

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 March 2014

CASE NO.: 2013-NTS-00002

In the Matter of:

MICHAEL BEN GRAVES,
Complainant,

vs.

MV TRANSPORTATION,
Respondent.

Appearances: Michael Ben Graves,
For himself

Todd Hunt, Esq.,
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This case arises under the National Transit Systems Security Act of 2008 (“NTSSA”) and the regulations published by the Secretary of Labor at 29 U.S.C. Part 1982. The current proceeding began when the Complainant, Michael Ben Graves, filed a complaint under 6 U.S.C. § 1142 of the NTSSA with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleging that the Respondent, MV Transportation, had retaliated against him for reporting a safety concern to his supervisors. The Complainant requested a hearing before the Office of Administrative Law Judges after OSHA dismissed his complaint.

For the reasons set forth below, this complaint is DISMISSED.

PROCEDURAL BACKGROUND

This is the Complainant's second proceeding before the OALJ. The current case began with a complaint the Complainant filed with OSHA on October 26, 2011, alleging that he had been retaliated against for engaging in activity protected by the NTSSA. OSHA issued a determination dated December 10, 2012, finding that there was no reasonable cause to believe that the MV Transportation had violated the NTSSA and retaliated against the Complainant. The Complainant requested a hearing before the OALJ in a letter dated December 14, 2012.

The hearing in this case was held on May 20 and 21, and June 6, 2013, in Long Beach, California. The Complainant and counsel for the Respondent both appeared and participated in the hearing. At the hearing on May 20, 2013, ALJ Exhibit ("ALJX") 1, Judge William Dorsey's April 18, 2012, decision in OALJ case number 2011-NTS-00004 involving the Complainant and MV Transportation, was admitted into evidence. (HT,¹ p. 7.) Complainant's exhibits ("CX") 1 through 14² were also admitted, HT, p. 13, as were Respondent's ("EX") A and B. (HT, p. 13.) At the June 6, 2013, hearing, Complainant's exhibit 15 was admitted into evidence. (HT, p. 607.)

Closing briefs were due June 20, 2013, but on June 19, 2013, the Complainant submitted additional exhibits and asked that they be admitted into evidence. With this submission, on June 19, 2013, I vacated the closing brief schedule to give Respondent an opportunity to respond to the Complainant's additional exhibits, which I marked as CX 16-18, and made the closing briefs due July 26, 2013. Respondents opposed the admission of CX 16-18, and on July 1, 2013, I issued an order excluding those exhibits. After my order excluding CX 16-18 was issued and mailed, I received a reply that the Complainant filed on July 1, 2013. I did not provide for a reply to Respondents' response to be filed, but after receiving it, since I had already excluded CX 16-18, I treated the reply as a motion for reconsideration of my ruling and issued another order on July 8, 2013, stating that I still saw no reason to admit these exhibits. In that order, I noted that the Complainant appeared to be alleging that he had either been fired or denied disability benefits in retaliation for his protected activity and suggested that he file a new complaint with the Occupational Safety and Health Administration.

The Complainant filed an "Amended Closing Brief" on July 3, 2013, and Respondents filed their closing brief on July 29, 2013.

Issues

I reviewed the issues for the hearing with the parties during a telephonic pre-hearing conference conducted on May 13, 2013, and confirmed the issues at the beginning of the hearing. The issues include:

1. Did MV Transportation retaliate against the Complainant for engaging in protected activity?

¹ References to "HT" are to the hearing transcript.

² CX 14 was admitted for the limited purpose of showing that the Complainant filed a grievance alleging harassment for two incidents.

2. Did MV Transportation retaliate against the Complainant by disciplining him on September 30, 2011, for his involvement in a minor traffic accident?
3. Did MV Transportation retaliate against the Complainant when Supervisor Paz allegedly tailgated the Complainant in November 2011?
4. Did Operations Manager Katrina Galloway harass the Complainant on July 24, 2012, by giving him an interview notice requiring him to report to her within 24 hours regarding a customer complaint?
5. Did MV Transportation fail to provide the Complainant with medical treatment and paid leave after an incident on November 27, 2012, in retaliation for his protected activity?
6. Was the Complainant improperly assessed attendance penalty points in retaliation for his protected activity?
7. If these allegations are true, are they adverse actions under the National Transit Systems Act?

(HT, pp. 4-5.)

Stipulations

During the pre-hearing conference, and confirmed at the May 20, 2013, hearing, the parties agreed to the following factual stipulations:

- 1 The Complainant made complaints in January 2011 to the Respondent that the Respondent's practice of having drivers back transit buses between other transit buses in Respondent's yard without a spotter was unsafe.
- 2 The Complainant's complaint about backing up the buses without a spotter was a protected activity.
- 3 The Complainant filed a complaint with the Occupational Safety and Health Administration in January 2011 alleging that MV Transportation had retaliated against him about bus operations safety issues.
- 4 The Complainant's January 2011 complaint was a protected activity under the National Transit Systems Act.
- 5 MV Transportation was aware of the Complainant's January 2011 protected activity.
- 6 The Complainant filed another complaint with OSHA on October 20, 2011, alleging that he was retaliated against for his protected activity.

(HT, pp. 14-19.)

ANALYSIS AND FINDINGS

Complaint History³

Earlier Complaint

The Complainant is employed as a bus driver by MV Transportation. When bus drivers finished their shifts and returned to the bus yard, they parked their buses by backing them up. MV Transportation provided spotters to help the bus drivers only if a driver asked for a spotter, but spotters were not always available. The Complainant complained to his supervisors on January 4, 2011, and January 14, 2011, that backing up a bus between other buses without a spotter was unsafe. After these complaints, the Complainant felt MV Transportation had retaliated against him for his safety complaints. He filed a complaint with OSHA on January 14, 2011, alleging that he had been retaliated against for his protected activity. On July 23, 2011, OSHA completed its investigation into this complaint and issued a determination finding that one of his complaints of retaliation was moot and that the other alleged retaliation was unrelated to his protected disclosures. The Complainant disagreed with OSHA's determination and asked for a hearing before the OALJ about his complaint.

