



In the Matter of:

BEVERLY C. CALHOUN,

ARB CASE NO. 00-026

COMPLAINANT,

ALJ CASE NO. 99-STA-7

v.

DATE: November 27, 2002

UNITED PARCEL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, MN*

For the Respondent:

John Doyle, Esq., Jill Stricklin Cox, Esq., *Constagi, Brooks & Smith, Winston-Salem, NC*

FINAL DECISION AND ORDER

This case arises under the employee protection ("whistleblower") provision of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C. §31105 (1994). Complainant Beverly Calhoun (Calhoun) filed a complaint alleging that Respondent United Parcel Service (UPS) retaliated against him for engaging in activities protected by the STAA. Following a hearing on the merits, the ALJ held that Calhoun was not subjected to any adverse actions by UPS and recommended dismissal of the complaint. Calhoun has appealed the ALJ's recommended order to the Administrative Review Board (ARB). We concur with the ALJ's conclusion, albeit with different reasoning, that UPS did not retaliate against Calhoun for engaging in protected activity. We dismiss the complaint.

BACKGROUND

Calhoun began working for UPS in 1970. He was employed as a feeder driver¹ at UPS' Greensboro Hub in Greensboro, North Carolina. Recommended Decision and Order (Rec. Dec.)

¹ A feeder driver is a tractor-trailer driver who delivers packages to a turnaround point, where he or she meets another feeder driver from another facility, exchanges trailers, and returns to his or her point of origin. Rec. Dec. at 3.

at 3. In addition to driving, his responsibilities included pre-assembling and pre-inspecting his tractor-trailer unit prior to his workday. This is referred to as the "pre-trip" process. Hearing Transcript (T.) 54. UPS has established company-wide time estimates for the completion of each part of the pre-trip. T. 363, Respondent's Exhibit (RX) 21. During his employment with UPS Calhoun was identified as a good driver and had acquired an impressive safety record. Rec. Dec. at 3.

In January, 1998 UPS management reviewed its records and concluded that a number of drivers were over-allowed for their overall paid days.² T. 925-29. At the request of UPS Greensboro Division Manager Bob Latchford (Latchford), Feeder Manager Roger Millner compiled a list of the ten most over-allowed Greensboro feeder drivers in terms of their overall paid days. Rec. Dec. at 3. UPS assigned managers to work with these drivers to identify and correct any problems causing the over-allowances. Rec. Dec. at 4; RX 34; T. 925-35.

UPS' operational records revealed that Calhoun was also the most over-allowed feeder driver at the Greensboro Hub. RX 29, 34. He had been informed as early as 1996 that he was spending an excessive amount of time on his pre-trip. Complaint, ¶10, T. 199-200. Calhoun's over-allowances averaged 2.56 hours per day, and by 1997 he was identified as the most over-allowed feeder driver out of approximately 2,000 feeder drivers employed in UPS' entire Southeast Region. Rec. Dec. at 3; RX 34; T. 566, 612.

On January 20, 1998, Millner informed Calhoun that Byron Tucker, another feeder manager, would be working with him in order to determine why he was over-allowed. Rec. Dec. at 4, T. 202. On January 20 and 21, 1998, Tucker conducted start work audits, safety training rides, and finish work audits with Calhoun. Tucker completed audit forms noting that some of Calhoun's pre-inspection practices were inconsistent with UPS' established methods. Rec. Dec. at 4. Calhoun refused to sign the forms. T. 626-29; RX 21, 24.

In February 1998, Calhoun wrote letters to the Federal Highway Administration (FHWA), President and CEO of UPS Jim Kelly, and the Governor of North Carolina accusing UPS of harassing him for raising safety concerns. Complainant's Exhibits (CX) 27-29. In May 1998, UPS expanded the aforementioned list to encompass the 25 most over-allowed drivers. These drivers were divided among five supervisors, with each supervisor assigned to work with five drivers. Calhoun was assigned to work with UPS Transportation Services Supervisor Wayne Odeck. T. 677-78; RX 35. By this time UPS decided to allow Calhoun to conduct his pre-trip inspections by his own preferred method. T. 262-66, 680-81. However, on July 14, 1998, Calhoun filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that "from January 1, 1996 to the present, UPS has harassed, intimidated and humiliated the Complainant for his inspection of equipment and for complaining about the unsafe condition of equipment." Complaint, ¶24.

