In the Matter of:

ROBERT WEST,

COMPLAINANT,

v.

KASBAR, INC./MAIL CONTRACTORS OF AMERICA, INC.,

RESPONDENT.

ARB CASE NO. 04-155

ALJ CASE NO. 2004-STA-34

DATE: November 30, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center, Burnsville, Minnesota***

For the Respondent:
Donna Galchus, Esq., ***Cross, Gunter, Witherspoon & Galchus, P.C., Little Rock, Arkansas***

FINAL DECISION AND ORDER

Robert West complained that Kasbar, Inc. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), and its implementing regulations, 29 C.F.R. Part 1978 (2005), when it issued him a written warning for taking a rest stop inside the cab of his truck and logging the time as on duty. We approve the Administrative Law Judge's (ALJ) Recommended Decision and Order (R. D. & O.) that the complaint be dismissed for failing to state a claim that West suffered tangible job consequences.

BACKGROUND

For the purpose of ruling on the motion to dismiss, we assume the truth of West's allegations. In his November 3, 1998 complaint to the Occupational and Safety Health Administration (OSHA), West alleged that he was an employee and Kasbar was a commercial motor carrier subject to the STAA. Complaint at 1. On August 15, 1998, West was driving back from Indianapolis to Kansas City. From 5:30 a.m. to 6:30 a.m., he took a nap in the cab of his truck, which did not have a separate sleeper berth. *Id*. at 1-2. On August 18, 1998, Kasbar issued a warning letter that said:

> 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.
>
> 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.

Id. at 3 and Exhibit A (emphasis and brackets in original).

West asserted that United States Department of Transportation (DOT) regulations prohibited him from driving while fatigued and required that he log time in his truck other than sleeping in a sleeping berth as on duty. He therefore complained that, contrary to the STAA, Kasbar had disciplined him for engaging in a protected activity. Complaint at 1-3.

OSHA did not investigate. On February 20, 2004, it wrote West's counsel that, because of the age of the complaint and the failure of West to provide information regarding the alleged violation, the case was considered closed. Motion to Dismiss, Exhibit A. On March 19, 2004, West's counsel objected to OSHA's "Findings and Order," thereby appealing the decision to an ALJ.

Mail Contractors of America purchased Kasbar, Inc. and the ALJ substituted Mail Contractors as the Respondent. *See* Order Substituting Party, Canceling Hearing, and Setting Deadline for Responses to Respondent's Motion to Dismiss, June 18, 2004. The ALJ addressed two issues that Mail Contractors raised in its motion to dismiss.

First, OSHA's decision to close its investigation after West failed to provide relevant evidence was "in effect [a] finding that it did not have a reasonable basis to believe that Respondent had violated the STAA." R. D. & O. at 3. West properly appealed that decision to an ALJ. *Id.* Mail Contractors does not press the point before us, and therefore we need not address it.

Second, the ALJ ruled that West's STAA complaint failed as a matter of law, because the warning letter did not amount to discrimination "regarding pay, terms, or privileges of employment" under the STAA. *Id.* at 3-4.

The R. D. & O. is now before us under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

In ruling on a motion to dismiss, we make all reasonable inferences in the non-moving party's favor, and deny dismissal unless he can prove no set of facts which would entitle him to relief. *Fullington v. AVSEC Servs., LLC,* ARB No. 04-019, ALJ No. 2003-AIR-30, slip op. at 5 (ARB Oct. 26, 2005).

DISCUSSION

We now consider whether West's complaint was properly dismissed because he failed to allege that Kasbar subjected him to an adverse action.

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These protected activities include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 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," § 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, § 31105(a)(1)(B)(ii).

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; and that the protected activity was the reason for the adverse action. *Forrest v. Dallas and Mavis Specialized Carrier Co.,* ARB No. 04-052, ALJ No. 2003-STA-53, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.,* ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply,* ARB No.

03-117, ALJ No. 03-STA-14, 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,

In this case, West satisfactorily alleged that he was a Kasbar employee and that Kasbar was an employer subject to the STAA. West also averred that he engaged in protected activity under the STAA when he refused to comply with Kasbar's policy that he log his breaks as off duty, rather than, as he did, on duty, not driving.[1] However, we proceed to the issue on which the ALJ decided this case. Where future violations could lead to West's discharge, was Kasbar's second written warning to him for violating company policy an adverse action under the STAA?

