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Issue Date: 21 November 2021

CASE NO.: 2020-STA-00080
2020-STA-00082

OSHA NO.: 0-1960-18-118
0-1960-18-119

In the Matter of:

WAYNE STOKES and WILLIAM CRUMRINE,
Complainants,

vs.

ALBERTSON'S, LLC, and DARRELL KIDD and SCOTT MELLEN,
Respondents.

APPEARANCES:

PETER L. LAVOIE, Esq.
Truckers Justice Center
Edina, MN
For the Complainant Wayne Stokes

RAYMOND PEREZ, II, Esq.
Jackson Lewis PLLC
Atlanta, GA
For Respondents

Before: Christopher Larsen
Administrative Law Judge

AMENDED DECISION AND ORDER DENYING RELIEF

These are claims under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 ("STAA"). I held a videoconference hearing in this case on August 17, 2021. On October 25, 2021, I issued a Decision

and Order Denying Relief, but, on November 10, 2021, I vacated that Decision and Order in response to Complainant's Motion for Reconsideration. Having fully considered the entire record and the arguments of the parties, I now issue this Amended Decision and Order Denying Relief.

The Complainant William Crumrine did not appear at the hearing (TR 4:6-20)[1]. On August 23, 2021, I issued an Order to Show Cause directing Mr. Crumrine to show cause for his failure to appear at the hearing, and advising him I would dismiss his claim if he did not respond. Mr. Crumrine filed no response to the Order to Show Cause, and I now dismiss his claim. Additionally, during the hearing, Mr. Stokes testified he asserts no claim against Respondent Scott Mellen (TR 38:20 - 39:17). Consequently, I dismiss this claim as against Respondent Scott Mellen as well.

At the hearing, I heard testimony from two witnesses: the sole remaining Complainant, Wayne Stokes, and William Kidd, currently the Vice President and General Manager of the Portland Distribution Center for Albertson's, LLC. I also received in evidence Claimant's Exhibits ("CX") 1 through 7, Respondent's Exhibits ("RX") 1 through 3, and Joint Exhibits ("JX") 1 through 4. The parties also stipulated to these facts (TR 5:11-25):

1. Mr. Stokes is an employee as defined at 49 U.S.C. section 31101 (2). He is a member of a labor union and his employment with Albertson's, LLC, is subject to a collective bargaining agreement.

2. Respondent Albertson's, LLC, maintains a base of operations at 17505 NE San Rafael Street, Portland, OR 97230. Respondent Albertson's, LLC, is a motor carrier operating in interstate commerce and a "person" subject to the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. section 31105 ("STAA").

3. Respondent Albertson's employs Mr. Stokes to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in commerce.

4. In April of 2018, Mr. Stokes filed a complaint with OSHA alleging that Respondents had discriminated against him and assess him demerit points in violation of 49 U.S.C. section 31105. The Complaint was timely filed.

5. On June 1, 2020, OSHA issued a decision denying Mr. Stokes' Complaint.

6. On June 23, 2020, Mr. Stokes filed timely objections to OSHA's decision and requested a hearing *de novo* before an Administrative Law Judge of the Department of Labor.

[1] Citations are to the page and line numbers of the transcript of the hearing.

7. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceedings.

The decision which follows is based on my careful consideration of the entire record, the stipulations of the parties, and the arguments of the parties in support of their respective positions, including their post-hearing briefs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find and conclude:

About nineteen years ago, Mr. Stokes began working as a truck driver for Safeway (TR 13:6-15). As a Safeway driver, Mr. Stokes became aware of a document colloquially known as "the Dan Henry letter" (CX 7), under which he understood Safeway had agreed not to issue demerit points to its truck drivers who missed work because they were too sick or too fatigued to drive safely (TR 28:24 - 29:22; 34:21 - 35:5). While employed by Safeway, Mr. Stokes never received demerit points under Safeway's attendance policy (TR 39:22 - 40:16).

Mr. Stokes belongs to Local 162 and has been a shop steward for twelve or thirteen years (TR 15:20 - 16:2).

Around 2015, the owner of Albertson's LLC acquired Safeway (*see* CX 6). Albertson's, LLC, and Safeway merged, and on or about October 9, 2016, Mr. Stokes began to work for Albertsons (TR 42:2-15). Both Albertson's and Safeway maintained distribution centers in the Portland area, and those two facilities merged as well. The merger changed Mr. Stokes' seniority relative to other drivers, and he had to bid for his route (TR 16:5 - 17:8). He also had to undergo orientation and additional training when he began working for Albertson's (TR 42:13-21).

