



In the Matter of:

RONALD JOE MELTON,

ARB CASE NO. 06-052

COMPLAINANT,

ALJ CASE NO. 2005-STA-002

v.

DATE: September 30, 2008

YELLOW TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

Anderson B. Scott, Esq., *Fischer & Phillips, LLP*, Atlanta, Georgia

FINAL DECISION AND ORDER

Ronald Joe Melton complains that Yellow Transportation, Inc. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2008), and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it issued him a warning letter for claiming fatigue to avoid work. Following a hearing on the merits, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on February 2, 2006, concluding that Yellow did not violate the STAA. This Board affirms.

Judge Wayne Beyer delivered the opinion of the Board except as to Part IV B. Judge Transue and Douglass joined as to all but Part IV B. Judge Transue writes separately for Part IV B and is joined by Judge Douglass.

BACKGROUND

Melton had been a commercially licensed tractor-trailer driver for 35 years, including working for Yellow, a shipping company subject to the STAA, for over six years, as an “extra-board” driver. R. D. & O. at 6; Transcript (Tr.) at 21-24. An extra-board driver “takes extra runs” and “cover[s] for a driver who [is] . . . on vacation, or sick, or fatigued.” Tr. at 23. On an extra-board shift, a driver is available for “call blocks” where he is required to wait by the phone in case the employer contacts him in need of another driver. R. D. & O. at 6; Tr. at 21-24. Consequently, Melton had to adjust his sleep patterns to work an irregular schedule. Tr. at 159, 162.

In April of 2004, though, Melton received a bid to work as a regularly scheduled driver on the route from Nashville, Tennessee to Jackson, Mississippi. R. D. & O. at 6; Tr. at 26. The ordinary starting time for the route was 6:00 a.m. on Sundays, Wednesdays, and Fridays. Tr. at 27. The trip was approximately 415 miles long and would last eight to nine hours. R. D. & O. at 6; Tr. at 30. Yellow paid Melton by the mile for each trip completed. R. D. & O. at 8, 31. For the runs that were on time, Melton would arrive at the office early, around 5:30 a.m., to fill out paperwork, and inspect the vehicle. Tr. at 27. He would leave the terminal about 6:20 a.m. R. D. & O. at 6 - 7; Tr. at 29. He would stay overnight in Jackson and return to Nashville the next day. Tr. at 31. Tuesday was his day off. Tr. at 32.

The trips were often delayed, especially on Sundays, and occasionally into the afternoon. Tr. 96, 126, 159, 162, 174. When a trip was delayed, Yellow had to contact the driver at least two hours prior to the scheduled departure time. R. D. & O. at 7; Tr. at 74. If Yellow did not send the run out before midnight, the driver was not required to complete the drive, and he was paid. Tr. at 75.

In May 2004, Melton took a ten-day vacation. R. D. & O. at 7; Tr. at 33. He returned to Nashville on Thursday, May 27, 2004. Tr. at 37. Upon his return, Melton re-established his working sleeping patterns, going to bed at 6:30 p.m. to 7:00 p.m. and getting eight hours of sleep each night. R. D. & O. at 7; Tr. at 37-38.

On Saturday, May 29, Melton went to bed between 6:30 p.m. and 7:00 p.m. and set his alarm for 4:00 a.m. Tr. at 37-38. But at 3:53 a.m., Mike Millican, dispatcher for Yellow, called Melton at his home, awakening him, and told Melton that the trip to Jackson was delayed. R. D. & O. at 7; Tr. at 42. Because he had already slept nearly eight hours and was not fatigued, Melton stayed up, made a pot of coffee, and watched TV. *Id.* At 12:12 p.m., having heard

nothing further from Yellow, Melton called Danny Bennett, the Yellow Transportation Dispatcher to “take [himself] out of service.” R. D. & O. at 7; Tr. at 42. Bennett told Melton that there were no trucks on the dock and “nothing coming inbound.” Tr. at 43. Melton then told Bennett that he “was going to become too fatigued to take [the] run.” Tr. at 43. Bennett noted the call and marked Melton’s T-Card (time card) that Melton called in fatigued. R. D. & O. at 7; Joint Exhibit (JX) 4 (Melton’s T-Card). Melton did not contact his supervisor in the following ten days to explain why he was too fatigued to complete the May 30 trip. Tr. at 160.

On June 10, 2004, Jeff Bacon, line haul shift operations manager for Yellow, issued Melton a letter of warning for “using fatigue as a subterfuge to avoid work (absenteeism).” Tr. 158; JX 2 (June 10, 2004 Letter of Warning). The letter stated that “[a]ny further occurrences of this nature will subject you to more severe disciplinary action,” “in accordance with Article 45 of the National Master Freight Agreement (NMFA)” and regional supplemental agreement. JX 2; See JX 1 at 223-225 (National Master Freight Agreement and Supplements). Bacon issued the letter of warning because he thought Melton’s claim of fatigue “was a suspicious pretense” to get more time off after a ten-day vacation. Tr. at 159. Bacon knew that the Sunday bid had historically been delayed, and Melton spent his career as an extra board driver who had a very irregular schedule. *Id.*; Tr. at 162, 172. If Melton did not take the run, his next workday would have been Wednesday.

Both Yellow and union witnesses testified that a single warning letter was corrective action, and although it was a pre-condition to most discipline, it was not itself discipline. Tr. at 180, 203, 206, 216, 246. A warning letter had no effect on hours, work assignments, pay, opportunities for advancement, or retirement benefits. Tr. 208, 216, 248. Except for cardinal offenses, such as theft or fighting, a written warning during the preceding six months was required before Yellow could suspend or discharge an employee. R. D. & O. at 9; Tr. at 179-180; JX 2. After six months, the written warning “aged off” and could no longer be considered for disciplinary purposes. R. D. & O. at 9; Tr. at 122-123, 163-164. Nevertheless, warning letters remained in the employee’s personnel file and could be used to impeach the testimony of an employee who “opened the door” at a grievance hearing by claiming a clean employment history. R. D. & O. at 14; Tr. at 121, 123, 130, 136-137, 140, 153, 155, 210, 217.

