U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

WAYNE STOKES, **ARB CASE NO. 2022-0007**

COMPLAINANT, **ALJ CASE NOS. 2020-STA-00080**
2020-STA-00082

v.

ALBERTSON'S, LLC AND
DARRELL KIDD, **DATE: May 20, 2022**

RESPONDENTS.

Appearances:

For the Petitioner:
Paul O. Taylor, Esq., Peter L. LaVoie, Esq.; *Truckers Justice Center*; Edina, Minnesota

For the Respondents:
Raymond Perez, Esq.; *Jackson Lewis P.C.*; Atlanta, Georgia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, and its implementing regulations.[1]

[1] 49 U.S.C. § 31105 (2007), and its implementing regulations at 29 C.F.R. Part 1978 (2021).

Wayne Stokes (Complainant) filed a complaint alleging that Albertson's, LLC[2] (Albertsons) and Darrell Kidd, Vice President and General Manager of Albertsons' Portland Distribution Center, retaliated against him in violation of STAA's whistleblower protection provisions. Following a hearing, an Administrative Law Judge (ALJ) issued an Amended Decision and Order dismissing the complaint (Amended D. & O.).[3] Complainant appealed to the Administrative Review Board (ARB or the Board). We affirm.

BACKGROUND

Complainant began working as a truck driver for Safeway Inc. (Safeway) on or about October 18, 2002.[4] While employed by Safeway, Complainant was aware of a settlement agreement known as the "Dan Henry letter."[5] The Dan Henry letter provided that Safeway would not issue demerit points to its truck drivers who missed work because they were too ill or fatigued to drive safely.[6]

In 2015, Albertsons acquired Safeway, and the two companies merged operations.[7] The merger changed Mr. Stokes' seniority relative to other drivers, and he had to bid for his route.[8] Complainant began working for Albertsons.[9] On or about October 10, 2016, Complainant underwent orientation and training, and received a copy of Albertsons' Distribution Center Attendance Call-In Procedures (Call-In Procedures).[10] Under Albertsons' Portland Distribution Center's Attendance Policy (Attendance Policy), any driver could receive "points" for taking unapproved absences from work, reporting late to work, and leaving work early.[11] Drivers could also receive additional points if they failed to notify a supervisor of an

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2 The record contains different variations of the company's name; the ALJ and the parties inconsistently refer to "Albertson's" or "Albertsons." In our decision, we will refer to the party as "Albertsons" and the respondent parties (Darrell Kidd) collectively as "Respondents."

3 *Stokes v. Albertson's, LLC*, ALJ Nos. 2020-STA-00080, -00082 (ALJ Nov. 21, 2021) (Amended D. & O.).

4 Amended D. & O. at 3; Hearing Transcript (Tr.) at 13.

5 Amended D. & O. at 3; Complainant's Exhibit (CX) 7.

6 Amended D. & O. at 3; Tr. at 28-29, 34-35.

7 Amended D. & O. at 3; CX 6.

8 Amended D. & O. at 3.

9 Amended D. & O. at 3; Tr. at 42.

10 Amended D. & O. at 3; Joint Exhibit (JX) 4; Tr. at 43-44.

11 Amended D. & O. at 3; JX 3 at 2.

absence at least one-hour before their scheduled shift.[12] A driver's accumulation of "points" or "occurrences"[13] within any given fifty-two-week period could result in discipline.[14] The Attendance Policy further provides that "[t]he exclusions to this policy will be time off approved in advance or time off required by the Collective Bargaining Agreement or time off required by law."[15]

Albertson requires drivers to complete an Absentee Interview Form (AIF)[16] upon returning to work from an absence or tardy.[17] On July 16, 2017, Complainant missed work due to an illness.[18] When Complainant returned to work, he completed an AIF and gave it to a dispatcher or supervisor.[19] Complainant also completed and submitted AIFs for his absences on January 12 and 13, 2018;[20] January 16, 19, and 20, 2018;[21] March 2 and 3, 2018;[22] and March 6, 2018.[23] Complainant claimed that he was "too ill to drive safely," or some variation of that claim, on the AIFs he submitted to management.[24]

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12 *Id*.

13 As the ALJ noted, the parties and witnesses use the terms "points" and "occurrences" interchangeably. Amended D. & O. at 3 n.2. The Attendance Policy and Call-In Procedures use the term "occurrences." JX 3-4.

14 Amended D. & O. at 3. According to the Attendance Policy, the following discipline incurred based on points or occurrences: four points resulted in verbal counseling, six points resulted in written counseling, eight points resulted in a three-day suspension, nine points resulted in a "last and final warning," and ten points resulted in discharge. JX 3 at 3.