On October 10, 2016, Mr. Stokes received a copy of Albertson's Distribution Center Attendance Call-In Procedures (JX 4) (TR 43:1 - 44:15). Under Albertson's Portland Distribution Center's Attendance Policy (JX 3), Mr. Stokes could receive "points"[2] for taking unapproved absences from work (TR 46:4-10). But he would not receive points for taking time off as "required by law" (JX 3, p. 2, last ¶; TR 47:6 - 48:3). A driver's accumulation of "points" or "occurrences" within any given 52-week period may result in discipline, as more fully set forth at JX 4, pp. 3-4.

On July 16, 2017, Mr. Stokes missed work because of illness. On returning to work the next day, he completed the required "Absentee Interview Form," or "AIF," explaining the reason for his absence, and gave it to a dispatcher or supervisor (CX 1, p. 1; TR 17:21 -19:1). He also completed and turned in AIF forms for illness-

[2] What the parties and witnesses sometimes refer to as "points" are called "occurrences" in the Portland Distribution Center Attendance Policy (JX 3) and in the Portland Distribution Center Attendance Call-In Procedure (JX 4).

related absences from work on January 12 and 13, 2018 (CX 1, p. 2); January 16, 19, and 20, 2018 (CX 1, p. 3); March 2 and 3, 2018 (CX 1, p. 4); and March 6, 2018 (CX 1, p. 5). These forms were not returned to Mr. Stokes after he gave them to the dispatcher or supervisor (TR 19:2-9).

Sometime later, Mr. Stokes had a conversation with another shop steward, Mike Fogarty, who told Mr. Stokes that Albertson's was "not recognizing that *[sic]* Dan Henry letter" (TR 28:6-21). Concerned that he might be accumulating "points" for the absences he had claimed, on March 12, 2018, Mr. Stokes sent an e-mail to Jen Liepold (CX 5, p. 1), whom he describes as "kind of like the go-between, between the drivers and HR"[3] (TR 30:5-14):

> Hi Jen,
>
> I had to take some sick days outside of the Oregon sick leave time, 03/02, 03/03, and 03/062018. I would like to know if I was given any points? Could I get me a *[sic]* copy of my 52 week report that includes the days mentioned.
>
> Thank you,
>
> Wayne Stokes

The next day, Ms. Liepold replied, but with some ambiguity. Her e-mail appears to comprise three distinct sections, employing different fonts and colors (CX 5, p. 1):

> Ok requested and got this back. It must be hand written.
>
> Please see the steps below outlined by Darrell, which he sent to all department Managers to share with their team. Wayne needs to put this in writing and submit to HR. He can drop it off in mailbox or Bill can drop it off ☺. To answer the question in regards to using sick time outside of SST, does it incur a point, the answer is yes.
>
> 1) When a union EE requests their attendance information, instruct them to put the request in writing and submit it to the HR department
> 2) HR will provide the most current 52 week attendance report to the shift superintendent or supervisor

[3] In fact, the uncontradicted evidence shows Ms. Liepold, in March, 2018, 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 Wayne or any other driver about attendance points and – and AIFs." She no longer works for Respondent (TR 134:8 - 135:12).

3) The superintendent or supervisor will give the requested information to the EE

Because Ms. Liepold had not told him how many "points" appeared on his record, Mr. Stokes decided to request his 52-week attendance report some time after receiving her e-mail. It was his understanding the company had 45 days to respond to his written request.

On April 25, 2018, Mr. Stokes filed a complaint with OSHA, alleging Respondents had violated 49 U.S.C. §31105 by issuing demerit points against him for failing to work when he was too sick to drive safely (JX 1, p. 9, ¶ 28).

When Mr. Stokes received the 52-week attendance report, dated April 27, 2018[4], it showed no "points" or occurrences (TR 32:15 - 33:1).

As it turns out, Albertson's had given Mr. Stokes one "point" for his absences on March 2 and 3, 2018, and a second "point" for his absence on March 6, 2018 (*see* CX 1, pp. 4-5). Mr. Stokes' "Absentee Interview Forms" were reviewed by Kim Beck, the Human Resource Manager at the time, and it was she who decided the points were appropriate (TR 109:13-22; 110:16 - 111:7). After Mr. Stokes requested his 52-week report, Mr. Kidd learned Ms. Beck had given Mr. Stokes those points, and Mr. Kidd directed Ms. Beck to remove them from Mr. Stokes' record (TR 130:8 - 131:4). She did so on April 27, 2018 – the same day Albertson's generated Mr. Stokes' 52-week report, showing he had no points (TR 115:15 - 117:22).