In response to the June 10 Warning Letter, Melton filed a grievance on June 16 with the Teamsters Local 480 in accordance with the NMFA. JX 3 (June 16, 2004 complaint form). The form he used quoted a portion of “Federal Motor Carrier Safety Regulation 392.3” that says “No driver shall operate a motor vehicle nor can a motor carrier require or permit a driver to operate a motor vehicle, while the driver’s ability or alertness is so impaired. [sic]” The document did not mention fatigue; nor did it actually represent that Melton had been ill. Rather, it says, “It is unfair to expect drivers at Yellow Freight to refrain from getting ill over a weekend period. Sickness is something totally out of a person’s control.” *Id.*

The written warning did not entitle Melton to a hearing on his grievance. Tr. at 99, 206-07. The procedure was for the union to mediate with Yellow to try to achieve voluntary

rescission of the letter. *Id.* In this case, the grievance was not successful with Yellow, since it claimed that Melton was “ill,” contrary to his original complaint of fatigue on May 30. R. D. & O. at 9; Tr. at 162. Yellow removed Melton’s letter of warning from his personnel file in December 2004 on advice of counsel. R. D. & O. at 14; Tr. at 107, 162.

On June 28, 2004, Melton filed a complaint with the Department of Labor Occupational Safety and Health Administration (OSHA) alleging that Yellow violated the STAA’s employee protection provisions when it issued Melton a warning letter for refusing to drive due to anticipatory fatigue. Yellow failed to submit a position statement and refused to allow an on-site investigation. Nevertheless, based upon available evidence, OSHA found that it was reasonable to believe that Yellow did not violate the STAA. JX 6 (Letter from OSHA regional administrator to Melton dated Sept. 23, 2004).

Following Melton’s timely objection, an Administrative Law Judge (ALJ) conducted a two-day evidentiary hearing on the complaint and issued his R. D. & O. denying the appeal. The ALJ found that, since Melton’s anticipatory fatigue was reasonable, he engaged in STAA-protected activity in refusing the run. R. D. & O. at 11-12. However, the ALJ also found that Yellow reasonably believed that Melton was not refusing to drive because he was too tired, but rather because he wanted to extend his vacation through his next scheduled run on Wednesday. *Id.* at 12. Accordingly, Yellow issued the warning letter based on a good faith mistake of fact. *Id.* at 23. Additionally, the warning letter did not violate the STAA because, having no effect on pay, terms, or conditions of employment, it did not qualify as discipline or discrimination. *Id.* at 20, 23.

ISSUES PRESENTED

The following issues are dispositive of this case: (1) whether the warning letter constitutes “discipline or discriminat[ion] regarding pay, terms, or privileges of employment” under the STAA; and (2) whether Yellow intended to retaliate against Melton for engaging in protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct.17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a). We are bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de

novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

DISCUSSION

I. The legal framework

To prevail on a claim of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Cf. Forrest*, slip op. at 4.

II. Melton's claim of protected activity

The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

The STAA protects two categories of work refusal, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. *Eash*, slip op. at 6; *Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). While subsection (1)(B)(i) deals with conditions as they actually exist, section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the provisions. See *Eash*, slip op. at 6; *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the complainant's refusal to drive, including his work record and medical excuses).

A complainant's refusal to drive may be protected activity under subsection (1)(B)(i) if his operation of a motor vehicle would have violated a Department of Transportation (DOT) regulation that states:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2003). This regulation, known colloquially as the "fatigue rule," plainly covers a driver who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Eash*, slip op. at 6; *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-021, slip op. at 5 (ARB July 31, 2001).

However, a complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive - a "mere good-faith belief in a violation does not suffice." *Eash*, slip op. at 6; *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Cortes v. Lucky Stores, Inc.*, ARB No. 98-019, ALJ No. 1996-STA-030, slip op. at 4 (ARB Feb. 27, 1998). Thus, a complainant must introduce sufficient evidence to demonstrate that his driving ability is or would be so impaired that actual unsafe operation of a motor vehicle would result. See *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-048, slip op. at 6 (ARB July 31, 2003) (complainant who claimed sickness failed to produce sufficient evidence to demonstrate an actual violation of the fatigue rule).

A complainant's refusal to drive may also be protected under subsection (1)(B)(ii) if he has "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." This clause covers more than just mechanical defects of a vehicle - it is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). Thus, a driver's physical condition, including fatigue, could cause him to have a reasonable apprehension of serious injury to himself or the public if he drove in that condition. *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, -036, ALJ Nos. 1998-STA-009, -11, slip op. at 14 (ARB Feb. 18, 1998). The employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-038, slip op. at 3 (ARB Jan. 9, 1997).

The ALJ found that Melton reasonably believed that he could not safely complete the trip. R. D. & O. at 11. It is not altogether clear whether the ALJ found that Melton's refusal to

drive was also protected under the “actual violation” section. Expecting a 6:00 a.m. departure, Melton was on indeterminate hold at 12:12 p.m., was entitled to two hours notice, and would have had a nine-hour drive ahead once he was dispatched with a load. *Id.* Melton argues that “substantial evidence supports the conclusion that Melton had a reasonable apprehension of serious injury due to anticipated fatigue.” Complainant’s Brief (CB) at 6. The ARB accepts the ALJ’s conclusion that Melton engaged in a protected refusal to drive. The next question is whether the warning letter is an adverse action.

III. Warning letter not discipline or discrimination

The STAA states that an employer may not “discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment.” 49 U.S.C.A. § 31105(a)(1). Since Yellow Freight did not discharge Melton, the issue to consider is whether a warning letter, without tangible consequences, constitutes “discipline” or “discrimination” with regard to “pay, terms, or privileges of employment.”

In interpreting the STAA’s whistleblower protection provisions and statutes that similarly require the complainant to prove retaliatory “discipline” or “discrimination” regarding “pay, terms, or privileges of employment,” the Board has long required complainants to prove a “tangible employment action,” namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See, e.g., Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 7-12 (ARB Nov. 27, 2002) (holding that an employer’s instructions, monitoring practices, break restrictions, and written criticism did not constitute adverse actions); *Jenkins v. U.S. Emtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003) (deciding under environmental whistleblower statutes that employment evaluation without material disadvantage (i.e., reduced pay increase), removal from an assignment, and transfer to another section with no change in performance standards, title, grade, or pay were not actionable).

