

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



In the Matter of:

JAMES SPEEGLE,

ARB CASE NO. 06-041

COMPLAINANT,

ALJ CASE NO. 2005-ERA-006

v.

DATE: SEP 24 2009

**STONE & WEBSTER
CONSTRUCTION, INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David J. Marshall, Esq., Debra S. Katz, Esq., and Daniel B. Edelman, Esq., Katz, Marshall & Banks, LLP, Washington, D.C., and Frank B. Potts, Potts & Young Attorneys, LLP, Florence, Alabama

For the Respondent:

Eugene Scalla, Esq., Jason C. Schwartz, Esq., Tanya Axenson Macallair, Esq., and Nicholas J. Bronni, Esq., Gibson, Dunn & Crutcher LLP, Washington, District of Columbia

For the Assistant Secretary of Labor of the Occupational Safety and Health Administration:

Steven J. Mandel, Esq., Ellen R. Edmond, Esq., and Joanna Hull, Esq., United States Department of Labor, Washington, District of Columbia

FINAL DECISION AND ORDER OF REMAND

James Speegle filed a whistleblower complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Stone & Webster Construction, Incorporated violated the Energy Reorganization Act (ERA)¹

¹ 42 U.S.C.A. § 5851(a)(1) (West 2007). Regulations that implement the ERA are found at 29 C.F.R. Part 24 (2007). Congress has amended the ERA since Speegle filed this

when it suspended and then terminated his employment for making nuclear safety complaints. After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that Stone & Webster did not violate the ERA. Because we find that substantial evidence establishes that Speegle's nuclear safety complaints contributed to Stone & Webster's decision to suspend and terminate him, we reverse and remand.

BACKGROUND

Stone & Webster is a construction contractor. Under a contract with the Tennessee Valley Authority (TVA), Stone & Webster provided paint coatings repair work at TVA's Browns Ferry Nuclear Plant in Alabama.² Speegle, a journeyman painter, worked for Stone & Webster.³ In January 2004, Speegle was the foreman of a crew of painters whose task was to remove old protective paint coatings and then prepare the surfaces for new paint coatings in the Unit 1 "Torus" area of the plant.⁴ The Torus is a donut-shaped vessel that surrounds the reactor core.⁵ The function of the Torus is to enable water to be flushed into the reactor core to cool the core in the event of a nuclear emergency meltdown.⁶

Prior to May 2004, Stone & Webster had used only journeyman painters for the Torus painting project in accordance with the specifications mandated in the G-55, a TVA-issued General Engineering Specification manual.⁷ The G-55 sets forth the requirements for the application of protective paint coatings at TVA nuclear plants.⁸ In May 2004, Stone & Webster's Lead Civil Superintendent, Richard J. Gero, decided that in light of an unexpected increase in the scope of the Torus painting project, Stone & Webster would also certify apprentice painters to work in the Torus.⁹

complaint. Energy Policy Act of 2005, Pub. L. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide whether the amendments would apply because even if they did, they are not at issue in this case and thus would not affect our decision.

² Respondent's Exhibit (RX) 46.

³ Hearing Transcript (HT) at 39-41.

⁴ HT at 47-49.

⁵ HT at 70, 453, 479; Complainant's Exhibits (CX) 10-11.

⁶ *Id.*

⁷ RX 23 at 1; HT at 86, 139, 141, 589.

⁸ RX 23 at 1; HT at 86.

⁹ HT at 587, 590, 678-679.

According to the G-55, a protective paint coating failure, such as paint chips, could adversely affect the cooling of the reactor core in the event of a nuclear accident because the paint chips might clog the water pumps.¹⁰ Appendix A of the G-55 establishes how "journeyman painters" qualify for the job of protective paint coating in areas like the Torus.¹¹ But the main text of the G-55 refers to these workers as "coating applicators."¹² In light of the apparent discrepancy within the G-55 and Gero's decision to also use certified apprentice painters for the work, Gero and Sebourn Childers, Speegle's supervisor, requested that the TVA issue an Engineering Work Request (EWR), which would approve a change of the terminology throughout the G-55 to reflect that a certified "coating applicator" could perform protective paint coating work.¹³

