



In the Matter of:

MICHAEL BEN GRAVES,

ARB CASE NO. 14-045

COMPLAINANT,

ALJ CASE NO. 2013-NTS-002

v.

DATE: July 23, 2015

MV TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael Ben Graves, *pro se*, Carson, California

For the Respondent:

Nicholas Rosenthal, Esq., *Seyfarth, Shaw LLP*, Los Angeles, California

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the National Transit Systems Security Act (NTSSA), 6 U.S.C.A. § 1142 (Thomson/West Supp. 2014), and its implementing regulations, 29 C.F.R. Part 1982 (2014). On October 26, 2011, Michael Ben Graves, a bus driver, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, MV Transportation, Inc., discriminated against him for complaining about unsafe workplace practices in violation of NTSSA. OSHA dismissed the complaint on December 10, 2012. Graves objected and requested a hearing with the Office of Administrative Law Judges. After an evidentiary hearing, an Administrative Law Judge (ALJ) entered a Decision and Order Dismissing Complaint (D. & O.) on March 14, 2014. Graves petitions for review, challenging the ALJ's dismissal of the claim. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to issue final agency decisions under the NTSSA and its implementing regulations at 29 C.F.R. Part 1982. Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,378, 69,379 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a). The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 7 (ARB Nov. 29, 2012).

DISCUSSION

The NTSSA provides that a public transportation agency shall not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done, to provide information or assist in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of a public transportation safety or security law, rule, or regulation.¹ In her D. & O., the ALJ found that the parties stipulated that Graves engaged in NTSSA-protected activity when he complained in January 2011 to Respondent that its procedure requiring drivers to back transit buses between other transit buses in its yard without a spotter was unsafe. She also noted that the parties stipulated that Graves's complaints to OSHA in January 2011 contending that Respondent retaliated against him for making safety complaints was protected activity. Graves did not contend that he had engaged in any more recent protected activity under the Act.

However, in reviewing Graves's contentions regarding retaliation, the ALJ rejected his contention that the assessment of the safety point, the "tailgating incident," the interview notice following a customer complaint, the lack of medical leave for treatment due to a work-related injury, Respondent's treatment of the work-related assault, and the assessment of attendance penalty points were adverse employment actions taken due to the protected activity. Whether these actions are unfavorable employment actions or not, substantial evidence supports the ALJ's essential factual findings and her ultimate conclusion that there was no causal link between Graves's protected activity and the alleged unfavorable employment actions. Specifically, the ALJ found that it was the company's policy to check on the drivers, including following them on their routes, to interview employees regarding customer complaints, and to require employees to schedule work-related doctor appointments after work hours. Moreover, the ALJ found that Graves submitted no evidence that the assessment of a safety point following the minor traffic

¹ 6 U.S.C.A. §1142; 29 C.F.R. § 1982.102.

accident and the attendance point related to the early return from lunch were causally related to his protected activity in 2011. While appreciating that Graves appealed this matter pro se, we find that he fails to sufficiently identify how the ALJ committed reversible error. Therefore, we affirm the ALJ's dismissal of Graves's whistleblower complaint.²

CONCLUSION

The ALJ's decision is **AFFIRMED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

² While we affirm the ALJ's dismissal of Graves's claim, we do not endorse every collateral legal issue in the ALJ's legal analysis. For example, the ALJ found that "the burden rests on the Complainant to show that there was disparate treatment, and he failed to do so." D. & O. at 18. However, Complainant's ultimate burden is to demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the alleged adverse action, not that there was disparate treatment. 29 C.F.R. § 1982.109. Nevertheless, we hold that the ALJ's factual findings support her ultimate conclusion that the claim should be dismissed.