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Issue Date: 28 July 2004

In the Matter of

ROBERT WEST
Complainant

v.

KASBAR, INC./MAIL
CONTRACTORS OF AMERICA
Employer

Case No. 2004-STA-00034

Paul O. Taylor
Burnsville, MN
For Complainant

Donna Galchus, Esq.
Little Rock, AR
For Respondent

H. Alice Jacks, Esq.
Kansas City, MO
For the Department of Labor

Before: JEFFREY TURECK
Administrative Law Judge

ORDER GRANTING MOTION FOR SUMMARY DISMISSAL

This is a case arising under the Surface Transportation Assistance Act, 49 U.S.C. §31105 (hereinafter referred to as "STAA"). On November 3, 1998, Robert West ("Complainant") filed an STAA complaint with the Occupational Safety and Health Administration ("OSHA") office in Wichita, Kansas, against Kasbar, Inc./ Mail Contractors of America[1] ("Respondent"). November 3, 1998 *Complaint*. The OSHA Area Director did not conduct an investigation in regard to the

[1] Complainant's original complaint named Kasbar, Inc. and Randel Tomlin as the Respondents. November 3, 1998 *Complaint*. However, Mail Contractors of America purchased Kasbar, Inc. in a stock purchase agreement. *Motion to Substitute Parties* (June 4, 2004). Accordingly, on June 18, 2004, I substituted Mail Contractors of America for Kasbar, Inc. as the Respondent in the instant case. *Order Substituting Party, Canceling Hearing, and Setting Deadline for Response to Respondent's Motion to Dismiss* (June 18, 2004).

complaint, stating that there was no indication of imminent danger, but suggested that Complainant seek a review of his determination with OSHA's Kansas City Regional Office, which he did. The Kansas City OSHA office logged this complaint in its system on January 25, 1999. *OSHA Assistant Regional Administrator's Letter* (February 20, 2004). Thereafter, no action was taken by any party until August 21, 2003, when Complainant contacted OSHA to inquire about the status of the complaint. *See id.* After investigating the procedural history of this case, OSHA determined that no investigative file existed. Citing its inability to obtain relevant documents from the Complainant , OSHA closed the case on February 20, 2004. *Id.* On March 19, 2004, Complainant objected to OSHA's February 20, 2004 findings and requested a hearing before this Office. *See Complainant's Objection to Secretary's Findings & Order*. By motion dated June 14, 2004, Respondent requested that this case be dismissed, contending that Complainant was not subjected to "an adverse employment action for which the [STAA] affords him relief." *Respondent's Motion to Dismiss*, at 1; *see also* November 3, 1998 *Complaint*. Respondent also contended that this office lacks jurisdiction over the instant complaint and that the complaint is barred by equitable laches. *Respondent's Motion to Dismiss*, at 1-2. Complainant filed a response to the *Motion to Dismiss* in which he contended that a warning letter is an adverse action protected under the STAA, that this Office has jurisdiction, and that the complaint is not barred by laches because the Respondent has not demonstrated that it is prejudiced by the delay in prosecuting this case. *Complainant's Brief in Opposition to Motion to Dismiss*; *see also* November 3, 1998 *Complaint.*

Background

Respondent is a commercial motor carrier. It employed Complainant at least through the date the complaint was filed with OSHA's Kansas City office. *See* November 3, 1998 *Complaint*, at 1-2.[2] During his employment with Respondent, Complainant drove a commercial motor vehicle that was not equipped with a "sleeper berth." *Id.* at 1-3.

Complainant is alleging that the warning letter that Respondent gave to him on August 18, 1998 was an adverse employment action. *Complainant's Brief in Opposition to Motion to Dismiss*, at 1-5; *see* November 3, 1998 *Complaint.* This warning letter contains an adequate discussion of the relevant facts, and is quoted in its entirety as follows:

> Please consider this letter as a Final Formal Written Warning letter for violation of known and long standing Company Policy and Regulations which prohibit the taking of rest stops (naps) inside the cab of the truck.
>
> On October 16, 1997, you were issued a Formal Written Warning for taking naps in the cab of the truck. As you are well aware, you have been instructed to take all meal breaks and rest stops (naps) as "Off Duty Time".
>
> Once again, you have chosen to ignore and disregard this Company Policy and Regulation by taking a rest stop (nap) inside the cab of your truck at Highland, Illinois on August 15, 1998, and logged such time as on duty not driving.

[2] Although it appears that the Complainant no longer works for Respondent, the record does not indicate when the employment relationship terminated.

> As this is the second Formal Written Warning issued to you for the same offence [*sic*], future violations of this nature will result in more severe disciplinary action up to and including discharge. Please govern your future actions accordingly.
>
> The written warning letter is issued pursuant to the terms and provisions of Article 27 of the current Collective Bargaining Agreement.