Childers informed Speegle and his crew about the decision to use certified apprentices.¹⁴ Speegle believed that using apprentice painters violated the G-55 and posed a nuclear safety risk because apprentices lacked the experience to safely apply protective paint coating.¹⁵ Speegle told Childers about his concerns at three safety meetings held on consecutive days in May 2004 and on one or two other occasions.¹⁶ In addition, Speegle raised his concerns several times with Gero.¹⁷

At a Saturday, May 22, 2004 safety meeting, Childers asked one of the journeyman painters to read the EWR that would approve the change of the terminology in the G-55. Speegle and his crew were at this meeting. After the reading, according to Childers and Hilary Joseph Albarado, a civil supervisor with Stone & Webster, who was also at the meeting, Speegle told Childers in a "loud voice" that "management can take that G-55" and "shove it up their ass."¹⁸ In a written statement about this incident that Speegle prepared two days later, he wrote that he stated at the meeting that "[they] should stick the G-55 up [their] ass."¹⁹ At the hearing, Speegle testified that he "may" also have told Childers, "Thank you. You just gave all these people's jobs away."²⁰

¹⁰ RX 23 at 10; HT at 50, 54, 981-982.

¹¹ RX 23 at 35-36.

¹² RX 23 at 10.

¹³ RX 13; HT at 321, 590-591, 594, 1035.

¹⁴ HT at 96-97; 667-668.

¹⁵ HT at 97, 102-103.

¹⁶ HT at 126, 139, 604, 661-662.

¹⁷ HT at 1029-1030, 1059, 1082-1083.

¹⁸ HT at 712, 945-946.

¹⁹ RX 1; *see also* HT at 304.

After the meeting, Childers and Albarado discussed what Speegle had said, and they both called Gero.²¹ Childers told Gero that he thought the remark was insubordination, and both Childers and Albarado recommended that Speegle be terminated.²² Gero instructed them to suspend Speegle until Monday May 24, when he could further investigate the matter.²³ On May 24, after obtaining written statements from Childers, Albarado, and Speegle, Gero decided to terminate Speegle.²⁴ Fran Trest, a Stone & Webster human resources manager, approved that decision, informed Speegle of his termination on May 24, and Speegle was formally terminated from the payroll as of June 1, 2004.²⁵ Trest testified that Speegle was terminated for insubordination and foul language.²⁶

On June 29, 2004, Speegle filed his ERA whistleblower complaint with OSHA.²⁷ He alleged that Stone & Webster terminated him because he had engaged in ERA-protected activity. OSHA conducted an investigation and, on November 29, 2004, dismissed the complaint. Speegle requested a hearing before an ALJ. In a January 9, 2006 Recommended Decision and Order (R. D. & O.), the ALJ found that Speegle had engaged in ERA-protected activity when he made internal and informal nuclear safety complaints to Childers and Gero regarding the certification of apprentices to perform the protective paint coating work. He found that Stone & Webster thus knew about this activity and took adverse action against Speegle when it suspended and then terminated him. But the ALJ found that Speegle did not prove that the suspension and termination were related to his protected activity. He therefore recommended that Speegle's complaint be dismissed.²⁸

²⁰ HT at 319.

²¹ RX 3-4; HT at 607.

²² RX 4; HT at 726-728, 950, 974.

²³ HT at 606-608.

²⁴ HT at 1026-1027, 1037; RX 1, 3-4.

²⁵ RX 2; CX 48 – Exhibit C. When Trest terminated Speegle's employment, he was formally on the payroll of Shook & Fletcher, a sub-contractor of Stone & Webster, but Stone & Webster officials made the determination to terminate Speegle. HT at 888; CX 48 – Exhibit C.

²⁶ HT at 179, 827; *see also* CX 25; RX 12.

²⁷ *See* RX 18 (Nov. 29, 2004 OSHA Determination).

²⁸ *Speegle v. Stone & Webster Const., Inc.*, 2005-ERA-006 (ALJ Jan. 9, 2006).