15 Amended D. & O. at 3; JX 3 at 2.

16 CX 1. The driver is responsible for completing the upper portion of the AIF. The driver records the dates of the absence or tardy, whether the absence was related to Family and Medical Leave Act (FMLA) or Oregon Family Leave Act (OFLA) leave, and whether the absence or tardy was reported with at least one hour's notice. The lower portion of the AIF is marked "OFFICE USE ONLY," and has fields for a supervisor's initials, to note whether the absence or tardy utilized Oregon Sick Protected Hours, FMLA, or OFLA time, and whether management assessed points for the absence or tardy.

17 Amended D. & O. at 3; CX 1; Tr. at 18-19, 22.

18 Amended D. & O. at 3.

19 *Id*.; CX 1 at 1; Tr. 17-19.

20 Amended D. & O. at 3-4; CX 1 at 2.

21 Amended D. & O. at 4; CX 1 at 3.

22 Amended D. & O. at 4; CX 1 at 4.

23 Amended D. & O. at 4; CX 1 at 5.

24 CX 1 at 1-5.

At some point after Complainant submitted the AIFs, Complainant had a conversation with a shop steward who informed him that Albertson did not recognize the Dan Henry letter.[25] Complainant then e-mailed a clerk at Albertson expressing concern that he was accumulating points for absences he incurred when he was too ill to drive safely.[26] The clerk informed Complainant that "using sick time out of [sick safe time]"[27] incurs a point, but she did not know how many points appeared on Complainant's attendance record.[28] The clerk also provided Complainant information on how to request his attendance record.[29, 30]

Following this e-mail exchange with the clerk, Complainant requested his fifty-two-week attendance record.[31] Albertsons' policy provides the company forty-five days to respond to a driver's attendance request.[32] On April 25, 2018, prior to the forty-five-day deadline, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Albertson violated 49 U.S.C § 31105 by issuing demerit points against him for failing to work when he was too sick to drive safely.[33]

Prior to Complainant's requesting his attendance report, a human resource manager reviewed Complainant's AIFs and assessed one point for Complainant's absences on March 2 and 3, 2018, and a second point for his absence on March 6, 2018.[34] After Complainant requested his attendance report, Kidd learned that the human resource manager assessed points for Complainant's absences and directed her to remove the points from Complainant's attendance record.[35] On April 27,

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[25] Amended D. & O. at 4; Tr. at 28.

[26] Amended D. & O. at 4; CX 5 at 1.

[27] The clerk's e-mail used the abbreviation "SST." CX 5 at 1. Based on the record, "SST" is an abbreviation for "sick safe time." Tr. at 66.

[28] Amended D. & O. at 4-5; CX 5 at 1.

[29] *Id*.

[30] The ALJ determined that the clerk was "'working in transportation as a clerk,' not in Human Resources, and 'should not have been involved in any way in – in going back and forth with [Complainant] or any other driver about attendance points and – and AIFs.'" Amended D. & O. at 4 n.3.

[31] Amended D. & O. at 5.

[32] *Id*.; Tr. at 115, 129.

[33] Amended D. & O. at 5; JX 1.

[34] Amended D. & O. at 5; CX 1 at 4-5; Tr. 109-11.

[35] Amended D. & O. at 5; Tr. at 130-31; Kidd was unaware of Complainant's OSHA complaint when he directed the human resource manager to remove the points from the

2018, the human resource manager removed the points from Complainant's attendance record, and then generated the attendance report for Complainant.[36] When Complainant received his fifty-two-week attendance report, it showed no "points" or occurrences.[37]

Complainant objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges (OALJ). On November 21, 2021, the Administrative Law Judge (ALJ) issued the Amended D. & O.[38] On November 30, 2021, Complainant petitioned the ARB for review of the ALJ's Amended D. & O.[39] For the reasons discussed below, we affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[40] The Board reviews questions of law presented on appeal de novo but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[41] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[42]

DISCUSSION

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attendance record. Kidd learned about Complainant's OSHA complaint on May 2, 2018. Amended D. & O. at 5; Tr. at 113, 131, 133-34.

[36] Amended D. & O. at 5; RX 3; Tr. at 115-17.

[37] Amended D. & O. at 5; Respondent's Exhibit (RX) 3; Tr. at 32-33.

[38] The ALJ originally issued a Decision and Order Denying Relief on October 25, 2021. *Stokes v. Albertson's, LLC*, ALJ Nos. 2020-STA-00080, -00082 (ALJ Oct. 25, 2021) (D. & O.). The ALJ vacated the D. & O. in response to Complainant's Motion for Reconsideration on November 10, 2021.

[39] Complainant initially petitioned the ARB for review of the ALJ's D. & O. on November 3, 2021. The Board issued this appeal with its own case number, ARB No. 2022-0007. Upon receipt of Complainant's petition concerning the ALJ's Amended D. & O., the ARB removed ARB No. 2022-0014 from its docket and consolidated the two cases. *See Stokes v. Albertson's LLC*, ARB Nos. 2022-0007, -0014, ALJ Nos. 2020-STA-00080, -00082 (ARB Dec. 2, 2021) (Order).