In August, 1998, Tucker told Calhoun that time spent on his restroom breaks is considered "break time" and should be deducted from his paid day. Rec. Dec. at 5-6. On August 4, 1998, Tucker met with Calhoun and told him that his equipment would be pre-assembled by other UPS employees and pre-inspected by mechanics. Rec. Dec. at 5. Calhoun was told that if he found any

² A "plan day" is a driver's projected wage for a workday. A "paid day" is the actual pay earned for that day. A driver is "over-allowed" when he or she exceeds time allowances, thereby increasing his or her paid day. Rec. Dec. at 3.

defects in his equipment after the mechanics conducted their inspection, those mechanics would be disciplined. Rec. Dec. at 5. Taylor and Latchford testified that the pre-inspection and pre-assembly procedures were instituted to find problems and correct them before Calhoun started work, so that Calhoun would not be delayed in leaving the yard. T. 685-6, 1001-2. Tucker also testified that he made his remarks regarding disciplining mechanics to convey the “urgency” of the situation. T. 725. UPS pre-assembled and pre-inspected his equipment throughout August 1998. During this period Tucker occasionally accompanied Calhoun during Calhoun’s pre-trip inspections. Calhoun testified that he continued to bring mechanical defects to UPS’s attention during the period that his equipment was being pre-inspected. T. 687-88.

Although Calhoun was instructed to use UPS’s established methods for vehicle inspection, Rec. Dec. at 5, he was never denied the right to inspect his own equipment. By September 1998, his start work time had improved, and UPS ceased pre-inspecting his units. T. 315-17, 691-92. In October, 1998 Tucker ceased accompanying Calhoun during his pre-trip. T. 316. UPS notes that its practice of pre-assembling equipment for its most over-allowed drivers was successful in reducing over-allowances, and that it continued the practice for a number of its feeder drivers. T. 692.

On October 30, 1998, after completion of an investigation, OSHA concluded that the complaint did not have merit. Calhoun appealed this decision to the ALJ.

THE ALJ’S DECISION

The ALJ found that Calhoun did not prove that UPS took any adverse actions against Calhoun for engaging in protected activity. The actions cited by Calhoun as adverse actions under the STAA included: (1) UPS oversight of Calhoun’s pre-trip inspections; (2) pre-assembling his trailers; (3) mechanics pre-inspection of his vehicle and potential disciplinary action against the mechanics if Calhoun subsequently discovered defects; (4) requiring him to attend morning meetings with management personnel; (5) instructing him to count his restroom breaks against his meal-time allotment; and (6) written criticisms. The ALJ applied decisions issued by the United States Court of Appeals for the Fourth Circuit to the actions and concluded that Calhoun, in order to prevail, was required to show more than the use of mean spirited or intimidation tactics by the employer; he had to demonstrate some type of immediate and serious impact on his employment (e.g. termination, suspension, demotion, decrease in pay, refusal to grant leave, etc.). Rec. Dec. at 4. The ALJ concluded that the UPS actions did not rise to the level of adverse employment actions. He dismissed the case. Calhoun timely appealed the ALJ’s decision to this Board.

ISSUES CONSIDERED

- (1) Whether the actions taken by UPS constitute discipline or discrimination against Calhoun regarding “pay, terms, or privileges of employment?”
- (2) Whether the actions, taken together, create a hostile work environment constituting discipline or discrimination against Calhoun’s “pay, terms, or privileges of employment?”
- (3) Whether UPS presented a non-discriminatory and non-pretextual reason for the actions?

STANDARD OF REVIEW

Pursuant to the STAA implementing regulation at 29 C.F.R. § 1978.109(c)(3), an ALJ's factual findings are conclusive if they are supported by substantial evidence on the record considered as a whole. *BSP Trans., Inc. v. United States 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. § 557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision of Energy Reorganization Act, 42 U.S.C. § 5851); *see* 29 C.F.R. § 1978.109(b). The Board accordingly reviews questions of law de novo. *See Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993); *Roadway Express, Inc. v. Dole*, 929 F.2d at 1063.

DISCUSSION

Statute and Case Law

The STAA provides in pertinent part:

- (a) Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because -
 - (A) the employee,...has filed a complaint...related to a violation of a commercial motor vehicle safety regulation, standard or order

See 49 U.S.C. §31105(a)(1)(A). To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence 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 there is a causal connection between the protected activity and the adverse action. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F. 3d 38, 45 (1st Cir. 1998); *Clean Harbors Env't'l Servs., Inc. v. Herman*, 146 F. 3d 12,21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich* 27 F. 3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F. 226, 228 (6th Cir. 1987).