Order to Show Cause

Speegle filed a petition for review of the R. D. & O. with the Administrative Review Board on January 17, 2006.²⁹ But on August 22, 2007, Speegle filed a Notice of Intent to File Lawsuit in Federal Court, which notified the Board of his intent to file a complaint regarding this matter in federal district court pursuant to 42 U.S.C.A. § 5851(b)(4). The relevant portion of that statute, amended effective August 8, 2005, provides:

If the Secretary has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

After filing this notice with the Board, Speegle filed suit in the United States District Court for the Northern District of Alabama on September 7, 2007.³⁰

On September 24, 2007, we ordered Speegle to show cause why the Board should not proceed to consider this case and issue the final agency decision. We noted that Speegle had not cited authority to support his assumption that the amended portion of the statute applied retroactively, and that, accordingly, the Board no longer had jurisdiction to decide the case. Speegle responded, contending that the Board no longer has jurisdiction pursuant to section 5851(b)(4). Stone & Webster replied, arguing that the amendment cannot apply to pending cases and, in any event, not to cases that have been already tried on the merits.³¹ Stone & Webster later argued that the recent case of *Elbert v. True Value Co.* should apply. There, the United States Court of Appeals for the Eighth Circuit held that a nearly identical amendment to the Surface Transportation Assistance Act's (STAA) whistleblower protection provisions, signed on August 3, 2007, and permitting de novo review in the district court, may not be retroactively applied to complaints filed prior to the amendment's effective date.³² Accordingly, as the Eighth

²⁹ See 29 C.F.R. § 24.8.

³⁰ *Speegle v. Stone & Webster Constr., Inc.*, CV 07-B-1626-NE (N.D. Ala.).

³¹ By order dated November 17, 2007, the district court granted Stone & Webster's Consent Motion for a Stay and ordered that Speegle's case before the district court be stayed until twenty days after we decided whether Speegle had shown cause why we should not proceed. *Speegle v. Stone & Webster Constr., Inc.*, CV 07-B-1626-NE (N.D. Ala.)(Order Nov. 13, 2007).

³² 550 F.3d 690 (8th Cir. 2008). The STAA amendment, which closely parallels the amendment to the ERA at 42 U.S.C.A. § 5851(b)(4), provides:

Circuit Court's reasoning is equally applicable regarding the effective date of the analogous ERA amendment at section 5851(b)(4), we shall proceed to decide this case.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the ALJ's recommended decision.³³ Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes.³⁴ When the parties appealed and filed their briefs with the Board, we reviewed questions of fact under the ERA *de novo*.³⁵ A new regulation calls for substantial evidence review.³⁶ Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁷ But the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight."³⁸ We are not barred from setting

With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for *de novo* review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

49 U.S.C.A. § 31105(c) (West 2007).

³³ See 29 C.F.R. § 24.8 (2007) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review ALJ recommended decisions under the statutes set forth at 29 C.F.R. §§ 24.1(a), 24.100, 24.110 (2007), among which is the ERA).

³⁴ See 5 U.S.C.A. § 557(b) (West 2007); 29 C.F.R. § 24.1(a).

³⁵ *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 4 (ARB Sept. 30, 2003).

³⁶ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b)(2007).

³⁷ *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

³⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. at 474, 477-487 (1951); see also *Dalton v. U.S. Dep't of Labor*, 58 Fed. App. 442, 445; 2003 WL 356780 (10th Cir. 2003) citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989) (noting that whether substantial evidence supports an ALJ's decision "is not simply a quantitative exercise, for evidence is not

aside a decision when we "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes."³⁹

Neither party has requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in the standard of review material to this case.⁴⁰ In any event, applying either standard of review, we conclude that Stone & Webster violated the ERA.

DISCUSSION

The Legal Standard

The ERA provides that an employer may not "discharge" or "otherwise discriminate" against an employee "with respect to his compensation, terms, conditions or privileges of employment" because the employee has engaged in certain protected activities.⁴¹ Protected activity under the ERA includes making an informal complaint about nuclear safety hazards to a supervisor, but such complaints must relate to nuclear safety "definitively and specifically."⁴² The complainant need not prove an actual violation of a nuclear safety law or regulation. A reasonable belief of a violation is enough.⁴³

To prevail on his ERA whistleblower complaint, Speegle must prove by a preponderance of the evidence that he was an employee who engaged in protected activity under the ERA, that Stone & Webster knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse

substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.").

³⁹ *Universal Camera Corp.*, 340 U.S. at 477-478.

⁴⁰ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after its brief has been filed).

⁴¹ 42 U.S.C.A. § 5851(a).

⁴² *Devine v. Blue Star Enters., Inc.*, ARB No. 04-109, ALJ No. 2004-ERA-010, slip op. at 6 (ARB Aug. 31, 2006), citing *Kester*, slip op. at 7-9.

