In the Matter of:

TIMOTHY A. CLARK, **ARB CASE NO. 06-082**

COMPLAINANT, **ALJ CASE NO. 2005-AIR-027**

v. **DATE: March 31, 2008**

AIRBORNE, INC., d/b/a
FIRST FLIGHT MANAGEMENT, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Timothy A. Clark, *pro se*, Horseheads, New York

For the Respondent:
Pamela Doyle Gee, Esq., *Davidson & O'Mara, P.C.*, Elmira, New York

ORDER OF REMAND

Timothy Clark filed a complaint with the United States Department of Labor alleging that his former employer, Airborne, Inc., retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] A Department of Labor Administrative Law Judge (ALJ) concluded that Airborne did not violate AIR 21 when it fired Clark and thus recommended that Clark's

[1] 49 U.S.C.A. § 42121 (West Supp. 2005). 29 C.F.R. Part 1979 (2007) contains the regulations that implement AIR 21.

complaint be denied. This Board has authority to issue final decisions in AIR 21 cases.[2] We remand.

AIR 21 requires that a whistleblower like Clark prove by a preponderance of evidence that his protected activity was a "contributing factor" in the adverse action taken against him.[3] A "contributing factor" is "*any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision*."[4]

We must remand because the ALJ did not apply the "contributing factor" standard. He wrote that under AIR 21, the "adverse action must have been taken *because of* the employee's protected activity."[5] The ALJ also framed one of the issues as being whether Clark has "shown by a preponderance of the evidence that the adverse employment action was *due to* his protected activity."[6] And in concluding, the ALJ wrote that Clark "has not met his burden of proof in showing that [Airborne] terminated him *due to* his protected activity."[7] And while we note that in one instance the ALJ mentions the "contributing factor" standard,[8] we find that he erroneously applied "because of" and "due to" standards.

We also note that the ALJ found that even if Clark had proven that Airborne terminated him "due to" protected activity, Airborne would avoid liability because it met the statutory requirement to prove by clear and convincing evidence that it would have fired Clark regardless of protected activity.[9] But this alternative finding and conclusion do not obviate the need to

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2 *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

3 *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

4 *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (decided under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1)) (emphasis in original).

5 R. D. & O. at 8 (emphasis added).

6 *Id*. at 2, 9 (emphasis added).

7 *Id.* at 10 (emphasis added).

8 The ALJ framed the fourth issue before him as: "If Complainant's protected activity is found to have contributed to the adverse action, has Respondent demonstrated by clear and convincing evidence that it would have taken the same action against Complainant even in the absence of the protected activity." *Id.* at 2.

9 *Id.* at 9; *see* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

remand this case because the ALJ did not specify any rationale or authority for concluding that Airborne avoids liability, *i.e.* what is the clear and convincing standard of proof and exactly how did Airborne meet it? Thus, we cannot accept this conclusion.[10]

Therefore, we **REMAND** this matter for proceedings consistent with this Order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[10] *See* 29 C.F.R. § 18.57(b) ("The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record.").