The employer may then present evidence of a nondiscriminatory reason for the adverse employment action. The burden then shifts to the Complainant to prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must prove not only that the asserted reason presented by the respondent is false, but also that discrimination was the true reason for the adverse action. At all times the complainant bears the ultimate burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

There is no dispute that Calhoun engaged in protected activity under the STAA when he contacted the FHWA and UPS management about his safety concerns. CX 27-29. The issues before the Board relate to whether UPS took adverse actions against Calhoun because he filed these safety complaints. And if there were adverse actions taken did UPS have a nondiscriminatory reason for

the actions or is UPS's proffered reason simply pretext for the real reason — its desire to adversely affect the employment position of Calhoun because he made safety complaints. An adverse action under the STAA is an action taken by the employer against an employee that results in the discharge of the employee, or discipline or discrimination against the employee regarding pay, terms, or privileges of employment. 49 U.S.C. 31105(a)(1). The action must have tangible job consequences. See *Shelton v. Oak Ridge National Laboratories*, ARB Case No. 98-100, slip op. at 9 (ARB Mar. 30, 2001), (“We are persuaded that in the absence of any showing that some tangible job consequence flowed from it, the “Oral Reminder” issued to Shelton is not an adverse action.”)

Calhoun cites a number of alleged adverse actions and also states that the actions taken together constitute harassment and created a hostile work environment designed to discourage Calhoun from bringing safety concerns to the company's attention. These allegations are discussed below.

Alleged Adverse Actions

1. UPS' Pre-Trip Procedures

Calhoun alleges that UPS required its drivers to engage in a pre-trip process that violates Department of Transportation (DOT) safety regulations. Complaint, ¶12; Complainant's Brief at 1. His chief argument regarding the pre-trip process is that UPS imposes a 32-minute time limit for inspection of his equipment, which he argues is an inadequate amount of time to conduct a pre-trip safety inspection. Complainant's Brief at 14.

DOT regulations require drivers to satisfy themselves that their commercial motor vehicle is in good working order prior to commencing their routes.³ UPS has established implementing *guidelines* for each step of its pre-trip process. UPS' guidelines tell drivers how much time they should try to spend on each task; they are not absolute deadlines. T. 969. The timeframe for completion of the pre-trip inspection is 32 minutes. UPS analyzed company wide data on pre-trip inspections and learned that some drivers were taking over two hours to conduct a pre-trip inspection. UPS was paying for that. The large majority of drivers took less than an hour to conduct a pre-trip inspection. UPS conducted an audit of the top 25 worst offenders. Calhoun was the most

³ Specifically, 49 C.F.R. §392.7 states that:

No commercial motor vehicle shall be driven unless the driver thereof shall have satisfied himself/herself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: Service brakes, including trailer brake connections. Parking (hand) brake. Steering mechanism. Lighting devices and reflectors. Tires. Horn. Windshield wiper or wipers. Rear-vision mirror or mirrors. Coupling devices.

Similarly, 49 C.F.R. §396.13 provides that:

Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition; (b) Review the last driver vehicle inspection report; and (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit, which is no longer part of the vehicle combination.

over allowed driver of 2000 drivers in the southeast region, averaging 2.56 hours per pre-trip inspection.

To determine the reasons for Calhoun's overage UPS conducted an audit of Calhoun's start work procedures that included observations and discussions with Calhoun regarding his procedures and the procedure guidelines developed by the company. During the audit, Calhoun continued to inspect his own vehicle. He was observed performing tasks such as manually checking the tightness of tire lug nuts, attempting to lift side flaps that were not designed to be lifted, manually checking hoses, and simply standing and staring at his equipment. Rec. Dec. at 4; T. 635-54; RX 21, 22. Tucker and Ondeck, two supervisors, discussed these steps with Calhoun, expressing their belief that these steps were not necessary and were among the reasons it was taking Calhoun so long to conduct his pre-trip inspection. Calhoun argues that the UPS guideline of 32 minutes for an inspection is inadequate. Most drivers spend 45 minutes to an hour conducting their inspections. UPS representatives recognized that the guidelines were developed under ideal conditions and stated that the 32-minute time was a goal. They never required Calhoun to meet the 32-minute guideline. T. 969. Their interest was in reducing Calhoun's inspection times to be more in line with other drivers. Calhoun was never told that he must limit his pre-trip inspection to 32 minutes. *Id.*