The STAA prohibits discrimination "regarding pay, terms, or privileges of employment." § 31105(a)(1)(A). Because the whistleblower protection statutes under our jurisdiction do not define those terms, we have looked to Supreme Court and Circuit Court decisions giving them meaning in Title VII and other employment discrimination cases. To establish prohibited discrimination, the complainant must allege and later prove that he suffered "tangible job consequences." *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 98-CAA-19, slip op. at 8 (ARB Mar. 30, 2001), *citing Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 612-613 (7th Cir. 2001).

In *Oest*, the Seventh Circuit held that oral or written reprimands under a progressive discipline system did not implicate "tangible job consequences" to establish an independent basis for liability under Title VII. 240 F.3d at 613. A reprimand is not adverse because it may bring an employee closer to termination. "Such a course [is] not an inevitable consequence of every reprimand, however; job-related criticism can prompt an employee to improve her performance and thus lead to a new and more constructive employment relationship." *Id.*

Relying on *Oest*, we held in *Shelton* that an oral reminder, memorialized in a memorandum placed in the employee's personnel file, had no tangible job consequences and was therefore not an adverse action under environmental whistleblower statutes. Slip op. at 8. *See also Whittaker v. Northern Ill. Univ.*, 424 F.3d 640, 647-648 (7th Cir. 2005) (holding that negative employment evaluation, written warnings, and placement on "proof status" (requiring plaintiff to produce proof of sickness in order to receive sick leave) did not result in tangible job consequences and therefore were not adverse employment action under Title VII).

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[1] Although not raised as an issue in this case, we have previously held in another case against Mail Contractors that an employer's requirement that a driver log break time as off duty did not violate a DOT regulation. *See Hardy v. Mail Contractors of America*, ARB No. 03-007, ALJ No. 02-STA-22, slip op. at 2 (ARB Jan. 30, 2004), *citing* 62 Fed. Reg. 16370, 16422 (Apr. 4, 1997) ("It is the employer's choice whether the driver shall record stops made during a tour of duty as off-duty time.").

Returning to the facts in this case, we note that West alleged that he received a second written warning, which could lead to his discharge. However, he did not assert that the written warning resulted in actual job consequences, and so he failed to claim actionable discrimination under the STAA. *Accord Whitaker*, 424 F.3d at 647-648; *Oest*, 240 F.3d at 612-613; *Shelton* slip op. at 8. Because West failed to allege an essential element of his legal claim (adverse action), his complaint fails as a matter of law.

In reaching this conclusion, we have considered, but are not persuaded by, West's argument in favor of an expansive interpretation of "adverse action." *See* Complainant's Brief in Opposition to the Administrative Law Judge's Recommended Decision and Order. Although we agree that the STAA "is aimed at preventing [employer] intimidation" of employees for exercising their rights, intimidation does not equate with adverse action. In the case that language comes from, *Long v. Roadway Express, Inc.*, 1988-STA-31 (Sec'y Mar. 9, 1990), three employees alleged tangible job consequences, delay-time pay, for exercising STAA-protected rights.

Similarly, West quotes language from *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997), that an adverse action is "simply something unpleasant, detrimental, even unfortunate." However, a description is not a definition. In *Stone & Webster*, the adverse action was a demotion and transfer to a less-desirable facility, in other words, a tangible job consequence.

West also cites us to cases stating that adverse action does not require economic harm. *See, e.g., Diaz-Robainas v. Florida Power & Light Co.*, 1992 ERA-10, slip op. at 2 (Sec'y Apr. 15, 1996). While it is true that "terms, or privileges of employment" do not invariably entail monetary losses, they do have tangible consequences. In sum, West fails to direct us to an employment discrimination case ruling that a warning letter without tangible job consequences constitutes an adverse action.

CONCLUSION

Because West did not allege an adverse action under the STAA, we accept the ALJ's recommendation and **DISMISS** West's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge