses involved in the decision to terminate Complainant.

Childers testified that he told the journeymen about the proposal in early May 2004. He said there was above-normal anger amongst the painters and several of them made vicious remarks against him, turning the issue into a nightmare. Eventually, he tried to tell them the debate was over at their level and they should pursue higher avenues of complaint. Childers recalled that nothing like that had ever happened in his experience at Browns Ferry and he had to stop the safety meeting to diffuse the situation. He described it as overwhelming and shocking. After the Saturday morning meeting, he called Gero at home and told Gero what had happened. Childers testified that Gero specifically asked about the use of the word "ass," and said he wanted to make sure the statement had not been blown out of proportion. Childers told Gero that he thought the comment was one of insubordination and Albarado voiced his opinion that the statement was one of total disrespect and that Complainant should be terminated.

Childers testified that the outburst at the meeting was the sole basis for the termination, since he took Complainant to mean that he intended not to follow procedures. He also said that the protected activity (repetitively raising the issue) was not part of what made the conduct at the safety meeting insubordinate and had nothing to do with his termination. Childers did say at his deposition that that Complainant's previous G-55 complaints were part of the information on which he based his interpretation of Complainant's outburst.

The record shows that Childers finally had enough of dealing with complaints from the painters. He tried to have a brief final discussion and explain that the issue was closed at his level and any complaints would have to be made further up the chain. When Complainant profanely and loudly made his remark in the presence of other employees, Childers was shocked. Obviously, Childers was aware of the complaints in general and specifically aware that Complainant had made some of those complaints. Moreover, the original ALJ found that those previous complaints were a part of the background information which led to Childers' conclusion that Complainant's remarks indicated his intent to not follow the G-55.

That does not answer directly the ultimate question of whether Childers would have reached the same conclusion and recommended termination had Complainant been silent amid his coworkers' complaints to Respondent and made the profane statement his first complaint on the issue. However, I find that the clear and convincing evidence of record shows it is highly probable he would have. Implicit in Childers' testimony that the protected activity was not part of what made the conduct at the safety meeting insubordinate is that he would have recommended termination even in the absence of the protected activity. Moreover, even in the requisite hypothetical, where Complainant never says a word prior to the safety meeting, the issue remains one of great contention and a nightmare for Childers, who had heard the complaints, passed them along, gotten an answer, and now just wanted to move on. He

essentially testified that he still would have recommended termination. The previous ALJ found him to be a credible witness and to the extent it is necessary for me to arrive at an independent judgment in that regard, so do I.

That, in turn, raises the same question as to Gero's decision to fire Complainant. Gero testified that he was aware of Complainant's strong opposition to the use of apprentices, that they had a discussion about it, and that they had agreed to disagree. He also testified that disagreement had nothing to do with his decision to terminate Complainant and he made the decision to terminate for insubordination because Complainant had indicated that he intended not to follow procedures. In fact, Gero admitted that he had the option of demoting Complainant but decided a demotion was inadequate, since Complainant had refused to follow the G-55 and the refusal to enforce the G-55 with his crew was grounds for firing. Gero said that part of what made Complainant's actions so egregious was that the issue had already been addressed by a number of experts, but Complainant was still trying to not follow the rules given to him. Gero said Complainant was still allowed to question the opinion of the experts, but was not allowed to say he was not going to follow their decision.

The question of "fact" then is whether it was highly probable that if Complainant himself had never said a word about the G-55 to Respondent before he told Childers and the other employees around him that the company could shove it up its ass, Gero would have still accepted Childers' recommendation and fired Complainant.

Neither side has cited any testimony where either Childers or Gero were specifically asked what they would have done if Complainant had never said a word about the G-55 to them before his outburst at the safety meeting. That neither side thought to ask that question is not surprising, however, since both of the witnesses said that the prior complaints played no role in their respective decisions related to the termination and the previous ALJ so found.<sup>45</sup> Of course, that finding was vacated and reversed by the Board, at least in part because of the role the prior complaints had in Childers' and Gero's interpretation of what Complainant meant by his outburst, their determination that he was evincing his intent to not comply, and the decision to fire him. Nonetheless, as he did with Childers, the previous ALJ found Gero to be a credible witness and to the extent it is necessary for me to arrive at an independent judgment in that regard, so do I.

Thus, I find that the clear and convincing weight of the evidence shows that as both Childers and Gero indicated, Complainant's prior complaints did not play a major role in the decision to fire him. In the unlikely hypothetical that is mandated for application in this case, I must assume that in the midst of the *cause celebre* of the G-55, Complainant said nothing to Respondent, remaining silent (at least as far as Respondent was concerned) until the safety meeting, when he broke his silence with an obscene and public statement. Had that happened, I find the clear and convincing evidence shows that the fact Complainant had not personally been previously involved in the complaints and resistance to the plan would not have changed Respondent's response. 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

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<sup>45</sup> Saying protected activity was not a contributing factor in a decision to take adverse action clearly implies that the adverse action still would have been taken even in the absence of the protected activity.

“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.<sup>46</sup>

Consequently, given the narrow nature of the remand, I find only that the evidentiary record shows by clear and convincing evidence that Respondent would have taken the same action against Complainant absent the protected activity.

Given that finding, the complaint is dismissed.

**So ORDERED** this 13<sup>th</sup> day of June, 2013, 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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<sup>46</sup> 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.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.