Thus, the ARB has generally held that a warning letter without tangible job consequences does not constitute actionable discipline or discrimination. For example, in *West v. Kasbar*, ARB No. 04-155, 2004-STA-034 (ARB Nov. 30, 2005), the respondent issued a second formal written warning to the complainant that he violated company policy by taking naps in the cab of the truck and logging the time as on rather than off duty. The letter advised that future violations would result in more severe disciplinary action up to and including discharge. The Board noted that written reprimands under progressive discipline systems may not have tangible job consequences and can lead to corrected performance. *Id.* at 4.

In *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, 2004-STA-040 (ARB Dec. 29, 2005), the respondent issued a warning letter to the complainant for excessive absenteeism. The respondent could discipline a driver for absenteeism only within nine months of issuance of the written warning. The complainant challenged issuance of the warning but made no claim that it

resulted in actual consequences. Therefore, the ARB held that the complainant failed to allege an element of his whistleblower retaliation claim, an adverse action. *Id.* at 3. *See also Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 6-7 (ARB Mar. 14, 2008) (warning letters that do not affect terms, conditions, and privileges of employment not unfavorable employment actions), citing *Oest v. Illinois Dep't of Corrs.*, 240 F.3d 605, 612-613 (7th Cir. 2001).

It is undisputed that the single warning letter at issue in this case did not effect Melton's hours, work assignments, pay, opportunities for advancement, or retirement benefits. It was not itself discipline, and, in his case, it did not lead to discipline. Nor did Melton allege or show that he was treated differently than other drivers. The letter was removed from Melton's personnel file without consequences. And Yellow issued it, not because it thought Melton had a reasonable right to claim he would be fatigued, but, as the ALJ found, because Yellow reasonably believed he was "using [a claim of] fatigue as a subterfuge to avoid work (absenteeism)." R. D. & O. at 12. Under ARB precedents, the warning letter was not an adverse action; it was not "discipline" or "discrimination" under the STAA.

IV. Melton's arguments about warning letter on appeal

A. ARB precedents

Melton contends that the warning letter he received was an adverse action under STAA. CB at 6. He argues that adverse actions are not limited to "ultimate employment actions" and that a warning letter "chills the willingness" of employees to file whistleblower complaints. CB at 8. In his brief, Melton "urges the Board in this case to reverse its holdings in *West* and *Agee*" since "the Board departed from settled precedent." CB at 18. The five cases Melton identifies to illustrate his point, CB at 6-8, are distinguishable.

In *Self v. Carolina Freight Carriers Corp.*, 1989-STA-009, slip op. at 6-7 (Sec'y Jan. 12, 1990), Self had prior absences. The second of two warning letters established him as a "habitual offender," and rendered him "subject to monitoring, responsible for furnishing doctors' releases, and specifically vulnerable to discipline," which the Board said constituted a change in his working conditions under the STAA. *Id.* at 7.

In *Stack v. Preston Trucking Co.*, 1989-STA-015 (Sec'y April 18, 1990), five letters criticized Stack's job performance. As to the first two, the Secretary of Labor could not determine whether they were the subject of a prior proceeding, and remanded that issue to the ALJ. *Id.* at 2. In the course of doing so, the Secretary noted that the letters "assertedly document that Stack's employment conditions were altered because he was subjected to special investigation" without concrete proof that he was liable for some unspecified damage. *Id.* at 4 n. 1. The Secretary noted that "this treatment would be akin to false accusation, unwarranted reprimand, intimidating comments, and undeserved evaluation that may, under certain

circumstances, constitute recognized forms of adverse action.” *Id.* As to the remaining three letters, the Secretary dismissed Stack’s retaliation claims. *Id.* at 2-3.

Hornbuckle v. Yellow Freight Sys., Inc., 1992-STA-009 (Sec’y Dec. 23, 1992) is also distinguishable because a warning letter did lead to tangible consequences. On April 9, Hornbuckle received a “letter of information” for delaying the arrival of freight because he took a fatigue break. The letter itself had no tangible effect. But two short freight delays on April 12 and April 13 resulted in a three-day suspension under Yellow’s progressive discipline procedures. The Secretary of Labor ruled that the suspension was in retaliation for Hornbuckle’s protected activity (refusing to drive because of fatigue) on April 9. *Id.* at 17.

In *Scott v. Roadway Express*, ARB No. 99-013, ALJ No. 1998-STA-008 (ARB July 28, 1999), Roadway issued two warning letters to Scott for taking more than five sick days in one year, even though he had physicians’ notes indicating that he was incapacitated due to illness on the days in question. The Board ruled that disciplining Scott for refusing to drive when it was undisputed that he was ill violated the STAA. *Id.* at 11. The ARB did not consider whether those particular warning letters had tangible consequences, because even without considering them, Roadway was justified in terminating Scott’s employment based on his overall work record. *Id.* at 14.

Finally, Melton cites *Eash v. Roadway Express, Inc.*, ARB No. 02-008, ALJ No. 2000-STA-047 (June 27, 2003). Eash met his burden of demonstrating that Roadway improperly issued a warning letter for Eash’s refusal to drive in icy conditions. Yet Roadway also established that it would have suspended Eash for five days based on the balance of his work record. *Id.* at 7.

In short, when the Board has found that warning letters were adverse actions it was where they resulted in the alteration of terms or conditions of employment; *Self, Stack*; where they led to adverse actions; *Hornbuckle*; or where the respondent failed to show a legitimate, non-discriminatory reason for their issuance; *Eash*. Those are not the facts and circumstances in this case.

B. *Burlington Northern & Santa Fe Railway Co. v. White*

In his supplemental brief, Melton urges the Board to abandon the tangible employment consequence test we have followed in *West, Agee*, and other holdings and to adopt the deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Complainant’s Supplemental Brief (CSB) at 1. This member rejects the importation of the *Burlington Northern* test to cases arising under the STAA.¹

¹ While this member would argue (in disagreement with my colleagues) that the deterrence test of *Burlington Northern* does not trump the tangible employment test the ARB has previously applied

In *Burlington Northern*, the Supreme Court distinguished between the substantive anti-discrimination provisions of Title VII of the Civil Rights Act of 1994, 42 U.S.C.A. § 2000e-2(a)(West 2003),² and the anti-retaliation provisions, § 2000e-3(a).³ The anti-discrimination provisions make it an unlawful employment practice for an employer to “discharge” or “discriminate” against an individual “with respect to his compensation, terms, conditions, or privileges of employment,” because of such individual’s race, color, religion, sex, or national origin. The anti-retaliation provision makes it an unlawful employment practice for an employer to “discriminate against” an employee who, among other things, “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation.

to the other whistleblower statutes and their implementing regulations that fall under our jurisdiction, that question is not before us in this case.