The Complainant's complaint was assigned to Judge William Dorsey who conducted a hearing into the Complainant's complaint on October 31, 2011, and issued a decision on April 18, 2012, finding that the Complainant had engaged in a protected activity, that MV Transportation was aware of his protected activity, that the Complainant suffered an adverse action when he was assessed safety points and that Jesus Zamora's repeated orders for the Complainant to back up his bus between buses in the bus yard without a spotter were also adverse actions. Judge Dorsey also found that Mr. Zamora's actions against the Complainant were retaliatory and that the Complainant's protected activity was a contributing factor to Mr. Zamora's actions. Judge Dorsey found that the Complainant's protected activity did not contribute to the decision to assess safety points against him for his involvement in a preventable accident. However, Judge Dorsey found the Complainant had failed to prove any compensatory or punitive damages were warranted for Mr. Zamora's actions and simply ordered MV Transportation to prominently post his decision at every location where other employment-related employee notices were posted. The Complainant appealed Judge Dorsey's decision to the Administrative Review Board ("ARB"). The ARB issued a decision on August 30, 2013, affirming Judge Dorsey's decision. *Graves v. MV Transportation, Inc.* ARB No. 12-066, ALJ No. 2011-NTS-4 (ARB Aug. 30, 2013)

Current Complaint

The current case arises from a complaint the Complainant filed with OSHA on October 26, 2011, alleging that MV Transportation retaliated against him on several occasions for the same protected activity found by Judge Dorsey. The Complainant alleged in his October 2011 complaint that MV Transportation had retaliated against him because he was disciplined on September 30, 2011, for his involvement in a minor traffic accident; he was tailgated by Road

³ Some of these facts are taken from Judge Dorsey's earlier decision involving the Complainant and Respondent, ALJX 1.

Supervisor Wagner Paz⁴ while he was transporting passengers; and he was ordered by Supervisor Paz to drive unsafely to meet a relay bus.

In early to mid-2012, the Complainant added additional complaints of retaliation. On January 17, 2012, he alleged that a Field Supervisor named “Mario” had harassed him by entering his bus unexpectedly and taking photos of various parts of his bus. On May 13, 2012, he alleged that on May 12, 2012, Field Supervisors Paz and Mario Rodriguez had harassed him by ordering him to report his down time by radio when he ran five minutes late and at subsequent one minute intervals. Then, on July 25, 2012, the Complainant alleged that on July 24, 2012, Operations Manager Katrina Galloway gave him an interview notice requiring him to report to her within 24 hours regarding a customer complaint.

OSHA investigated the Complainant’s complaints and issued a determination on December 10, 2012, finding that there was no evidence to support his complaints of harassment and that the actions he complained of were “legitimate supervisory and managerial tasks conducted by Respondent’s management in compliance with established company procedures.” (CX 6-1.) OSHA also found that none of these actions were adverse actions. (CX 6-2.) OSHA further found that the Complainant’s treatment with regard to his workers’ compensation injury was in accordance with California law and/or company policy for accepted procedures for processing workers’ compensation claims. (CX 6-3.) OSHA dismissed his complaint. (CX 6-3.)

The Complainant asked for a hearing before the OALJ with regard to these new complaints. On February 11, 2013, the Complainant filed an amended complaint dated February 8, 2013, with the OALJ adding allegations that Respondent retaliated against him by secretly placing “false, discriminatory and malicious” documents in his personnel file, endangering him and his passengers by failing and refusing to follow or comply with Respondent’s policy and procedures regarding an attack on the Complainant by a passenger on November 27, 2012, refusing to permit the Complainant to go to scheduled workers’ compensation doctor appointments during business hours, penalizing him for returning from his lunch break a few minutes early, and refusing to pay him for the Martin Luther King holiday because he gave notice and went to a worker’s compensation doctor’s appointment. (CX 11-1.)

I conducted a telephonic pre-hearing conference in this case on May 13, 2013. During the pre-hearing conference, at my request, the Complainant identified the specific retaliatory actions he was alleging against MV Transportation in this proceeding. The alleged retaliatory actions that he is pursuing in this case before the OALJ are:

1. After a September 30, 2011, traffic accident, he was assessed safety points.
2. In November 2011, Supervisor Paz tailgated him.
3. On July 24, 2012, Katrina Galloway harassed him by giving him an interview notice requiring him to report to her within 24 hours regarding a customer complaint.

⁴ Mr. Paz’s correct name is Wagner Paz, but the Complainant at times referred to him as “Warner” Paz. *See* CX 10-1; CX 12-14.

4. He was treated differently from other employees with work-related injuries and not in accordance with company policy after an incident on November 27, 2012.
5. He has been treated unfairly in the assessment of attendance penalty points on multiple occasions.

These alleged retaliatory acts were memorialized in an order I issued on May 14, 2013, after the pre-hearing conference and confirmed again at the hearing.

During the pre-hearing conference, Respondent's counsel noted that two of the alleged retaliatory acts that the Complainant wanted addressed at the hearing were the subject of complaints that were pending before OSHA and the State of California and objected to having to defend the allegations before OSHA and at the hearing. I advised the Complainant that MV Transportation had a valid point and that if he wished OSHA to further investigate the alleged retaliatory acts, then those complaints needed to be withdrawn as issues at the hearing or he could withdraw his complaint and pursue those claims at the hearing, though the complaints with the State of California could continue. The Complainant subsequently notified OSHA's regional supervisory investigator, Joshua Paul, that he was withdrawing his complaints that were pending against MV Transportation at that time.