⁴³ See, e.g., *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 10-11, 27-28 (ARB July 14, 2000) and cases cited therein.

action.⁴⁴ Even if Speegle proves a violation, Stone & Webster may avoid liability if it proves by clear and convincing evidence that it would have suspended and terminated Speegle in the absence of his protected activity.⁴⁵

Protected Activity, Knowledge, and Adverse Action

The ALJ found that Speegle engaged in protected activity, known to Stone & Webster, when he made his internal and informal complaints to Childers and Gero about the certification of apprentices to perform protective paint coating work in the Torus.⁴⁶ The G-55, the ALJ noted, specified that "journeyman" painters were to apply the "safety-related" protective paint coatings in the Torus and that a coating failure could cause paint chips to clog the water pumps, preventing the cooling of the reactor core in the event of a nuclear accident.⁴⁷ Thus, the ALJ determined that Speegle's complaints indicated his reasonable belief that certifying apprentices for such work violated the nuclear safety-related requirements contained in the G-55 and constituted notice to Stone & Webster of a potential nuclear safety violation.⁴⁸

To constitute protected activity under the ERA, an employee's complaint must implicate nuclear safety "definitively and specifically."⁴⁹ Gero and Childers admitted that Speegle expressed his concern to them that apprentices were not capable of safely performing the protective paint coating work in the Torus and that certifying apprentices for such work would violate the G-55 nuclear safety-related requirements.⁵⁰ Moreover, Gero admitted that Speegle's concern was related to nuclear safety, and Childers testified that Speegle's concern was reasonable.⁵¹ Thus, the record clearly supports the ALJ's findings that Speegle's complaints to Childers and Gero implicated nuclear safety and therefore constituted protected activity under the ERA and that Stone & Webster knew about Speegle's complaints.

⁴⁴ 42 U.S.C.A. § 5851(b)(3)(C); *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-001, slip op. at 11 (ARB Aug. 29, 2008); *Kester*, slip op. at 5-8.

⁴⁵ See 42 U.S.C.A. § 5851(b)(3)(D).

⁴⁶ R. D. & O. at 32-33, 35.

⁴⁷ R. D. & O. at 32-33; see RX 23 at 10, 35-36.

⁴⁸ R. D. & O. at 32-33; see HT at 136-138; RX 23 at 10, 35-36.

⁴⁹ *Devine*, slip op. at 6, citing *Kester*, slip op. at 7-9.

⁵⁰ HT at 661-662 (Childers), 1028-1029 (Gero).

⁵¹ HT at 662 (Childers), 1028-1029 (Gero).

The ALJ also found that Stone & Webster took adverse employment action against Speegle when it initially suspended him on May 22, 2004, after his comment at that day's safety meeting, and then terminated him on May 24, 2004.⁵² Suspending and terminating Speegle certainly constitutes adverse action.

Causation

Speegle must prove by a preponderance of the evidence that that his protected activity was a contributing factor in the adverse action.⁵³ Speegle can succeed either directly or indirectly. Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.⁵⁴ If Speegle does not produce direct evidence, he may instead satisfy his burden of proof indirectly, or inferentially, with circumstantial evidence. That is, he may prove by a preponderance of the evidence that the reason Stone & Webster offered for terminating him—insubordination—is not the true reason for the suspension and termination, but instead is a pretext for its real reason—his protected complaints to Gero and Childers about the apprentices being allowed to work in the Torus.⁵⁵ If Speegle proves pretext, we may infer that his protected activity contributed to the termination, though we are not compelled to do so.⁵⁶

The ALJ found that Speegle did not prove by a preponderance of the evidence that his protected complaints to Childers and Gero contributed to the suspension and termination. He found that Speegle did not present direct evidence that either Childers or Gero retaliated against him for his protected activity. Nor did he accept Speegle's argument that Childers's and Gero's hostility toward him constituted circumstantial evidence of retaliation for protected activity. For instance, though Childers may have cut Speegle off when Speegle was questioning the apprentice certification at the May 20 safety meeting, and may have later told Speegle to "keep his big fat mouth shut" about that issue, the ALJ found that this behavior signified only Childers's irritability and impatience with Speegle's constant complaints about the certification issue, not hostility because of protected activity. Likewise, the ALJ found that even if, as Speegle contended, Gero described the painters as being "arrogant," this did not demonstrate

⁵² R. D. & O. at 35.