Removing the points from Mr. Stokes' record, in Mr. Kidd's view, is consistent both with the Dan Henry letter and with the Portland Distribution Center's Attendance Policy (TR 126:21 - 128:22; 118:4 - 120:14).[5]

On April 27, 2018, Mr. Kidd did not know Mr. Stokes had filed a complaint with OSHA (TR 131:9-13; 133:24 - 134:2). He first learned of that complaint five days later, on May 2, 2018 (TR 113:4-24).

[4] A copy of the report appears in the record as RX 3.

[5] Albertson's takes the same position in its post-hearing brief. Although it does not consider itself bound by the Dan Henry letter, it argues its attendance policy, like the Dan Henry letter, allows drivers to take time off without penalty when they are too ill or fatigued to drive safely (Respondents' Post-Hearing Brief, p. 10).

Discussion

The parties agree Mr. Stokes' absences on July 16, 2017; January 12 and 13, 2018; January 16, 19, and 20, 2018; and March 2, 3, and 6, 2018; were not "occurrences" within the meaning of the Portland Distribution Center Attendance Policy (JX 3). They also agree that treating them as "occurrences," or giving Mr. Stokes "points," in connection with any of those absences is not consistent with the Dan Henry letter (CX 7). They agree that Albertson's initially recorded two "points" against Mr. Stokes in connection with his absences in March, 2018, but, on April 27, 2018, removed those "points" from his record.

Mr. Stokes argues the assessment of demerit points against him was an "adverse action" for purposes of STAA. He correctly argues the assessment of a point, under the facts of this case, might constitute discrimination against him regarding pay, terms, or privileges of employment, even though it did not immediately result in disciplinary action (Complainant's Brief, pp. 16-19). He further correctly argues the temporal proximity between his report of his inability to drive and the assessment of a demerit point against him could suffice to support a finding that his complaint contributed to the assessment of a point against him (Complainant's Brief, pp. 20-21). He likewise correctly argues the intentional issuance of a demerit point, to be removed from a driver's record only if challenged, could constitute a discretionary exception to mootness (Complainant's Brief, pp. 23-25). But he does not address Respondent's contention that it made a mistake and corrected it in due course. His entire arguments rests on an assumption of Respondent's bad faith.

Respondent argues

> Albertsons no-fault attendance policy fully complies with the STAA and has specific exclusions for time off required by law such as absences due to feeling too ill or sick to drive. Even though not bound by the Dan Henry Settlement Agreement, Albertsons' attendance policy was already in compliance since it included such exceptions and the company applied them where drivers reported being too ill or sick to drive such as in the cases with Complainant Stokes.

(Respondent's Brief, p. 10.)

In this case, Mr. Stokes asked Respondent whether it had assessed demerit points against him. Respondent thereafter removed the points it had assessed and notified him he had no points on his record. There is nothing in the record before me, other than Mr. Stokes' suspicion, to show Respondent makes a practice of issuing demerit points in questionable cases, knowing it can escape accountability by removing them if and when the affected driver complains. If there were such evidence, it would put this case in an entirely different light. But Mr. Stokes' suspicion

alone, unsupported by anything other than possibility, does not constitute such evidence. And, in this case, Respondent admits assessing points against Mr. Stokes, on the facts of this case, violated its own policy. I will not assess damages in excess of $250,000.00 against Respondent on the record before me.

Because Albertson's interprets its attendance policy consistently with Mr. Stokes' understanding of the Dan Henry letter, I need not and do not decide whether the Dan Henry letter is binding on Albertson's. I find and conclude Albertson's own policy does not allow it to count Mr. Stokes' absences in March, 2018, as "occurrences."

Mr. Stokes filed his OSHA complaint on April 25, 2018, and Albertson's removed the occurrences from his record two days later. This temporal proximity suggests Albertson's would not have corrected Mr. Stokes' record in the absence of his OSHA complaint. But the record before me, considered in its entirety, does not establish this inference by a preponderance of the evidence.

Because Albertson's acknowledges the Attendance Policy does not allow it to treat Mr. Stokes' absences as "occurrences," and because Albertson's acted within a reasonable time to correct Mr. Stokes' attendance record, I conclude Mr. Stokes is not entitled to damages or further relief under STAA.

Accordingly, Mr. Stokes' claim for relief is denied.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

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The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.
Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

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If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

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