Factual Background

September 30, 2011, Accident

The Complainant was involved in a minor accident on September 30, 2011, at 8:25 p.m. when he ran into the wheel of a shopping cart that was in the street as he was making a left turn. (CX 8-13.) The Complainant promptly reported the accident to Dispatch and was told to wait for a field supervisor. (HT, p. 58.) When the field supervisor was unable to get to the Complainant within a 30-minute window, his instructions were changed. (HT, p. 58.) No supervisor showed up at the scene of the accident immediately, and another dispatcher instructed the Complainant to continue on his route. Supervisor Jerry Romero arrived at the scene at about 9:09 p.m. and noted that there were two shopping carts on the sidewalk. (CX 8-17.)

The Complainant filled out an accident report stating that cars in front and to his side obstructed his view of a shopping cart that was partially in the street in front of him. He avoided the cart but believed that the leg of the cart struck the right rear tire guard of his bus and when he inspected his bus, he found a screw for the tire guard was stripped loose. (CX 8-16.)

After the Complainant returned to the bus yard, he spoke to Supervisor Paz about the accident. Supervisor Paz inspected the damage to the Complainant's bus and noted that there were markings on the rear tire that showed it had hit the sidewalk and reported his conclusion was the Complainant had hit the curb because he felt that if the shopping cart was in front of the coach, the rear of the coach would not have been damaged. (HT, pp. 146-47, 149; CX 8-19.) Gloria Huff, the Safety Manager, completed a Stationary Object Auto Incident Review Form about the accident and reported the accident as being a preventable one. (CX 8-11, 8-12.) The Complainant was assessed a safety point for this accident. (HT, p. 66.)

The Complainant filed a grievance over the assessment of the safety point, and it was later removed.⁵ (HT, p. 66.)

Tailgating Incident

It is Respondent's standard procedure to have field supervisor follow buses occasionally on their routes. (HT, p. 66.) On one occasion,⁶ the Complainant was driving a bus on a route along the Pacific Coast Highway when he felt a car was tailgating him. (HT, pp. 26-28.) The Complainant believed he was being tailgated by Supervisor Paz. After completing his run and returning to the bus yard, the Complainant filled out an incident report about the tailgating incident, which he reported as being unsafe because Supervisor Paz was driving too closely behind his bus. (HT, pp. 26-28; CX 8-4; CX 12-7.)

Katrina Galloway Incident

When the Complainant was driving his bus on the 125 line,⁷ an African-American male passenger, on three occasions refused to pay his fare or show his bus pass when he boarded the Complainant's bus. When the Complainant asked the passenger to pay his fare or to show his bus pass, the passenger became irate and cursed the Complainant for being late. The passenger told the Complainant after the second incident that he was going to report the Complainant's tardiness to Katrina Galloway, who he said was a friend of his, and that he would continue to complain about the Complainant until the Complainant was fired. (HT, pp. 31-32.)

After the second incident, Katrina Galloway contacted the Complainant about the passenger's complaints and told the Complainant that the passenger had called her several times to complain about the Complainant but denied that she knew him personally. (HT, p. 32.) The Complainant reported to Ms. Galloway that the passenger cursed and threatened him and that he was concerned about his safety. The Complainant was not aware of any action that Ms. Galloway took in response to his complaints about the passenger. (HT, p. 33.) He filed a complaint against Ms. Galloway, and he filed a complaint with his union but does not believe they processed his union complaint. (HT, p. 34.) The Complainant has not been assessed any safety or attendance points or any types of points as a result of these complaints. (HT, p.79.)

November 27, 2012, Incident

On November 27, 2012, the Complainant stepped off his bus at about 4:00 p.m. to speak to a wheelchair passenger at the Artesia Blue Line Train Station to ask if the passenger wanted to get on his bus. While he was off the bus, he was struck in the back of his head. He looked on the ground to see if anything had been thrown at him, but he did not see anything. He asked the people around him if they had seen anything, and one of them said someone had hit the Complainant on the head and run off and boarded the train. The Complainant felt a little dizzy,

⁵ The Complainant offered somewhat confusing testimony about this safety point. He initially said it was removed, (HT, p. 66.) Then, he said it was agreed that it would be removed in a proceeding involving the union but that the safety points are sometimes not removed. *Id.* When pressed he stated that he did not know if the safety points were still in his file. (HT, pp. 66-67.) He acknowledged he has not suffered any demotion or loss in pay due to an accumulation of safety points. (HT, p. 67.)

⁶ The date of this incident is in dispute and will be discussed later.

⁷ The Complainant did not say when these incidents occurred.

but he got back on the bus and called Dispatch. The dispatcher on duty was Operations Manager Igor Petrovich. He told Mr. Petrovich he had been hit on the back of his head by a passenger and asked what to do. Mr. Petrovich asked the Complainant if he was okay. The Complainant said he was okay and that he was okay to continue in service. (HT, pp. 322-23.) The Complainant told Mr. Petrovich that he still wanted the police to come because he had been assaulted. Mr. Petrovich instructed the Complainant to continue on his route and dispatched a road supervisor to meet him on his route. (HT, pp. 35-36.)

After the road supervisor arrived, the Complainant told him he was not feeling well, and the road supervisor took the Complainant to the medical clinic after first stopping off at the bus yard to pick up the paperwork necessary for the medical visit. (HT, p. 37.)