⁵³ 42 U.S.C.A. § 5851(b)(3)(C); *Pierce*, slip op. at 11; *Kester*, slip op. at 5-8.

⁵⁴ *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5 (ARB Jan. 30, 2008); *Coxen v. UPS*, ARB No. 04-093, ALJ No. 2003-STA-013, slip op. at 5 (ARB Feb. 28, 2006).

⁵⁵ See *Sievers*, slip op. 5; *Jenkins v. U.S. E.P.A.*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003).

⁵⁶ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

hostility toward Speegle in particular.⁵⁷ Substantial evidence supports these findings. And though Speegle's protected acts and his suspension and termination occurred closely in time, thus creating an inference of causation, the ALJ correctly held that the May 22 "above it" comment operated as a significant intervening event that could have caused the adverse action and therefore compromised the inference of causation.⁵⁸

Speegle also argued to the ALJ that Stone & Webster "concocted shifting and false reasons" for terminating him, and therefore its reason for the termination is a pretext for unlawful retaliation.⁵⁹ Furthermore, he contended that when Stone & Webster terminated him for insubordination, it treated him more harshly than other employees who had been similarly insubordinate. This fact, Speegle urged, strongly suggested that Stone and Webster terminated his employment because of his protected activity, not insubordination.⁶⁰ But the ALJ found that the record did not support these two arguments.⁶¹ Speegle reiterates these arguments to us.⁶² For the reasons set out below, we find that substantial evidence in the record as a whole demonstrates that Stone & Webster did indeed invent different reasons for terminating Speegle and that the company treated Speegle differently than other similarly insubordinate employees.⁶³

Shifting Explanations

An employer's shifting explanations for taking adverse action may be considered evidence of pretext.⁶⁴ The ALJ found that Stone & Webster's different reasons for

⁵⁷ R. D. & O. at 36-37.

⁵⁸ R. D. & O. at 37-38. See *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No 1997-WPC-001, slip op. at 8 (ARB July 31, 2001).

⁵⁹ Complainant's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law at 17-18, 36-38.

⁶⁰ *Id.* at 13-16, 31-34.

⁶¹ R. D. & O. at 39, 40.

⁶² Complainant's Initial Brief at 17-18, 26-27; 20-21, 29.

⁶³ Speegle also argues that the record contains other circumstantial evidence that his protected complaints contributed to the suspension and termination. He contends that Childers in effect "admitted" that Speegle's history of making nuclear safety complaints "influenced" his decision to recommend termination. Speegle also argues that after he filed his whistleblower complaint, Childers attempted to intimidate painters who supported him. Furthermore, according to Speegle, TVA and the Nuclear Regulatory Commission eventually validated his safety concerns. Complainant's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law at 19-22. But since we find that the record supports Speegle's shifting explanation and disparate treatment arguments, we need not examine these additional arguments.

terminating Speegle were not "incompatible," but the record supports Speegle's argument that the company's very different reasons for why it suspended and terminated him evidence pretext.

Stone & Webster's Payroll Removal Form, which Gero signed and is dated May 24, 2004, indicates that Speegle was terminated, effective June 1, 2004, for "insubordination."⁶⁵ After Speegle filed the instant complaint with OSHA on June 29, 2004, Stone & Webster filed a response with OSHA on July 21, 2004. This response, consistent with the Payroll Removal Form, indicated that the "position of the company" was that "Mr. Speegle was terminated for his insubordinate attitude and foul language he exhibited toward Sebourn Childers [at the May 22, 2004 meeting]."⁶⁶

But when TVA's Office of Inspector General (OIG) investigated the Speegle incident in September and October of 2004, Gero told an investigator that he fired Speegle because he "was not going to follow the changed [G-55] procedures" and that "the word 'ass' had nothing to do with my decision to fire Speegle." Furthermore, Gero told the investigator, "I can't have any employee deliberately disobeying procedures."⁶⁷ On October 14, 2004, Childers told an OIG investigator that Speegle was fired not because he used the word "ass," but rather because "he let me know he was not going to follow procedures, specifically the G-55 procedures that had been changed."⁶⁸ Likewise, Trest told the investigator that Speegle was not fired for using the word "ass," but "for telling management in effect that he 'was not going to work with the new directives under G55 procedures.'"⁶⁹ At the June 2005 hearing before the ALJ, Childers and Gero repeated that Speegle was fired for not following procedures.⁷⁰

⁶⁴ See *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004); *James v. Ketchikan Pulp Co.*, 1994-WPC-004, slip op. at 2 (Sec'y Mar. 15, 1996) (employer's shifting explanations about the reason for taking an adverse action often reveal that the real motive was unlawful retaliation); *Hobby v. Georgia Power Co.*, 1990-ERA-030, slip op. at 9 (Sec'y Aug. 4, 1995) (contradictions in employer's explanation are persuasive evidence of pretext), citing *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995) (the pretextual nature of the employer's termination of an employee's employment is further demonstrated by the employer's shifting explanations for its actions).