[40] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[41] 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted).

[42] *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

To prevail on a STAA retaliation complaint, a complainant must prove by preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[43] If the employee meets his burden of proof, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable action in absence of the protected activity.[44] The Board has previously held an employer satisfies this burden when it shows that it is "highly probable" it would have taken the action in the absence of protected activity.[45]

Complainant alleged that Respondent retaliated against him by issuing points on his attendance record for absences he incurred when he was too ill to drive safely.[46] The ALJ determined that Complainant was not entitled to relief because Albertsons' Attendance Policy did not allow it to treat Complainant's absences as "occurrences," and Respondent acted within a reasonable time to correct Complainant's attendance record.[47] The ALJ also found that based upon the record, Complainant failed to establish by a preponderance of the evidence that his protected activity contributed to the alleged adverse action he suffered.[48]

Complainant argues on appeal that the ALJ erred as a matter of law by denying his complaint.[49] Specifically, Complainant avers that Respondents' assessment of demerit points to his attendance record was an adverse action because the points were more than trivial and amounted to preliminary steps toward a possible suspension and discharge, which caused him to suffer mental pain and anguish.[50] Complainant also argues that Albertsons' assessment of points is similar to issuing warning notices in other whistleblower contexts;[51] that the Attendance Policy, as applied to STAA-protected activity, is a *per se* violation of the

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43 49 U.S.C. § 42121(b)(2)(B)(iii); 29 U.S.C. § 31105(b)(1) (incorporating the AIR 21 legal burdens of proof).

44 *Id.* at § 42121(b)(2)(B)(iv).

45 *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 9 (ARB May 13, 2020) (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017)).

46 Amended D. & O. at 6.

47 *Id.*

48 *Id.* at 7.

49 Brief of Complainant Wayne Stokes (Comp. Br.) at 12-23.

50 Comp. Br. at 14.

51 *Id.* at 16-19.

STAA;[52] and that the ALJ's Amended D. & O. is inconsistent with the purpose of the STAA.[53] Complainant further contends the ALJ erred in his contributing factor analysis because he failed to "resolve evidence pointing to protected activity as a contributing factor in the issuance of demerit points."[54]

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude the ALJ's finding that Complainant did not suffer an adverse action is supported by substantial evidence. Respondent, upon further analysis of the issue or learning of the mistake, removed the demerit points from the 52-week report before submitting it to Complainant. Complainant suffered no consequences from the temporary assignment of demerit points.[55] None of Complainant's arguments demonstrate that the ALJ abused his discretion or

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[52] *Id.* at 22.

[53] *Id*. at 19.

[54] *Id.* at 23-29.

[55] The ALJ found that Albertson acted within a reasonable time to correct Complainant's record. Amended D. & O. at 7. The Board has similarly held that an employee was not entitled to relief after an employer's rescission of a presumptively adverse action. *See Onysko v. Utah Dep't of Envt'l Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003, slip op at 2-3 (ARB Dec. 16, 2020) (per curiam) (affirming, adopting, and attaching an ALJ's Summary Decision that an employee did not suffer an adverse action when the employer accidentally sent a termination e-mail to the employee but then rescinded the e-mail immediately); *Hirst v. Se. Airlines, Inc.*, ARB Nos. 2004-0116, -0160, ALJ No. 2003-AIR-00047, slip op. at 11-12 (ARB Jan. 31, 2007) (holding that a pilot's termination that was rescinded two days later by the airline was not an adverse action because the airline recognized its mistake, immediately informed the pilot he was still employed, and ensured the pilot suffered no economic loss); *McNeill v. Crane Nuclear, Inc.*, ARB No. 2002-0002, ALJ No. 2001-ERA-00003, slip op. at 17-18 (ARB July 29, 2005) (holding an employee's termination that was rescinded within hours by the employer was not an adverse action because it did not cause a significant change in the employee's employment status and, at most, only caused the employee's temporary unhappiness); *Griffith v. Wackenhut Corp.*, ARB No. 1998-0067, ALJ No. 1997-ERA-00052, slip op. at 11-12 (ARB Feb. 29, 2000) (holding that an employee's reprimand and three-day suspension that were rescinded promptly and voluntarily by the employer was not an adverse action because the employee suffered no financial harm or negative effect on her employment and that her anxiety was too temporary to render the action adverse).

committed reversible error.[56] Accordingly, we **AFFIRM** the ALJ's Amended D. & O.[57]

SO ORDERED.

[56] Because we are affirming the ALJ's finding that Complainant did not suffer an adverse action, the parties' other arguments are moot, and we decline to make any determination on those arguments.

[57] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).