The doctor at the clinic told the Complainant that he had a contusion to his head and was suffering from a whiplash effect to his neck area. (HT, p. 37.) The doctor told the Complainant to go on limited or modified duty for the next day until he saw the Complainant at a follow-up visit. (HT, pp. 39, 82.)

Ms. Carter subsequently met with Mr. Petrovich and counseled him about his handling of the assault on the Complainant, telling him that he should have dispatched the police to the incident. (HT, pp. 339, 598.)

The Complainant's Modified Duty

On November 28, 2012, after he was assaulted, the Complainant was assigned to modified duty based on his doctor's release. On the same day, the Complainant signed a document acknowledging receipt of a letter dated November 28, 2012, notifying him of his temporary modified work assignment to perform "Time/Load checks on assigned route." (HT, pp. 83-84; EX A.) This assignment involved performing time and load checks on assigned routes. (HT, p. 84; EX A.) The duties required him to ride on a bus route to keep track of how many people were entering and exiting the buses. The Complainant's medical restrictions did not restrict him from riding a bus, but the Complainant objected to the duty because of his concern that his assailant had not been caught. (HT, pp. 38-39, 86, 420-21, 424.) After the Complainant objected to the assignment, Ms. Mitchell assigned the Complainant to other duties in the office. (HT, pp. 39, 84, 421.) The modified duty assignment form, which the Claimant signed told him to schedule any medical/physical therapy appointments for any continuing medical care during his off-duty hours because if he scheduled his appointment during his scheduled shift, his absence would be unpaid. (EX A.)

While on modified duty, the Complainant attended follow-up visits with his doctor during work hours. At a follow-up visit on November 28, 2012, the doctor told the Complainant that he wanted the Complainant to have some therapy for his back area and instructed the nurses to schedule the Complainant for physical therapy. (HT, p. 40.) His physical therapy appointments were scheduled during the normal 8:00 a.m. to 4:30 p.m. business hours. When the Complainant returned to work one day after a physical therapy appointment, Ms. Mitchell told the Complainant that she had changed his physical therapy appointment to after 4:30 because other than the initial and follow-up visit, the company was not required to pay wages when an employee with a work-related injury went to medical appointments. (HT, p. 40.)

On January 2, 2013, Ms. Carter issued a memo to Ms. Holland, Mr. Petrovich, Ms. Mitchell, Monica Tapia, and Patrick Campbell, advising them that all modified duty operators, dispatchers, and supervisors had to clock in and out with dispatch each day and asking them to note that they only pay for the initial doctor's visit and do not pay for follow-up doctor appointments when someone was on modified duty. (EX B.) Ms. Mitchell had been allowing injured employees to remain on the clock when they went for their medical appointments.

Ms. Carter disciplined Ms. Mitchell for failing to follow the company policy by allowing employees to be paid when they went to doctor's visits while on modified duty. (HT, p. 599.)

Respondent's Disciplinary Procedures

Under the terms of the collective bargaining agreement that MV Transportation had with its union, discipline is imposed progressively, starting with an oral counseling followed by a written warning. (CX 2-3.)

Attendance points are assessed against employees who violate the attendance rules. The attendance points are assessed on a rolling 12-month basis. An attendance point is removed from an employee's record 12 months after it is assessed. (HT, p. 603; CX 1-5.) If an employee accumulates 7 attendance points within a 12-month period, the employee is issued a written warning. (CX 1-5.) If an employee acquires 10 attendance points within a 12-month period, the MV Transportation employee handbook states that the employee could be terminated. (HT, pp. 603-04; CX 1-5.) Attendance points are completely removed if the employee goes 6 consecutive months without accruing any attendance points. (HT, p. 603.) Under the collective bargaining agreement, any disciplinary action has to be taken against an employee within 10 days of the misconduct the disciplinary action is based on. (HT, p. 374.)

MV Transportation's Leave Policy for Work-related Injuries

Article 17, Section 4 of the collective bargaining agreement between MV Transportation and its union provides that if MV Transportation requires an injured worker to go to its physician for a medical examination, MV Transportation must pay for the examination, but the leave taken for the examination would be without pay. (CX 2-6.)

Attendance Safety Points Assessed Against the Complainant

With some exceptions that are not applicable here, § 512(a) of the California Labor Code provides that an employer may not employ an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes. Cal. Lab. Code § 512. The California Industrial Welfare Commission ("IWC") issues wage orders on an industry-by-industry basis which regulate wages, hours and working conditions in California. *Martinez v. Combs* 49 Cal. 4th 35, 57 (2010).

The IWC's Wage Order No. 9-2001 ("Wage Order 9) regulates wages, hours and working conditions in the Transportation Industry. Section 11 of Wage Order 9 reiterates the requirements of § 512(a) of the California Labor Code that an employee cannot work for more

than 5 hours without a meal period of at least 30 minutes.⁸ Section 11(D) of Wage Order 9 specifically states that if an employer fails to provide an employee with the required 30 minute meal break, the “employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation.”

MV Transportation’s time keeping and payroll policy and system requires employees to take a 30 minute lunch break. In compliance with Wage Order 9, an employee who takes less than 30 minutes for lunch is paid an hour’s pay characterized as a “lunch penalty.” (HT, pp. 521-22, 524.) An employee who returns from lunch early is given a verbal counseling about the early return for the first occurrence. (HT, p. 372.)

