In the Matter of:

JOEL P. JORDAN, II, **ARB CASE NO. 10-076**

COMPLAINANT, **ALJ CASE NO. 2009-STA-062**

v. **DATE: January 17, 2012**

IESI PA BLUE RIDGE LANDFILL CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kimberly H. Ashbach, Esq., Ambler, Pennsylvania

For the Respondent:
Brad C. Mall, Esq., *Munck Carter, LLP*, Dallas, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

ORDER OF REMAND

Joel P. Jordan, II filed a complaint with the United States Department of Labor alleging that his former employer, IESI PA Blue Ridge Landfill Corp., discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).[1] On March 15, 2010, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O) in which he held that IESI did not violate the

[1] 49 U.S.C.A. § 31105(a) (Thomson/West 2011). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2011).

STAA when it fired Jordan. The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA.[2]

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[3] Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[4]

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.[5] Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[6]

Although IESI discharged Jordan on November 20, 2007, the ALJ did not apply the STAA burdens of proof in effect as of August 3, 2007, the date Congress amended the STAA to incorporate the burdens of proof contained in AIR 21. The ALJ found that Jordan engaged in protected activity, and we summarily affirm that finding. But, the ALJ made no clear finding as to whether Jordan's protected activity was or was not a "contributing factor" in his discharge. Within one paragraph of his decision, the ALJ found that the "Complainant's termination was in some way related to his protected activity" and also referred to a "causal link for a prima facie case" and an "inference" of a causal link.[7] Determining whether there was a prima facie case or an inference is not the same as determining whether Jordan ultimately proved that his protected activity was "a contributing factor."[8]

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[2] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

[3] 49 U.S.C.A. § 31105(a)(1).

[4] 49 U.S.C.A. § 42121 (Thomson/West Supp. 2011); *see* 49 U.S.C.A. § 31105(b)(1).

[5] *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -44; slip op. at 4 (ARB Dec. 18, 2009).

[6] 49 U.S.C.A. § 42121(b)(2)(B); *see, e.g., Sacco,* ARB No. 09-024, slip op. at 5-6.

[7] R. D. & O. at 47.

[8] *See Bechtel v. Competitive Techs., Inc.,* ARB No. 06-010, ALJ No. 2005-SOX-033, slip op. at 5-7 (ARB Mar. 26, 2008).

If Jordan proved that his protected activity was a contributing factor, the ALJ was required to determine if IESI proved by clear and convincing evidence that it would have discharged him absent his protected activity. The ALJ's decision was ambiguous on this point as well because he discussed the "dual motive" analysis and explained that a complainant must prove pretext under such analysis. This is incorrect. If protected activity was a contributing factor, then it becomes the respondent's burden to prove by clear and convincing evidence that it would have taken the same action without the protected activity.[9]

The ALJ must expressly determine whether Jordan proved by a preponderance of the evidence that his protected activity was a contributing factor in IESI's decision to fire him. Only if Jordan meets his burden of proof, the ALJ should then determine whether IESI established by clear and convincing evidence that it would have discharged him absent his protected activity. If IESI meets this burden, then it will avoid liability under the STAA. If IESI does not, and providing that Jordan has established his protected activity as a contributing factor in his discharge, then the ALJ should consider appropriate remedies under the STAA.[10] We make no determination on the merits of this case nor do we intend to suggest that the application of the proper standard will change the outcome of the case.

Accordingly, we **REMAND** the case for further proceedings consistent with this Order.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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9 *Id*. at 50-51.

10 49 U.S.C.A. § 31105(b)(3)(A).