The Board does not find the actions taken by UPS to be adverse actions. The actions did not discriminate against Calhoun nor were they disciplinary actions affecting his pay, terms or privileges of employment. Similar actions were taken with respect to all drivers on the top 25 overage list. T. 702. The actions were not intended to prevent Calhoun from performing an adequate pre-trip inspection but instead were an attempt to find a reasonable method to reduce his "paid days." This is evident from the fact that, despite their observations, Calhoun was ultimately allowed to perform his pre-trip as he wished without retribution. T. 262-66, 680-81. Calhoun has failed to show that the attention and instruction he received regarding his pre-trip procedures constituted discrimination in pay, terms, or privileges of employment. The reasons given by UPS were legitimate and non-discriminatory. The Board finds that Calhoun did not provide evidence that these reasons were merely pretext for discrimination. It is clear to the Board that UPS took legitimate actions designed to reduce the large amount of time Calhoun was spending on his pre-trip inspection.

2. & 3. Pre-assembly and Mechanic's Pre-Inspection of Trailers

First, Calhoun alleges that UPS harassed and discriminated against him by pre-assembling (beginning August 1998) and requiring mechanics to pre-inspect his trailers (during the month of August 1998). The pre-inspection process was not instituted for any other driver. Complainant's Brief, ¶25. Calhoun believes this was done in retaliation for making safety complaints.

However, the record in this case convinces the Board that UPS only engaged in an effort to reduce Calhoun's over-allowed time. Calhoun had expressed concerns to UPS that he was frequently delayed because of mechanical defects that required him to visit the shop more frequently than any other driver in the hub. T. 685-6, 1001-3. The record also indicates that many of Calhoun's return loads were time-sensitive, thus necessitating his departure from Greensboro in a timely fashion. T. 685-686, 1001-03, 1045-46. He was the *most* over-allowed driver of 2000 drivers in the UPS Southeast region. These factors convinced UPS to have Calhoun's equipment pre-inspected and pre-assembled. T. 685-6, 860-61, 1000-1003.

The pre-inspection practice appears to have taken place only between August and September of 1998, a period during which UPS was working with a number of drivers to reduce their paid days. T. 315-16. Calhoun's own testimony indicates that UPS' efforts reduced his overall paid day by as

much as thirty minutes. T. 318-19. Further, the pre-assembly process was so successful that UPS began pre-assembling units for drivers on a regular basis. T. 861-862.

The Board finds that the pre-inspection and pre-assembly of equipment did not constitute discipline or discrimination against Calhoun with respect to his pay, terms or privileges of employment.⁴ Calhoun has not shown that any tangible adverse consequences flowed from institution of these procedures.⁵ And UPS had a legitimate, non-discriminatory reason for initiating these actions reducing Calhoun's over-allowance.

A second action Calhoun alleges as adverse is that UPS told him that those mechanics pre-assembling his trailers would be disciplined if Calhoun found defects in his equipment. Calhoun argues that this violated the STAA by presenting him with "the dilemma of either putting the motoring public at risk or putting folks I work with in jeopardy." Complainant's Brief at 28, 36. The Secretary has held that one of the purposes of the STAA is to prevent intimidation. *Long v. Roadway Express, Inc.*, Case No. 88-STA-31, Dec. and Rem. Ord. (Sec'y Sept. 15, 1989).

There is no evidence that any of the actions taken by UPS were in retaliation for Calhoun's protected activity.⁶ To the contrary, Latchford's testimony indicates that UPS was concerned with the mechanics' ability to perform their tasks, as well as ensuring that drivers such as Calhoun were not slowed down by what was referred to as "break downs on property" (BOPs):

Q Now did you give any instructions in particular with respect to the shop –

A Yes.

Q – and mechanics ? What were your instructions with respect to the mechanics?

A I told them I'd hold them accountable if they didn't perform their job.

Q And, what did you mean when you said you were going to hold them accountable?

A I expected them – I pay them to do a job. I expected them to do the job.

Q But specifically with respect to inspecting the units ?

A To make sure there were no problems that would cause a break down on property.