February 2013 Attendance Point Incident

On February 4, 2013, the Complainant was called into Jacqueline Mitchell’s office to discuss an “attendance” matter. (HT, p. 372; and C’s test). Ms. Mitchell, the MV Transportation Safety Manager, met with the Complainant, Traci Smith, the union’s Business Representative, Caleb Brown, the Complainant’s union steward, and the Training Manager, Mr. Campbell, to notify the Complainant that he was being disciplined and assessed an attendance point. (HT, p. 46.) The discipline was actually initiated by Mr. Petrovich, but he was not available to impose the discipline before the 10-day deadline set by the collective bargaining agreement, so the discipline paperwork was prepared and given to Ms. Mitchell to give to the Complainant. (HT, pp. 365, 377-79.) The Complainant was being given a written warning for returning from lunch early on January 28, 2013, January 29, 2013, January 30, 2013, and January 31, 2013. (CX 9-4; HT, p. 46.)

Kishell Holland, an Operations Manager, later determined that the Complainant had been incorrectly given a written warning on February 4, 2013, and that the discipline should have been a verbal warning. After she discovered the error, she discussed it with Ms. Carter who instructed her to change the Complainant’s February written warning to a verbal warning. (HT, pp. 548-49.) The error was not communicated to him until April 16, 2013. (HT, pp. 379, 392.)

April 2013 Attendance Point Incident

On April 2, 2013, while working modified duty, the Complainant signed out for lunch at 12:01 p.m. and wrote down that he returned at 12:30 p.m. (CX 4-2.) The Complainant was paid an extra hour of pay as a “lunch penalty” for his early return on April 2, 2013. (CX 4-7.)

At about 4:10 p.m. on April 16, 2013, Ms. Holland met with the Complainant and his union representative, Sharon Dunning, and informed the Complainant that his February 4, 2013, written warning about attendance points had been incorrectly issued and would be reduced to a verbal warning and that he was now being given a written warning for failing to take a full 30-minute lunch break on April 2, 2013. (HT, pp. 48-49, 386; CX 4-1, CX 4-3.) The Complainant notified Ms. Holland at 4:30 p.m. that his work day had ended and that he was unwilling to stay and would return the next morning. (CX 4-3.) Under the union collective bargaining agreement April 16, 2013, was the last day that discipline could be imposed for this incident. Ms. Holland

⁸ There are some exceptions to Wage Order 9 for persons employed in administrative, executive, and professional capacities, but they are not applicable here.

discussed the situation with Ms. Carter who instructed Ms. Holland to sign the discipline document “as a refusal” and to give the Complainant a copy. (HT, p. 559.) Ms. Holland advised the Complainant that the meeting could not be completed the next day because April 16, 2013, was the last day MV Transportation could impose discipline for the April 2, 2013, incident. The Complainant left the meeting anyway, so Ms. Holland imposed the discipline and noted that the Complainant refused to sign the discipline notice. (HT, p. 411-12; CX 4-1.)

On April 24, 2013, the Complainant delivered a check to Ms. Carter at MV Transportation in the amount of \$50.00 to pay back the wages he had been overpaid due to his early return from lunches. (HT, p. 51.) Ms. Carter did not cash the check. (HT, p. .) On the same day, he sent a letter to Respondent’s counsel, Ms. Carter, the California Labor Commissioner, OSHA, and his union’s business agent, Traci Smith, accusing MV Transportation of erroneously overpaying him and violating California wage laws by paying him when he returned from lunch a “couple of minutes early.” (CX 4-10.)

Grievance Procedure

The collective bargaining agreement between MV Transportation and its union provides for a three step grievance process. The first step involves presentation of the grievance to the General Manager. At Step 2, the grievance is referred to the Director of Labor Relations, and at Step 3, the grievance is taken to arbitration. (CX 2-1.)

Lawana Carter, who became General Manager of MV Transportation’s Carson facility where the Complainant worked on May2, 2012, HT, p. 449, modified the grievance procedure at the request of the union by adding an initial step which involved taking the grievance to an Operations Manager before it was brought to her as the General Manager. (HT, pp. 466-67.)

Complainant’s Grievances

On October 8, 2011, the Complainant sent Traci Smith a grievance alleging that Myron Broadnax and Warner [sic] Paz had been harassing him and that Mr. Paz had unsafely tailgated him on the highway. (CX 14-3.) On October 12, 2011, the Complainant’s union filed a grievance, Grievance No. 8327, on his behalf alleging that he was being harassed by Assistant General Manager Broadnax and Supervisor Paz. (CX 12-9, CX 14-1.) In response to Grievance No. 8327, Mr. Broadnax told Ms. Smith in a memo dated November 15, 2011, that the Complainant’s incident reports to him never mentioned harassment and that the incidents that were reported were still under investigation. He also stated that all documents received from the Complainant had been forwarded to corporate for review. (CX 14-2.)

The Complainant brought up the subject of his grievance against Mr. Paz when he met with Ms. Carter on June 12, 2012, about another grievance the Complainant had filed. (HT, p. 254.) Ms. Carter had no prior knowledge of the grievance against Mr. Paz and understood it had been handled at her level of the grievance process before she arrived, so she referred the Complainant’s grievance to Cliff Reynolds, who handled grievances at the next level. (HT, pp. 255-56; 259, 480-81, 490-91.)

On July 31, 2012, Cliff Reynolds, the Director of Labor Relations for MV Transportation, conducted a Step 2 grievance meeting concerning a grievance the Complainant

had filed alleging that he had been harassed by Myron Broadnax, Judie Smith, Lawana Carter, Martha Pitt, Dana Coffee, Ms. Gallaway, Mr. Villasenor, Ms. Huff, Mr. Paz, and Mario Rodriguez. Mr. Reynolds notified Traci Smith on September 27, 2012, that there was no proof that any employee had violated the collective bargaining agreement and that the grievance was without merit. However, he noted that MV Transportation takes harassment of its employees very seriously and that the matter was being turned over to the MV Senior Human Resources Manager, Ken Chiang, for a more thorough investigation. (CX 5-2.)