² The substantive anti-discrimination provisions state:

It shall be an unlawful employment practice for an employer –

(1) *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or*

(2) *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.*

§ 2000e-2(a) (emphasis added).

³ The anti-retaliation provision of Title VII states:

It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§ 2000e-3(a) (emphasis added).

While the anti-discrimination provisions limit actionable “discrimination” to tangible harms in the workplace (i.e., “compensation, terms, conditions, or privileges of employment”), the Court found no such limitation in the language of the anti-retaliation provision. 548 U.S. at 61-63. “[D]iscriminate against” is not defined in the provision, and according to the Court, can include harms that are not employment related, or, if they are employment related, are not tangible. However, they cannot be “trivial” and must be “materially adverse,” which the Court defined to mean “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). So a violation of Title VII’s substantive discrimination provision still requires a tangible employment consequence, but a violation of the retaliation provision occurs whenever an employee would be deterred from making a protected complaint.

Federal courts applying Title VII and similar employment discrimination statutes after *Burlington Northern* have maintained this dichotomy. Where the anti-discrimination portion of the statute speaks of “compensation, terms, conditions, or privileges of employment” or the like, the court will apply a tangible employment consequences test. Where the anti-retaliation portion of the statute speaks only of “discrimination,” the court will apply *Burlington Northern*’s “dissuade a reasonable worker” deterrence test. *See, e.g., Whigum v. Keller Crescent Co.*, 260 Fed. Appx. 910 (7th Cir. 2008) (racial discrimination and retaliation under Title VII); *Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007) (racial discrimination and retaliation under Title VII); *Watson v. City of Cleveland*, 202 Fed. Appx. 844 (6th Cir. 2006) (racial discrimination and retaliation under Title VII); *Hempfling v. United Refining Co.*, No. 06-334, 2008 WL 201900 (W.D. Pa. Jan. 23, 2008) (age discrimination and retaliation under Age Discrimination in Employment Act (ADEA)); *Toulan v. DAP Prods., Inc.*, 2007 U.S. Dist. LEXIS 4087 (D. Md. Jan. 17, 2007) (discrimination based on race, national origin, and gender and retaliation under Title VII); *Malone v. City of New York*, 2006 U.S. Dist. LEXIS 61866 (W.D.N.Y. Aug. 30, 2006) (discrimination based on race and gender, and retaliation under Title VII).

The ARB should not import the Supreme Court’s *Burlington Northern* test to the STAA. Although the STAA whistleblower protection provision is an anti-retaliation statute, its language has the same tangible employment consequence requirement as the substantive provision of Title VII. STAA makes it a violation to “discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment” because the employee engaged in activity that the STAA protects. 49 U.S.C.A. § 31105(a)(1). The STAA does not make it a violation to “dissuade” a worker from engaging in protected activity. Our allegiance must be to the language of the STAA, and not to the Supreme Court’s interpretation of different language from a different statute, no matter how alluring some may find the *Burlington Northern* test.

Although this member declines to adopt *Burlington Northern* as the measure of a STAA violation, courts applying its deterrence test in appropriate statutory settings have concluded that a “single Letter of Warning is simply not the sort of action that would dissuade a reasonable employee” from exercising her rights. *Carroll v. Potter*, No. 3:05-CV-108-S, 2007 WL 3342298, at *5 (W.D. Ky. Nov. 7, 2007) (interference and retaliation suit under the Family

Medical Leave Act (FMLA)).⁴ In *Carroll*, shortly after returning from FMLA-approved leave, the Post Office issued a warning letter to Carroll regarding her performance. *Id.* at *2. The letter stated that “future deficiencies will result in more severe disciplinary action being taken against you” and that “such action may include suspension, reduction in grade and/or pay, or removal from the Postal Service.” *Id.* at *5. Although the letter had the effect of moving Carroll closer to a termination or suspension, the court found the letter was not materially adverse under *Burlington Northern. Id.*

Other courts have reached similar conclusions. See *Kant v. Seton Hall Univ.*, No. 03-6135, 2008 WL 65159, at *16 (D.N.J. Jan. 4, 2008) (letters warning of “disciplinary action up to and including dismissal” would not have “dissuaded a reasonable worker from making or supporting a charge of discrimination” under *Burlington Northern*); *Fratarcangeli v. United Parcel Serv.*, No. 8:04-CV-2812-T-TGW, 2008 WL 821946, at *9-10 (M.D. Fla. Mar. 26, 2008) (Although warning “placed Plaintiff in greater jeopardy of more serious discipline,” he did not argue “that he subsequently suffered more serious disciplinary action as a result of this attendance warning. Therefore, at best, this discipline is a trivial harm that had no materially adverse effect upon the plaintiff.”); *Pedicini v. United States*, 480 F. Supp. 2d 438, 454 (D. Mass. 2007) (warning letters indicating possibility of future discipline “fall short of the materially adverse standard.”).

In sum, a warning letter without any tangible job consequence is not discipline or discrimination under STAA. Since Melton failed to prove that he suffered an adverse action, a requisite element of his case, his entire claim must fail. *Eash* slip op. at 5; *Forrest*, slip op. at 4. Nevertheless, this opinion proceeds to the second dispositive question, whether Yellow intended to retaliate against Melton for engaging in protected activity.

V. Melton did not prove intentional discrimination

Melton also failed to prove that his putative protected activity was the reason for the warning letter. This Board has often found it useful to analyze whistleblower complaints under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See, e.g., *Densieski*, slip op. at 4; *Regan*, slip op. at 4. Here, Melton reasonably believed that he would be too tired to drive (his protected complaint), and for the sake of argument only, the warning letter was discipline or discrimination (the adverse action). If he adduced evidence that the reason Yellow issued the warning letter was that Melton would be too tired to drive, he established his prima facie case.