⁶⁵ CX 25.

⁶⁶ CX 48-Exhibit A at R 000297.

⁶⁷ CX 42 at 2.

⁶⁸ CX 41 at 2.

⁶⁹ CX 47 at 2.

The record is clear that at the May 22 meeting Speegle never said anything about not following or obeying procedures. Despite how Childers, Gero, and Trest interpreted it, Speegle's vulgar comment does not indicate that he was not going to abide by the new policy. Moreover, Gero, Albarado, and Trest all admitted at the hearing that they never asked Speegle what he meant by his comment.⁷¹ Nor did the Stone & Webster officials adequately explain what "procedures" they believed Speegle would disregard. Was Speegle going to sabotage the Torus painting project? Demonstrate against the apprentices? Exactly what? Furthermore, Speegle testified that his disagreement about the change to the G-55 never made him want to disobey procedures.⁷² And Childers admitted that, before his outburst, Speegle had been a good worker and one of the better foremen, and both he and Gero indicated that they never knew Speegle not to comply with procedures or work rules.⁷³

In short, substantial evidence in this record demonstrates that between the time Stone & Webster terminated Speegle's employment and the hearing before the ALJ, Stone & Webster gave very different reasons for its actions. The ALJ did not adequately examine or explain this inconsistency. Instead, he merely accepted Gero's testimony that Speegle was terminated because he refused to follow the G-55. The ALJ does not explain how, on the one hand, he finds that Speegle's comment indicates that he deliberately planned not to follow some unspecified "procedures," yet, on the other hand, that the outburst was only an impulsive reaction to the G-55 announcement.⁷⁴ Consequently, we find that terminating Speegle for insubordination was a pretext.

Disparate Treatment

Speegle also contends, in effect, that regardless of how Stone & Webster officials interpreted the May 22 "shove it" comment, when the company suspended and terminated him for insubordination based on that vulgar outburst, it treated him differently than it had treated other employees who had been guilty of similar insubordination.⁷⁵ Speegle argues that two other Stone & Webster employees, James

⁷⁰ See HT at 744 (Childers testified Speegle terminated for showing "disregard" for "procedure"); HT at 1026, 1048, 1092, 1098-1099 (Gero testified Speegle terminated because he indicated he would not follow procedure).

⁷¹ HT at 844, 990, 1077.

⁷² HT at 170, 844.

⁷³ HT at 767-769, 1049.

⁷⁴ Compare R. D. & O. at 39 (Speegle comment showed intention not to follow procedures) with R. D. & O. at 35 (Speegle comment was an "impulsive reaction" to the announcement about the change in G-55).

⁷⁵ Complainant's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law at 13-16, 31-34; Complainant's Initial Brief at 20-21, 29.

Jones and Santo Chiodo, exhibited insubordinate conduct that was very similar to his outburst at the May 22 meeting, but they were treated more leniently. Speegle argues that this evidence further supports a finding that the reason Stone & Webster gave for his termination was a pretext.

Where the employer's reason for taking adverse action is that the employee violated a work rule, the employee may prove pretext by showing either that he did not violate the rule or that, if he did, other employees who engaged in similar conduct, but who did not engage in protected activity, were not similarly treated.⁷⁶ A whistleblower who argues disparate treatment must prove by a preponderance of the evidence that similarly situated persons were treated more favorably.⁷⁷ The United States Court of Appeals for the Eleventh Circuit has held that, in the Title VII context, to meet the similarly situated requirement, the plaintiff must establish that he is "similarly situated in all relevant aspects to the non-minority employee," that is to say, "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways."⁷⁸ "The most important factors . . . are the nature of the offenses committed and the nature of the punishments imposed."⁷⁹ The plaintiff need not prove that the conduct was the same or nearly identical, but only that it was similar.⁸⁰ In deciding whistleblower cases that the Secretary of Labor is authorized to adjudicate, the Secretary and this Board often have relied upon cases arising under Title VII of The Civil Rights Act of 1964.⁸¹

⁷⁶ Cf. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1563 (11th Cir. 1987) (under Title VII, 42 U.S.C.A. § 2000e *et seq.*); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 ("Especially relevant" to a showing of pretext "would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired."); *Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (disparate treatment of similarly situated employee of a different race may evidence pretext and support inference of racial discrimination).