Document in Complainant's Personnel File

In 2012, the Complainant reviewed his personnel file and found a "report of unusual incident" dated September 10, 2011, signed by Wagner Paz which said that the Complainant "dragged the line." It accused the Complainant of driving slower than the speed he was supposed to drive, delaying service on his line. (HT, pp. 108-09; CX 8-6.) Mr. Paz felt that the Complainant engaged in this conduct about once a month and that the conduct was unacceptable. (HT, p. 109.) On the second page of this incident report, Mr. Paz wrote that he did not tailgate the Complainant in response to a complaint the Complainant made that Mr. Paz had tailgated him. The Complainant had no prior knowledge that the document was in his personnel file.

Alleged Retaliatory Action

Safety Point for September 30, 2011, Accident

The Complainant testified that he was assessed a safety point for the accident on September 30, 2011, when he hit the shopping cart and alleges the assessment of the safety point was retaliatory. There is no documentary evidence or other testimony that a safety point was assessed against the Complainant, but that might be explained by the fact that he also testified that the safety point was removed after he appealed it. A safety point would constitute an adverse action since accumulation of safety points leads to discipline.

However, I do not find any safety points assessed against him for this accident to be a retaliatory act. Gloria Huff, the Safety Manager, reported the accident as a preventable one, and page 41 of the MV Transportation Employee Handbook states that all preventable incidents are assigned safety points, though the number of points assessed is based on the level of severity. (CX 1-13.) Without evidence that the accident should not have been characterized as a preventable one, I find the assessment of the penalty point was consistent with the Employee Handbook procedures and not a retaliatory act.

The Complainant wrote in his accident report that when he spoke to Supervisor Paz after returning to the yard on September 30, 2011, Supervisor Paz suggested that the accident might have happened because he was following the cars too closely, CX 8-17, and that he objected to Supervisor Paz's response. However, Supervisor Paz noted in his report that he questioned the nature of the accident because he felt the markings on the rear tire showed the tire had hit a curb and he did not see how only the rear wheel of the bus would make contact if the shopping cart was in front of the Complainant's bus, CX 8-19. In any event, there was an accident that deemed preventable, and assessment of a safety point was consistent with MV Transportation's policy.

More importantly, by the Complainant's own admission, the safety point was removed after he appealed it, making that point moot.

Thus, though assessment of a safety point is an adverse action, I do not find it was a retaliatory act in this instance.

Tailgating Incident

The Complainant accuses Supervisor Paz of tailgating him while he was driving on his bus route. There is a dispute as to when this alleged tailgating incident happened. The Claimant alleged that it took place on November 10, 2010. The Claimant testified about the incident and that he filed an incident report on the tailgating immediately after returning to the bus yard. (HT, pp. 26-29, CX 8-4.) The Claimant's report is dated November 10, 2010. (CX 8-4.) However, Mr. Paz denied ever tailgating the Claimant in the incident report dated September 10, 2010, that the Claimant testified he found in his personnel file. As mentioned earlier, the incident report in question was two pages long. The first page was dated September 10, 2010, but the original date, which was crossed out, appears to be November 10, 2010, which would be consistent with the Complainant's date. (CX 8-6.) However, the second page of the incident report is clearly labeled September 10, 2010. (CX 8-7.) Mr. Paz has no recollection as to why he changed the date on the first page of the incident report, and he was aware of only one tailgating complaint made by the Complainant. (HT, pp. 113, 114, 153.)

There is no indication that there was more than one alleged tailgating incident, and the Complainant asserts that it was in November, while Supervisor Paz denies ever tailgating the Complainant. However, the evidence actually contradicts the Complainant's allegation that the incident happened in November. The Complainant filed a harassment complaint with his union on October 8, 2012, alleging that Supervisor Paz tailgated him. (CX 14-3.) The Complainant could not lodge a complaint on October 8, 2012, about a tailgating incident that he claims did not occur until November 10, 2012. Thus, it appears that the Complainant's date is wrong.

I have no way of knowing why the Complainant dated his complaint about the tailgating incident November 10 or why Supervisor Paz changed the date on his report from November 10 to September 10, but the exact date really is unimportant. Though Supervisor Paz denies tailgating the Complainant, the Complainant's filing of an incident report concerning the incident upon his return to the yard, leads me to believe that the Complainant had a good faith belief that he was being tailgated.

In any event, even if Supervisor Paz had tailgated the Complainant, that does not constitute an adverse action and could not have led to an adverse action. Moreover, as a road supervisor, it was Supervisor Paz's responsibility to check on drivers as they were driving their routes, and that responsibility included following them as they drove their buses. Thus, I do not find this to be harassment or a retaliatory.

Katrina Galloway Incident

The exact nature of the Complainant's allegations against Ms. Galloway is unclear. The stated issue is whether she harassed the Complainant by giving him an interview notice requiring him to report to her within 24 hours regarding a customer complaint. Given that the

Complainant acknowledges that he had a difficult passenger who repeatedly stated he was going to make complaints to Ms. Galloway, and he apparently did make complaints to Ms. Galloway, it was appropriate for Ms. Galloway to follow-up on those complaints and make inquiries with the Complainant after she received those complaints.

Any request Ms. Galloway made of the Complainant to respond to the passenger's complaints, even if the complaints were groundless, does not constitute harassment or an adverse action. Ms. Galloway was merely carrying out her responsibilities as a manager and investigating the passenger's complaints against the Complainant, which the Complainant acknowledges were made against him.

I do not find Ms. Galloway's request for the Complainant to see her regarding a passenger complaint to be harassment or retaliation.