It then fell to Yellow to articulate legitimate, non-discriminatory reasons the warning letter was issued. Yellow knew only that Melton called in fatigued at noon on May 30 after a

⁴ The anti-retaliation provision of the FMLA states “It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.” 29 U.S.C.A. § 2615(a)(2)(West 2008).

ten-day vacation, and ample opportunity to obtain enough rest to safely complete his run. If Melton did not begin the run on Sunday, his next day of work would be Wednesday. Bacon, the line haul shift operations manager, issued the warning letter believing that Melton was not fatigued, but trying to extend his days off. He was “using fatigue as a subterfuge to avoid work (absenteeism).” His union grievance after the warning letter was sent indicated that Melton had been ill, not fatigued. If Melton claimed to be fatigued (or ill) when he was not, the warning letter was a legitimate exercise of Yellow’s rights.

Melton had the ultimate burden of proving a STAA violation, through direct evidence or by demonstrating that Yellow’s reason for issuing the warning letter was a pretext for discrimination. *Texas Dep’t of Cmty Affairs v. Burdine*, 450 U.S. 248, 256 (1981). “The relevant ‘falsity’ inquiry is whether the employer’s stated reasons were held in good faith at the time [the adverse action was taken], even if they later prove to be untrue . . .” *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1092 (10th Cir. 2007), quoting *Young v. Dillon Cos.*, 468 F.3d 1243, 1249 (10th Cir. 2006). The ALJ concluded that Bacon issued the warning letter in the mistaken, but reasonable, belief that Melton was not genuinely fatigued. R. D. & O. at 12. Therefore, Melton failed in his ultimate burden of proving that his protected activity (complaint of fatigue) was the “reason” for the warning letter.

CONCLUSION

Substantial evidence in the record supports the ALJ’s findings of fact and he correctly applied the law when he held that Melton did not suffer discipline or discrimination because he engaged in STAA-protected activity. Because the Board agrees that Yellow did not violate the STAA, it **AFFIRMS** the ALJ’s R. D. & O. and **DENIES** Melton’s complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

Judge Transue, joined by Chief Judge Douglass, concurs but writes separately on the issue of whether the “materially adverse” standard enunciated in *Burlington Northern & Santa Fe Ry. Co. v. White*⁵ applies here.

Chief Judge Douglass and I concur with our colleague that Melton engaged in activity that the STAA protects. We also agree that Melton did not prove that the warning letter was

⁵ 548 U.S. 53 (2006).

adverse or that Yellow intended to retaliate because of the protected activity. Therefore, we agree that Melton's complaint must be denied.

We cannot agree, however, with our colleague's position that the *Burlington Northern* standard does not apply to the STAA. We note that one panel of this Board did apply the standard to a STAA case.⁶ Furthermore, we have applied this standard in cases arising under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,⁷ the Energy Reorganization Act,⁸ the Sarbanes-Oxley Act of 2002,⁹ and the Environmental Acts.¹⁰ Even so, the Board has not explained in detail why the *Burlington Northern* standard applies to the employee protection statutes that the Department of Labor adjudicates.¹¹

Today, we provide that explanation. But before doing so, we should first review the facts, holdings, and rationale of *Burlington Northern*.

I.

Sheila White operated a forklift at Burlington's Memphis, Tennessee yard. Shortly after she began working for Burlington, she told company officials that her immediate supervisor had

⁶ See *Luckie v. United Parcel Serv.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-039, slip op. at 16-17 (ARB June 29, 2007).

⁷ 49 U.S.C.A. § 42121 (West Supp. 2005); *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-047, slip op. at 9-12 (ARB Jan. 31, 2007).

⁸ 42 U.S.C.A. § 5851 (West 2003); *Overall v. Tennessee Valley Auth.* ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 7-10 (ARB July 16, 2007).

⁹ 18 U.S.C.A. § 1514A (West 2006); *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 13 (ARB Aug. 31, 2007).

¹⁰ The Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Solid Waste Disposal Act (SWDA), also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6971 (West 2003); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005); *Powers*, slip. op. at 13.

¹¹ See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) at 4.(c.) (listing, among others, employee (whistleblower) protection statutes that the Department of Labor adjudicates).

sexually harassed her. Soon after that, another Burlington supervisor removed White from her forklift operator position and assigned her to ordinary track laborer duties. And several months later, her supervisor suspended her for 37 days without pay for insubordination. After she filed a grievance, Burlington decided that White had not been insubordinate and reinstated her and awarded her back pay for the 37-day suspension.

White sued, claiming that the sexual harassment violated Title VII's anti-discrimination provision. That provision, section 703(a), makes it unlawful for an employer, because of an individual's race, color, religion, sex, or national origin, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."¹² White also claimed that because she had reported the sexual harassment, the company retaliated by taking away her job as a forklift operator and later suspending her. These actions, she alleged, violated section 704(a), Title VII's anti-retaliation provision. That section makes it unlawful for an employer "to discriminate against any of his employees" because the employee or job applicant "opposed any practice" that Title VII forbids or "made a charge, testified, assisted, or participated in any manner" in a Title VII investigation, proceeding, or hearing.¹³

A jury found in Burlington's favor on the sex discrimination claim but in White's favor on the retaliation claims and awarded her damages. Burlington filed a motion arguing that it was entitled to judgment as a matter of law because the transfer from forklift operator to track duties and the suspension were not "adverse employment actions" within the meaning of section 704(a). When the District Court denied the motion, Burlington appealed. The Sixth Circuit Court of Appeals, en banc, affirmed the District Court but differed on the standard to apply in determining what constitutes "adverse employment action."¹⁴

The Supreme Court affirmed the Sixth Circuit's judgment but granted certiorari to resolve disagreement among the Circuits not only as to how harmful the employer action must be to fall within section 704(a), but also whether that action must be employment or workplace related.¹⁵ The Court first resolved the issue concerning 704(a)'s scope. It held that section 704(a) "extends beyond workplace-related or employment-related retaliatory acts and harm." In doing so, the Court rejected arguments that 704(a) should be construed together (*in pari materia*) with section 703(a), Title VII's anti-discrimination provision. As already noted, that provision makes it unlawful for an employer, because of an individual's race, color, religion, sex, or national origin, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual *with respect to his*

¹² 42 U.S.C.A. § 2000e-2(a) (West 2003).

¹³ 42 U.S.C.A. § 2000e-3(a).

¹⁴ *White v. Burlington Northern & Santa Fe Ry. Co.*, 364 F.3d 789, 795-804, 809-818 (6th Cir. 2004).