⁷⁷ *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-007, slip op. at 21 (ARB Jan. 30, 2004).

⁷⁸ *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). The Court of Appeals for the Eleventh Circuit would review any appeal taken from our final decision and order. See 42 U.S.C.A. § 5851(c)(1).

⁷⁹ *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir. 1998).

⁸⁰ See *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) ("Although susceptible to manipulation, the phrase 'similarly situated' is the correct term of art in employment discrimination law. Moreover, the law does not require that a 'similarly situated' individual be one who has 'engaged in the same or nearly identical conduct' as the disciplined plaintiff. Instead, the law only requires 'similar misconduct' from the similarly situated comparator."). But see *Silvera*, 244 F.3d at 1259 ("In order to satisfy the similar offenses prong [in determining whether employees are similarly situated], the comparator's misconduct must be nearly identical to the plaintiff's in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.'").

Trest, the human resources manager for Stone & Webster, testified that Jones was a non-manual employee, a professional engineer in fact, and that the company "expected the same" of him as it did a foreman, such as Speegle.⁸² After Jones had sent a "lot of" letters to managers and co-workers calling them "horrible names," Stone & Webster told Jones to stop and warned that if he continued, he would be fired.⁸³ But the record demonstrates that it was only after giving him "quite a few" of these warnings that Stone & Webster terminated Jones for "insubordination" for screaming a profanity at his supervisor in front of other employees.⁸⁴ As for Chiodo, Trest indicated that he was initially given a warning letter after he used vulgar language when "lashing out" at his foreman in front of his peers and foremen. And, like Jones, it was only after a subsequent similar outburst that Stone & Webster fired Chiodo for a second offense "insubordination to a supervisor."⁸⁵

The ALJ found that that Jones and Chiodo were not similarly situated employees because they had different supervisors than Speegle (i.e., not Childers and Gero), because their offenses were not "of comparable seriousness," and also because, unlike Jones and Chiodo, Speegle was a foreman who made his insubordinate comment in the presence of subordinate employees.⁸⁶ The record, however, does not support these findings.

As for having different supervisors, the ALJ reasoned that "the difference in supervisors is a significant factor due to the fact that insubordination encompasses a wide range of actions" and that it was "highly likely that different supervisors will react differently to varying acts of insubordination, which is a legitimate explanation for differential application of discipline." As the ALJ acknowledged, however, the fact that the comparator employees (Jones and Chiodo) had different supervisors than Speegle, while perhaps a factor in determining whether employees are similarly situated, is not dispositive.⁸⁷ That fact is especially non-dispositive here because, while the ALJ is undoubtedly correct that different supervisors may very well judge "varying" insubordinate actions differently, the record demonstrates that the Speegle-Jones-Chiodo insubordination was identical. For all intents and purposes, each of these men was

⁸¹ *Hirst v. Se. Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-047, slip op. at 9 (ARB Jan. 31, 2007); *Jenkins*, slip op. at 17.

⁸² HT at 874-875.

⁸³ HT at 875-877.

⁸⁴ HT at 871-873, 877.

⁸⁵ HT at 877-879; CX 26.

⁸⁶ R. D. & O. at 38-39.

⁸⁷ *See Anderson*, 253 F.3d at 566 (rejecting argument that when different supervisors administer discipline, the comparators as a matter of law cannot be similarly situated); *see also Moore v. Alabama Dep't of Corr.*, 137 Fed. Appx. 235, 239-239 (11th Cir. 2005).

judged insubordinate for the same reason: Jones screamed a profanity at his supervisor in front of other workers; Chiodo vulgarly lashed out at his foreman in front of other workers; and Speegle, also in the presence of his supervisor and co-workers, loudly and vulgarly proclaimed what management could do with the G-55. Yet before Stone & Webster terminated Jones and Chiodo, they received warnings. Speegle was gone two days later.