Medical Care After Worker's Comp Injury

After the Complainant was assaulted on November 27, 2012, and had to schedule physical therapy appointments, he was told that he had to schedule the appointments outside of work hours and that if he scheduled them during work hours, he would not be paid. The Complainant asserted that before he was injured, employees were allowed to go to work-injury related medical appointments during work hours with pay and that the policy was changed after his injury in retaliation for his protected activity.

MV Transportation does not deny that employees with work-related injuries were paid when they went to medical appointments regarding their work-related injury during work hours before November 27, 2012. This practice, however, was contrary to company policy.

MV Transportation's official company policy was that employees would not be paid for their work-related medical visits if the visits took place during work hours. The modified duty assignment forms, which Ms. Mitchell testified were pre-printed and were apparently last revised in June 2008, EX A, specifically warns the employee on modified duty that if they schedule their medical appointments during their scheduled shift, their time off would be unpaid. Additionally, Article 16, Section 4 of the union contract provides that even the time spent at a medical examination required by MV Transportation would be unpaid leave. (CX 2-6.)

Ms. Mitchell was apparently relatively new in her role as the Safety Manager and unaware of the policy and allowed employees with worked related injuries to seek medical care with pay during their work shift. Ms. Carter acknowledged that from May 2012 through November 2012, employees were allowed to go to work-related medical appointments with pay during their scheduled shift. (HT, pp. 537-39) However, she also stated that she made it clear that was not permitted and that she disciplined Ms. Mitchell for not enforcing the policy after she was reminded of it. (HT, pp. 538, 539, 542.)

If the actual practice permitted employees to be paid when they went to their work-related injury medical appointments, then denying the Complainant that same privilege would be discriminatory and more likely than not, retaliatory.

However, there is no evidence that once Ms. Carter discovered this mistaken practice of allowing injured workers to be paid when they went to their medical appointments during their work shift and ordered compliance with the company policy, the policy was only enforced against the Complainant. The Complainant identified injured employees who he said were paid when they went to their medical appointments before the policy was enforced, but offered no evidence that once the policy was enforced, it was only enforced for him.

Thus, I find the denial of paid time off to attend work-injury related medical appointments was not a retaliatory act. Moreover, it did not constitute an adverse action. The Complainant suggested that he could be charged an attendance point for making an appointment during work hours, but Ms. Carter emphatically testified that if he was charged an attendance point for going to see the doctor about his work-related injury during work hours, the attendance point would be removed as soon as he submitted documentation to show the appointment was for a work-related injury. (HT, pp. 574-75.) Additionally, she testified that she has already removed attendance points assessed against the Complainant when he submitted documentation to show his absence was due to a work-related medical appointment. (HT, p. 575.)

Though the Complainant alleges that denial of paid time to get medical care after he was assaulted on November 27, 2012, was contrary to company policy, the pre-printed modified duty form, EX A, which the Claimant received and signed shows that it was actually consistent with the company policy. Furthermore, this was consistent with the requirements of the collective bargaining agreement.

Thus, MV Transportation's refusal to allow the Complainant to be paid if he went to medical appointments for his work-related injury during work hours was consistent with company policy and the collective bargaining agreement and not retaliatory.

Events After the November 27, 2012, Assault on the Complainant

The Complainant has suggested that the treatment he received after the November 27, 2012, assault by a passenger was improper and retaliatory. He places great emphasis on the fact that the MV Transportation Road Supervisor Manual, CX 13, required his assault to be treated as a "Code 2" situation and asserts that it was improper to instruct him to continue on his route instead of having him remain at the scene of the assault until a supervisor arrived and the police were called.

Mr. Petrovich, the dispatcher who instructed the Complainant to continue on his route, did so after the Complainant told him that he was not hurt and could complete his route. Mr. Petrovich still dispatched a road supervisor who met the Complainant and took the Complainant to a clinic for medical care after the Complainant told the road supervisor that he was not feeling well. Mr. Petrovich acknowledges that he did not contact the police, but he was subsequently counseled by Ms. Carter for his failure to do so and instructed to contact the police in the future if a driver is assaulted. (HT, p. 459.)

Mr. Petrovich pointed out that even in a Code 2 situation, the Road Supervisor's Manual states that common sense and good judgment should govern in an emergency situation. Ms. Carter opined that if an operator who was assaulted said he did not need medical attention or the

police, she would not consider it to be a Code 2 situation. (HT, p. 452.) However, she acknowledged that the police are sometimes called in situations that are not Code 2 situations and that when a driver is assaulted, the police should be contacted and a supervisor should be dispatched regardless of what the driver says. (HT, pp. 452, 454.)

At one point, the Claimant alleged that MV Transportation's handling of the assault on him endangered his passengers and him, presumably because he was instructed to continue on his route and the police were not called. The MV Transportation procedures to be followed when a driver is assaulted were not followed on November 27, 2012. The Complainant should have been told to remain at the location where he was assaulted, and the police should have been contacted and a road supervisor should have been dispatched to meet with the Complainant and to investigate the incident.

While the procedures were not followed, I do not find the handling of the incident to be another instance of harassment of the Complainant or that it was an adverse action. The Complainant, himself, told Mr. Petrovich that he felt fine and could complete his route, and he admitted that no one at the bus stop was willing to admit seeing anything. Mr. Petrovich's reliance of the Complainant's own assessment of his condition may have been an error in judgment, but that was all it was. I see no evidence that it was intended to endanger the Complainant's passengers, nor was it a deliberate attempt to provide the Complainant with less care than he should have gotten. That was certainly remedied as soon as the road supervisor met the Complainant and took the Complainant for medical care after the Complainant said he was not feeling well.⁹

Mr. Petrovich erred in failing to contact the police and instructing the Complainant to continue on his route, but in light of the fact that the Complainant reported to Mr. Petrovich that he was fine and could complete his route and that his assailant had taken off and there were no witnesses who were willing to provide any information, his action, though procedurally incorrect, was not an unreasonable one.