¹⁵ *Burlington Northern*, 548 U.S. at 60.

compensation, terms, conditions, or privileges of employment.”¹⁶ Section 704(a), the anti-retaliation provision, does not contain 703(a)’s limiting words, italicized above. Therefore, the Court held that 704(a) is not limited to workplace-related or employment-related retaliatory acts or harm.¹⁷

The Court then examined the split among the circuits as to how harmful the employer’s action must be before it is actionable under 704(a). In choosing the standard that the Seventh and District of Columbia Circuits employ, the Court held that a Title VII plaintiff bringing a 704(a) retaliation claim must show that a reasonable employee or job applicant would find the employer’s action “materially adverse.” That is to say, “the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”¹⁸ The Court preferred this standard because *material* adversity separates significant from trivial harm, like the “petty slights or minor irritations that often take place at work and that all employees experience.” The Court also liked this approach because, by judging the employer’s action through the eyes of a reasonable employee in the plaintiff’s position, this standard is necessarily objective, thus avoiding “the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.”¹⁹ The Court also noted that adopting a standard phrased in general terms rather than specific prohibited employer acts allows the fact finder to consider the particular circumstances underlying the employer’s action. This was important to the Court because an “act that would be immaterial in some situations is material in others.”²⁰

Having set out the facts, holdings, and rationales in *Burlington Northern*, we turn to why we conclude that the “materially adverse” standard applies to the STAA and other employee protection statutes that the Labor Department adjudicates.

II.

Under the STAA, certain employers may not “discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment” because the employee engages in specified protected activity.²¹ Thus, the STAA contains language very similar

¹⁶ 42 U.S.C.A. § 2000e-2(a) (emphasis added).

¹⁷ 548 U.S. at 61-67.

¹⁸ *Id.* at 57, 67-68, quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) and *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

¹⁹ *Id.* at 68-69.

²⁰ *Id.* at 69, quoting *Washington*, 420 U.S. at 661.

to 703(a)'s prohibition that employers may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of such individual's race, color, religion, sex, or national origin. All of the employee protection statutes that the Labor Department adjudicates either contain similar language or, by regulation, are limited to discrimination "with respect to the employee's compensation, terms, conditions, or privileges of employment."²²

Title VII's sections 703(a) and 704(a), like the STAA, prohibit "discrimination." All three statutes use the words "discriminate against" but do not define "discrimination." Courts and this Board have interpreted "discrimination" to mean "adverse employment action" or simply "adverse action."²³ Unlike Title VII's section 703(a), which prohibits discrimination because of protected status, 704(a) protects against discrimination because of protected activity, that is, it protects against retaliation. Retaliation is a form of discrimination. The STAA and all of the other employee protection statutes that the Labor Department adjudicates prohibit discrimination because of protected activity. Thus, claims brought under these statutes are prototypical retaliation claims. "A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee's protected activity rather than as a result of an employee's characteristics. The burdens of proving a retaliation claim are the same as those of a standard discrimination claim."²⁴

²¹ 49 U.S.C.A. § 31105 (a)(1) (West 2008).

²² See, e.g., Clean Air Act, 42 U.S.C.A. § 7622(a) (West 2003) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment"); Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851(a)(1)(West 1995) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment"). Whistleblower protection provisions that the Secretary adjudicates that do not contain the "compensation, terms, conditions, and privileges" language include the Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C.A. § 9610(a) (West 2005) ("No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee"); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a)(West 2003) (same); and the Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (West 2001) (same). Even so, the regulations that implement those statutes limit their scope to "compensation, terms, conditions, or privileges of employment." See 29 C.F.R. § 24.102(a) (2008).

²³ See *Washington*, 420 F.3d at 660 ("adverse employment action" is a "judicial gloss on the word 'discrimination'").

²⁴ See 63 Fed. Reg. 44,956, 44,957 (Aug. 10, 2007) (preamble to interim final rule implementing the Employee Protection Provisions of Six Federal Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended), citing *Essex v. U.S. Parcel Serv., Inc.*, 111 F.3d 1304, 1308 (7th Cir. 1997).

Here, our colleague applies the “tangible job consequence” standard that this Board employed, prior to *Burlington Northern*, to determine whether a STAA complainant (or any other whistleblower) suffered actionable adverse action. While agreeing that the STAA is an anti-retaliation statute, and agreeing, at least implicitly, that the Supreme Court held that the “materially adverse” standard applies to section 704(a), an anti-retaliation statute, our colleague will not apply the “materially adverse” standard because, unlike 704(a), the STAA contains the phrase “pay, terms, or privileges of employment,” which modifies and limits the words “discriminate against.” Simply put, he argues that because the Court applied the “materially adverse” standard to a statute that does not contain limiting language (i.e., “pay, terms, or privileges of employment”), and because the statutes we adjudicate do contain that language (explicitly or by regulation), we should not apply the “materially adverse” test to those statutes because “[o]ur allegiance must be to the language of the STAA, and not to the Supreme Court’s interpretation of different language from a different statute, no matter how alluring some may find the *Burlington Northern* test.”²⁵

Granted, the Court was interpreting the language in 704(a) and not the STAA, and thus, in one of its holdings, was “interpreting different language from a different statute.”²⁶ Nevertheless, our colleague seems to ignore the fact that, in its other holding, the Court specifically addressed the significance of modifying language similar to that contained in the STAA. As noted earlier, the Court announced two holdings. First, the Court wrote that since 703(a) contains the words “compensation, terms, conditions, or privileges of employment,” which modify “discriminate against” (similar to the STAA’s “pay, terms, or privileges of employment” that also modify “discriminate against”), those words “explicitly limit the scope of that provision to actions which affect employment or alter the conditions of the workplace.”²⁷ Section 704(a) does not contain any language modifying its use of “discriminate against.” Therefore, the Court held that the scope of 704(a) extends beyond workplace-related employer acts. Thus, the modifying language in 703(a) was relevant only in determining the scope of 703(a) and 704(a). Likewise, the modifying language contained in the STAA and the other Labor Department statutes or implementing regulations is relevant only to the scope of employer retaliation.

But the issue here is the degree, not the scope, of retaliation.²⁸ The Court’s separate holding addressed the degree of retaliation, that is, “the level of seriousness to which . . . harm [to the employee] must rise before it becomes actionable retaliation” under 704(a).²⁹ Put another way, the Court interpreted what “discriminate against” means in Title VII’s anti-retaliation statute. The fact

²⁵ *Supra*, at 11.

²⁶ *Id.*

²⁷ *Burlington Northern*, 548 U.S. at 62.

²⁸ In this case, as in all Labor Department cases, the scope of employer action is not an issue because, as we explained, it is limited to the workplace.

²⁹ 548 U.S. at 67.

that 704(a) did not contain the modifying language found in 703(a) was of no import in deciding what “discriminate against” means. What is at issue here is the degree of harm Melton suffered as a result of the warning letter. But our colleague will not apply the materially adverse test to determine the degree of Melton’s harm because his “pay, terms, or privileges of employment” are at stake.

This position is untenable. This is so because the Court applied the materially adverse test to the pay, terms, and conditions of Sheila White’s employment even though 704(a) does not contain those limiting words. The Court found that a jury could reasonably have concluded that reassigning White to the track labor duties and suspending her for 37 days without pay was materially adverse.³⁰ Certainly the reassignment and suspension pertained to White’s work conditions and compensation. Thus, the materially adverse standard applies regardless whether an anti-retaliation statute contains language that limits its scope.

The Secretary of Labor and this Board have often been guided by law developed under other federal employment discrimination statutes. In particular, we have been guided by cases decided under Title VII.³¹ For instance, in STAA cases, we specifically adopted the Supreme Court’s burdens of proof methodology for pretext analysis under Title VII.³² With *Burlington Northern*, the Supreme Court has decided that, under Title VII, employer retaliation because of protected activity is actionable only if it is “materially adverse.” Since the Labor Department adjudicates protected activity retaliation cases and since we rely on Title VII precedent, we see no reason not to apply the *Burlington Northern* materially adverse test to the STAA and the other retaliation statutes that the Department administers.

III.

Burlington Northern held that for the employer action to be deemed “materially adverse,” it must be such that it “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”³³ For purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from

³⁰ 548 U.S. at 71-73.

³¹ See *Hobby v. Georgia Power Co.*, ARB No. 98-166, 98-169, ALJ No. 1990-ERA-030, slip op. at 15 (ARB Feb. 9, 2001).

³² See *Safley v. Stannards, Inc., d/b/a/ Stannard Moving & Storage*, ARB No 05-113, ALJ No. 2003-STA-054, slip op. at 5 (ARB Sept. 30, 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

³³ 548 U.S. at 57.

engaging in protected activity. According to the Court, a “reasonable worker” is a “reasonable person in the plaintiff’s position.”³⁴

Does our colleague not embrace the “materially adverse” standard because it depends upon the perspective of a reasonable employee in similar circumstances? Surely he favors an objective approach to judge whether the employer’s action was adverse. Relying upon the whistleblower’s subjective feelings about the severity of the alleged retaliation certainly would not separate significant from trivial acts. And after all, the purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer’s action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes.

On the other hand, perhaps our colleague’s reluctance to apply the *Burlington Northern* standard stems from the fact that the words “materially adverse” would replace the words “tangible employment action,” or “tangible employment consequences,” or “tangible harms.” Since the employee protection statutes that we deal with are confined to employment or workplace related retaliatory acts, our colleague’s concern may be that a “materially adverse” employment action somehow differs from an employment action that results in “tangible consequences.” But both our case law and federal case law demonstrate that these terms are used interchangeably to describe the level of severity an employer’s action must reach before it is actionable adverse employer action.

Let’s start with our cases. A good example may be found in *Jenkins v. U.S. Envtl. Prot. Agency*.³⁵ There, the complainant alleged that her employer violated the employee protection sections of all of the Environmental Acts.³⁶ In deciding whether her numerous claims constituted adverse action, we devoted considerable energy in citing extensive federal case authority.³⁷ And those authorities used various terms to describe what constitutes adverse action. For example, at the outset of our discussion we quoted the Supreme Court’s *Burlington Industries, Inc. v. Ellerth*, where the Court wrote that examples of “tangible employment action” would be ones involving a “significant change in employment status” such as hiring or firing.³⁸

³⁴ *Id.* at 70-71.

³⁵ ARB No. 98-146, ALJ No. 1988-SWD-002 (ARB Feb. 28, 2003).

³⁶ See n. 6.

³⁷ *Jenkins*, slip op. at 20-22.

³⁸ 524 U.S. 742, 761 (1998).

A few lines later, we cited *Price v. Delaware Dep't of Corr.* for its observation that an actionable adverse action must be “serious and tangible enough to affect an employee’s terms and conditions of employment.”³⁹ As more authority for the “tangible” standard, we cited one Eighth Circuit case, three Seventh Circuit cases, and a New York district court case for the proposition that less obvious (than hiring or firing) employment actions might be adverse “if they have tangible effects.”

In the next paragraph, we cited cases from the Sixth, Eighth, and District of Columbia Circuits to support our observation that negative performance ratings alone may not constitute adverse action in some venues where proof of “material employment disadvantage” is necessary to render a complaint actionable. We therefore concluded that because the negative rating Jenkins received accompanied “monetary deprivation,” she had been “material[ly] disadvantage[d].” In ruling on whether Jenkins’s lateral transfer was actionable, we relied on *Ledergerber v. Stangler*, an Eighth Circuit case holding that lateral transfers not entailing a demotion in form or substance do not rise to the level of a “materially adverse employment action.”⁴⁰ And as authority for observing that an assignment to a less desirable work shift might constitute adverse action, we cited language from *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana* that “a termination from employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities” may signal “a materially adverse change.”⁴¹

West v. Kasbar, Inc./Mail Contractors of America, Inc., a STAA case that we decided, contains more examples of using interchangeable standards to define adverse action.⁴² As authority for the complainant’s burden to prove adverse action, we cited *Oest v. Illinois Dep't of Corrs.* That case indicates that though the Seventh Circuit has defined adverse employment actions broadly, an adverse action “must be materially adverse to be actionable.”⁴³ We also cited *Whittaker v. Northern Ill. Univ.*, a case that, in the same paragraph, states that an adverse action must “materially alter” the terms and conditions of employment, but that the adverse actions at issue did not result in “tangible job consequences” and therefore were not actionable.⁴⁴ As another example from our cases, in *Erickson v. U.S. Emt'l Prot. Agency*,⁴⁵ a case we decided a

³⁹ 40 F. Supp. 2d 544, 552-553 (D. Del. 1999).