November 13, 1998 *Complaint.* Following receipt of this warning letter, Complainant continued to work for Respondent. *See id.* He has not alleged that Respondent took any further disciplinary action against him during the duration of his employment with Respondent.

Jurisdiction

Respondent contends that this Office does not have jurisdiction over this case, contending that OSHA is required to conduct an investigation of a complaint and issue findings based on that investigation before a party can request a hearing. In this regard, *see* 29 C.F.R. §1978.104-05. But OSHA did conduct an investigation, albeit five years late, when it attempted to obtain relevant evidence from the Complainant. When Complainant did not provide such evidence, OSHA closed its investigation, in effect finding that it did not have a reasonable basis to believe that Respondent had violated the STAA. Complainant filed a timely appeal of that determination with this Office. Accordingly, I find that this Office has jurisdiction over the complaint.

Adverse Action

The STAA prohibits an employer from discharging, disciplining or discriminating against an employee because the employee refused to operate a vehicle in violation of a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. §31105(a)(1)(B)(i). To establish a prima facie claim under the STAA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in an activity protected under the STAA; (2) he was subject to an adverse employment action as a result of this activity; and (3) that the protected activity caused, all or in part, the adverse employment action. *See id.; Calhoun v. UPS*, 1999-STA-7, at 5 (November 27, 2002)(citing *BSP Trans., Inc. v. United States Dept. of Labor,* 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envt'l Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.,* 836 F. 226, 228 (6th Cir. 1987)). The question currently before me is whether the warning letter issued by Respondent is an adverse action under the STAA. *See Respondent's Motion to Dismiss*.

Courts have arduously labored to determine exactly what types of actions constitute "adverse actions" within the whistleblower context. The STAA defines an adverse action as an action that results in discharge, discipline or discrimination "against an employee regarding pay, terms, or privileges of employment." 549 U.S.C. §31105. Further, the Administrative Review Board ("ARB") recently found that to qualify as an adverse action under the STAA, the action must "have tangible job consequences." *Calhoun,* at 6 (citing *Shelton v. Oak Ridge National Lab.,* ARB Case No. 98-100, slip op. at 9 (A.R.B. March 30, 2001). Tangible job consequences

can come in many forms, including "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Shelton,* at 7 (quoting *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 612-13(7th Cir. 2001)(quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

While in the past courts have found that warning letters that are part of a progressive disciplinary scheme always fell within the definition of adverse action (*see, e.g., Self v. Carolina Freight Carriers Corp.*, 89 STA 9, at 6-7 (A.R.B. Jan. 12, 1990), this is no longer the case. *See, e.g., Shelton*, 95 CAA 19, at 7-8; *Oest,* 240 F.3d at 613-14 (7th Cir. 2001). Under the more recent cases, a factfinder must evaluate the "particular factual details of each situation" and determine if the details "implicat[e] sufficiently 'tangible job consequences' to constitute an independent basis of liability under" the STAA. *Oest*, 240 F.3d at 613 (citing *Byrson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996); *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998)). Courts recognize "that a reprimand can[not] be considered adverse simply because each reprimand may bring an employee closer to termination;" "[s]uch a course [is] not an inevitable consequence of every reprimand [and] job-related criticism can prompt an employee to improve her performance and thus lead to a new and more constructive employment relationship." *Shelton*, 95 CAA 19, at 8 (quoting *Oest*, 240 F.3d at 613). Accordingly, a warning letter that is part of a progressive disciplinary scheme is an adverse action in the whistleblower context only if accompanied by an actual, and not merely a speculative, tangible job consequence. *See Shelton*, 95 CAA 19, at 8; *Oest*, 240 F.3d at 613; *see also Calhoun*, 99 STA 7, at 11-12 (applying this principle to an STA case involving a "written criticism").

In the instant case, the Complainant alleges that the warning letter, by itself, is an adverse action. November 3, 1998 *Complaint*, at 3-4. The complaint is devoid of any allegation of an adverse action besides Respondent's issuance of a warning letter. *See* November 3, 1998 *Complaint*. Moreover, approximately five years have passed since the Respondent issued this warning letter and the Complainant has not alleged a resulting demotion, loss of promotion or compensation, discharge, discrimination, or any other "actual" consequence. Since a warning letter without any accompanying actual tangible job consequence is not an actionable adverse action under the Act (*see Shelton*, 95 CAA 19, at 8; *Oest*, 240 F.3d at 613), I find that Complainant has failed to allege that an adverse action under the STAA occurred. Therefore, Respondent's *Motion to Dismiss* is granted.[3]

[3] Since I have granted Respondent's *Motion to Dismiss* on the grounds of failure to state a cause of action, it is unnecessary for me to address the issue of equitable laches.

ORDER

IT IS ORDERED that Respondent's Motion to Dismiss is granted, and this claim is dismissed.

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JEFFREY TURECK
Administrative Law Judge