We have already addressed the ALJ's second reason for finding that Jones and Chiodo were not similarly situated to Speegle. The ALJ credited Gero's testimony that Speegle was fired because his "shove it" statement indicated that Speegle was not going to obey the rules. From this, the ALJ concluded that Speegle was not similarly situated to Jones and Chiodo because their insubordination did not evidence an intent not to follow the rules and therefore was not of "comparable seriousness" to Speegle's. We explained why the not-going-to-obey-the-rules rationale for terminating Speegle was a pretext. Therefore, the record does not support the ALJ's finding that the Jones-Chiodo insubordination was not as serious as Speegle's.

The ALJ's last reason for rejecting Speegle's argument that he was similarly situated to Jones and Chiodo was that "Speegle's position as a foreman is a distinguishing factor in comparison to these employees." The ALJ reasoned that since subordinates heard Speegle'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 Speegle was not similarly situated to Jones and Chiodo. At any rate, though Jones may not have been a foreman, according to Trest he was a "professional," an electrical engineer in fact, and the company expected him to comport himself in the same manner as a foreman.⁸⁸ Thus, the fact that Speegle was a foreman does not attenuate the comparison with Jones.

To sum up, the record reveals that like Speegle, Jones was terminated for his insubordinate screaming episode but only after numerous warnings that he would be fired if he continued to insult co-workers and managers. Chiodo, too, was treated more favorably than Speegle. Unlike Speegle, Chiodo was given a second chance after his first vulgar outburst. Therefore, since Stone & Webster treated the Jones and Chiodo insubordination more leniently than the identical Speegle insubordination, Speegle proved by a preponderance of the evidence that he was similarly situated to Jones and Chiodo. Speegle thus proved that firing him for his insubordinate "shove it" comment on May 22 was a pretext. Adding this finding to our conclusion that Stone & Webster's shifting reasons for suspending and firing Speegle also evidenced pretext, this record contains substantial evidence that Speegle's protected activity likely played a role in—i.e., contributed to—Stone & Webster's decision to suspend and terminate Speegle.

⁸⁸

HT at 874-875.

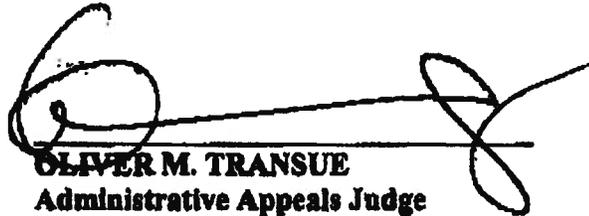
Dual Motive

Though Speegle proved that Stone & Webster violated the ERA's employee protection section, the company may nevertheless avoid liability if it can prove by clear and convincing evidence that it would have suspended and fired Speegle even absent his protected activity.⁸⁹ But Stone & Webster cannot meet this burden because substantial evidence shows that its reason for suspending and terminating Speegle—insubordination—was a pretext for unlawful retaliation.⁹⁰

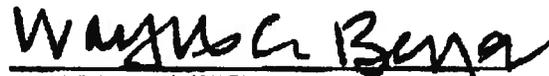
CONCLUSION

On the whole, this record contains substantial evidence that Speegle's informal complaints to Childers and Gero about certifying apprentices to work in the Torus contributed to their decision to suspend and then terminate him. Therefore, we **REVERSE** the ALJ. As a result, Speegle is entitled to the relief that the ERA affords to a successful litigant.⁹¹ We therefore **REMAND** this matter to the ALJ to award the appropriate relief.

SO ORDERED.



OLIVER M. TRANSUE
Administrative Appeals Judge



WAYNE C. BEYER
Chief Administrative Appeals Judge

⁸⁹ See 42 U.S.C.A. § 5851(b)(3)(D).

⁹⁰ See, e.g., *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-022, slip op. at 20 (ARB June 30, 2009) (concluding that since substantial evidence supported the ALJ's finding that the reasons the employer gave for firing employee were pretexts, the employer did not prove by clear and convincing evidence that they would have fired the employee absent his protected activity).

⁹¹ See 42 U.S.C.A. § 5851(b)(2)(B).

**ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE**

CASE NAME : *James Speegle v. Stone & Webster Construction, Inc.*

ARB CASE NO. : 06-041

ALJ CASE NO. : 2005-ERA-6

DOCUMENT : FINAL ORDER

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