⁴⁰ 122 F.3d 1142, 1144 (1997).

⁴¹ 993 F.2d 132, 136 (7th Cir. 1993).

⁴² ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 4-5 (ARB Nov. 30, 2005).

⁴³ 240 F.3d 605, 612-613 (7th Cir. 2001).

⁴⁴ 424 F.3d 640, 647-648 (7th Cir. 2005).

month before the *Burlington Northern* decision, we not only cited *Jenkins* as authority for what constitutes adverse action under two of the Environmental Acts, we also cited *Shotz v. City of Plantation, Fla.*, an Eleventh Circuit case that held that “an employee must show a *serious and material* change in the terms, condition, or privileges of employment.”⁴⁶ Finally, perhaps the best example of our using terms interchangeably is found in *Overall v. Tennessee Valley Auth.*⁴⁷ We quote:

To succeed, Overall must prove by a preponderance of the evidence that TVA took a “tangible employment action” that resulted in a significant change his employment status. This means that Overall must prove that TVA’s action was “materially adverse,” that is, TVA’s actions must have been harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity.^[48]

We briefly point out two federal appellate cases decided after *Burlington Northern* to further emphasize the point that federal courts, too, use interchangeable terminology to describe what constitutes adverse action. In *DeLarama v. Illinois Dep’t of Human Servs.*, the plaintiff sued under 703(a). The court began its discussion by stating, “We have explained that in order to be actionable, ‘adverse actions must be materially adverse.’” But in concluding its decision, the court wrote that because the plaintiff “has not alleged any *tangible consequences* resulted from [the employer action] . . . we affirm the district court’s conclusion that she did not suffer a *materially adverse* employment action.”⁴⁹ And in *Ginger v. District of Columbia*, involving federal employee Title VII discrimination and retaliation claims, the court wrote, “An employment action does not support a claim of discrimination unless it has ‘*materially adverse* consequences affecting the terms, conditions, or privileges of [the plaintiff’s] employment . . . such that a reasonable trier of fact could find objectively *tangible harm*.’”⁵⁰

⁴⁵ ARB Nos. 03-002, 03-003, 03-004, 03-064, ALJ Nos. 1999-CAA-002, 2001-CAA-008, 2001-CAA-013, 2002-CAA-03, 2002-CAA-018, slip op. at 18 n.52 (ARB May 31, 2006).

⁴⁶ 344 F.3d 1161, 1181-1182 (2003) (emphasis in original).

⁴⁷ ARB No. 04-073, ALJ No. 1999-ERA-025 (ARB July 16, 2007).

⁴⁸ *Id.*, slip op. at 10-11.

⁴⁹ ___F. 3d ___, No. 07-1156, 2008 WL 4052918, *at 2-3 (7th Cir. Sept. 2, 2008) (emphasis added).

⁵⁰ 527 F.3d 1340, 1343 (D.C. Cir. 2008) (quoting *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (emphasis added)).

We sum up. The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.⁵¹ The employee protections that the Labor Department administers are not “general civility codes,” nor do they make ordinary tribulations of the workplace actionable.⁵² Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment.⁵³ Therefore, the fact that the *Burlington Northern* test is phrased in terms of “materially adverse” rather than “tangible consequence,” or “significant change,” or “materially disadvantaged,” or the like, is of no consequence.⁵⁴ Applying this test would not deviate from past precedent. Like the *Burlington Northern* Court, our task has always been, and will continue to be, to separate harmful employer action from petty, minor workplace tribulations.

IV.

Eight members of the U.S. Supreme Court held that to be actionable under Title VII’s anti-retaliation provision, employer action must be materially adverse, that is, harmful to the point that it could dissuade a reasonable worker from engaging in activity that Title VII protects. We cannot agree that this holding should not apply to the anti-retaliation provisions of statutes that the United States Department of Labor administers and adjudicates merely because those statutes contain language limiting their scope, but Title VII’s anti-retaliation provision does not. *Burlington Northern* clearly indicated that section 704’s scope was of no import in adopting the materially adverse standard. Furthermore, applying the reasonable worker, objective standard that the Court announced comports with the purpose of the whistleblower protections. Moreover, applying this standard rather than the “tangible consequences” or “tangible employment action” test does not signal any departure from past practice. Only the terminology changes. Finally, we note that, contrary to our colleague’s assertion that courts will not do so, at least one court has found it “appropriate” to apply the materially adverse standard to a claim arising under the Sarbanes-Oxley Act, one of the statutes that the Labor Department

⁵¹ See *Jenkins*, slip op. at 20, citing *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-047, slip op. at 9 (ARB Jan. 31, 2007)

⁵² *Jenkins*, slip op. at 20, citing *Anderson v. Coors Brewing Co.*, 181 F. 3d 1171, 1178 (10th Cir. 1999).

⁵³ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 12 (ARB Feb. 29, 2000).

⁵⁴ *But see Crawford v. Carroll*, 529 F.3d 961, 973-974 nn.14, 15 (11th Cir. 2008) (indicating that the materially adverse standard is distinct and different from, and significantly broadens, the “serious and material” standard).

administers.⁵⁵ In addition, the Sixth Circuit seemed inclined to apply that standard in a case brought under the employee protection section of the Energy Reorganization Act, a statute the Department also administers.⁵⁶

For these reasons we hold, and thus a majority of this Board holds, that in cases arising under the employee protection sections of all of the statutes that the Labor Department adjudicates, the *Burlington Northern* materially adverse standard, not the tangible consequence standard, governs whether the employer action is adverse.

Applying this standard here, we find that the warning letter that Melton received was not materially adverse since, as our colleague has pointed out, the record demonstrates that it did not affect his pay, terms, or privileges of employment, did not lead to discipline, and was removed from his personnel file without consequences. Therefore, under the particular facts and circumstances presented here, the warning letter at issue would not dissuade a reasonable employee from refusing to drive because of fatigue. Accordingly, we concur that Melton's complaint must be **DENIED**.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁵⁵ See *Miles v. Wal-Mart Stores, Inc.*, No. 06-5162, 2008 WL 222694, *at 4 (W.D. Ark. Jan. 25, 2008).

⁵⁶ See *McNeill v. U.S. Dep't of Labor*, 243 Fed. Appx. 93, 98 (6th Cir. 2007) ("For purposes of this case, we assume that *White* [i.e. *Burlington Northern*] applies.").