In any event, the handling of the assault on the Complainant does not constitute an adverse action.

Assessment of Attendance Points

The Complainant challenges the assessment of attendance points against him when he returned from lunch early. He asserts that the assessment of the attendance point for his early return from lunch is retaliatory and violates the California Supreme Court's decision in *Brinker Restaurant v. Hohnbaum*, 43 C.4th 1004 (2012) ("*Brinker*").

Mr. Petrovich acknowledged that while no discipline is issued against an employee until the employee has accrued 7 attendance points in a rolling 12 month period, assessment of an attendance point is a disciplinary action. Since the assessment of attendance points can lead to

⁹ The Complainant at one point also took issue with the fact that he was not taken directly to the medical clinic for treatment because the road supervisor stopped by the company office first, but Mr. Petrovich explained that the road supervisor could not take the Complainant to the clinic without first getting the necessary paperwork from the company. (HT, pp. 323-25.)

disciplinary action, I find that assessment of attendance points for the Complainant's early return from lunch was an adverse action. However, I do not find that action to be retaliatory in this instance.

As discussed earlier, Wage Order 9 issued by the California Industrial Welfare Commission mandates that an employee who does not take a full 30 minute lunch break must be paid an hour of pay at the employee's regular rate of compensation."

The Complainant cites the *Brinker* decision and argues that the Supreme Court stated in *Brinker* that while an employer must provide an employee with a 30 minute lunch break after 5 hours of work, the employee is not required to take the full 30 minutes and by taking any type of disciplinary action against him for taking less than 30 minutes for lunch, MV Transportation was violating the *Brinker* decision.

The Complainant misunderstood the *Brinker* decision. The *Brinker* decision was a lengthy California Supreme Court decision that dealt with meal and rest periods required under California law in the restaurant industry. One of the issues before the California Supreme Court was whether or not the employer was obligated to make sure that no work was done during the required 30 minute meal break. The California Supreme Court decided that while the employer is obligated to provide an uninterrupted 30-minute meal break during which the employee is relieved of all duty, the employer is not responsible for making sure no work is performed during the meal period. *Brinker*, 43 C.4th at 1041. To comply with the California Labor Code, the employer could exercise no control over the employee during the 30-minute meal break, but the California Supreme Court specifically stated that even if the employer exercised no control over the employee during the meal break, if the employer knows or has reason to know that the employee is performing work during the meal period, the employer must still pay the employee.¹⁰ It just isn't required to do so at the premium¹¹ rate of pay. *Brinker*, 43 C.4th at 1040, n. 19.

Thus, while as the Complainant states, the *Brinker* decision does not require him to take the full 30 minute lunch break, if he failed to do so, MV Transportation was required by the California Industrial Welfare Commission and the *Brinker* decision to pay him straight time for his early return from lunch. Given that there were financial repercussions to MV Transportation when the Complainant returned from lunch early, it was not unreasonable for MV Transportation to discipline employees, such as the Complainant, who failed to take a 30 minute lunch.

The Complainant was counseled in February 2013 about his failure to take his full 30 minute lunch, and he was fully aware of the fact that he was paid an extra hour's pay as a lunch penalty for a shortened lunch period. Despite that knowledge, on April 2, 2013, he signed in

¹⁰ The California Supreme Court actually referred to Wage Order No. 5, which is the wage order applicable to the restaurant industry, the industry involved in the *Brinker* decision, but the meal break provisions of Wage Order No. 9, which applies to the transportation industry, are identical.

¹¹ The California Supreme Court repeatedly referred to the obligation to pay at the premium rate if the employee worked during the meal break. I am at a loss to explain why because the California Labor Code and IWC Wage Orders all refer to paying the employee at the regular rate of pay. The reference to premium pay may be based on an assumption that if the employee worked during the meal break, the employee would exceed 8 hours and be entitled to premium pay for working more than 8 hours in a single day, which is required by California law.

from lunch after 29 minutes instead of 30 minutes. This is especially significant since the Complainant's time was not entered with a time clock, but by hand, so he had the freedom to write whether he returned from lunch after 29 minutes or 30 minutes. (CX 4-2.) More importantly, the Complainant has offered no evidence that other employees who returned from lunch early were not assessed attendance points. I noticed that the April 2, 2013, sign-in sheet had another employee named "Johnson" who returned from lunch after 25 minutes, but there is no evidence that she was not disciplined. The burden rests on the Complainant to show that there was disparate treatment, and he failed to do so. Without evidence of disparate treatment, I decline to find the assessment of attendance points for an early return from lunch to be a retaliatory act.

CONCLUSION

In conclusion, I find MV Transportation's assessment of a safety point against the Complainant for his September 30, 2011, minor traffic accident was not a retaliatory act since it was deemed a preventable accident and subsequently removed, Supervisor Paz's alleged tailgating of the Complainant was not a retaliatory act and did not constitute an adverse action, Ms. Galloway's request for the Complainant to meet with her about a customer complaint was consistent with her duties as a manager investigating a customer complaint, was not a retaliatory act and was not an adverse action, MV Transportation's refusal to allow the Complainant to attend medical appointments for his work-related injury during work hours with pay was consistent with company policy and not a retaliatory act, and MV Transportation's assessment of attendance for the Complainant's early return from lunch was appropriate and not a retaliatory act.

ORDER

The Complainant's complaint is DISMISSED.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to

the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).

JENNIFER GEE
Administrative Law Judge