Q Have you given directions to hold other groups of individuals or other employees accountable?

A Absolutely.

Q Is that something you do often, Mr. Latchford?

A Every day.

T. 1002-1003.

⁴ We note that Calhoun may have received less overall pay because his hours of over-allowed work decreased, however, there is no evidence that he was entitled to receive pay for hours beyond those he actually worked.

⁵ The company was concerned about over-allowances because they affected company costs and can adversely affect service to customers. T. 1034-1044.

⁶ Nor is there any evidence that Calhoun actually was intimidated by UPS management into refraining from raising safety concerns. Calhoun testified that he continued to bring mechanical defects to UPS's attention during the period that his equipment was being pre-inspected. T. 687-88.

Similarly, Tucker testified that he wished to convey to Calhoun the “urgency” of the situation when he spoke to Calhoun about the mechanics. T. 725. Additionally the record shows that no mechanic was ever subjected to such discipline. T.686-688. The Board finds that the UPS instruction to the mechanics and to Calhoun did not discriminate or discipline Calhoun in any way affecting his pay, terms or privileges of employment. There was a legitimate, nondiscriminatory , business reason proffered by UPS for its action and Calhoun has not shown that this was pretext for discrimination.

4. & 5. Morning Meetings and Restroom Break Restrictions

Calhoun alleges that UPS violated the STAA by making him attend morning meetings and placing restrictions on his restroom breaks. In August 1998, Calhoun was told that, until his start work time improved, he would need to meet with Tucker every morning to discuss his start work procedures. CX 74 at 1. These meetings took place between August and October 1998. Tucker’s relevant testimony is as follows:

Q . . .With respect to the drivers on that twenty-five list, did you require that their supervisors give those individuals special attention?

A Well, they had to concentrate their efforts. Because these gentlemen were among the least best, they had to concentrate their efforts on figuring out why they were and how to reduce the overall paid day.

Q Did that include morning meetings with these drivers?

A Oh, absolutely. I do not believe in carrying on conversations when it regards an individual’s performance or personal issues, if there are personal issues, in the presence of other employees. In the mornings or even in the afternoon, there are ten, fifteen, there can be as many as twenty people in the check-in area. I don’t believe that that’s a business setting, and I don’t think it’s appropriate to have conversations with drivers regarding personal situations.

Q And in Mr. Calhoun’s case, when did you decide was the best time to try to catch him, provide him what input you had, about how he was doing or any questions you had?

A In the mornings.

Q. And during August of ‘98, did you meet with him from time to time during the mornings?

A Yes.

Q And, how long would these sessions last?

A They were very brief, five, ten minutes. And sometimes, you mentioned, when we walked over to the shop, that’s about a minute and a half walk.

Q Were you singling out Mr. Calhoun to have these meetings?

A Absolutely not.

Q Did you have meetings like this with other feeder drivers who were on this twenty-five list?

A Yes.

Q Did you observe other drivers who were on that twenty-five list during the month of August ‘98 –

A Yes.

T. 699-702.

The Board does not find that these meetings constitute adverse action pursuant to the STAA. There is nothing in the record to indicate that these meeting were designed to discipline or discriminate against Calhoun under the STAA. Meetings are well-known and accepted business practice for communicating company concerns. We find that UPS has articulated a legitimate, non-discriminatory purpose for holding these meetings with Calhoun and other UPS drivers to work with them to reduce their paid days. T. 987-95. There was no evidence they were selected on any other basis.

Calhoun also alleges that UPS wrongfully required him to count his restroom breaks against his meal-time allotment. Rec. Dec. at 5-6; CX 1 at 31. However, Calhoun's own witness testified that this policy applied to all Greensboro feeder drivers. T. 381-82, 409-11. Additionally, Calhoun testified that he did not know what other feeder drivers were told regarding restroom breaks. T. 410-11. We therefore find that this restriction on Calhoun's use of the restroom was not discrimination under the STAA .

6. Written Criticism

Another adverse action alleged by Calhoun relates to copies of audits and evaluations of Calhoun's performance dating back to 1978. RX 9, 11-18. Calhoun requests that the Board order UPS to "remove all memoranda, letters or other writings from its files disciplining the Complainant, or mentioning discipline, for inspecting equipment and complaining about unsafe equipment . . ." Complaint, ¶5. Though he does not specify, this request appears to refer to the "Driver Start Work Audits," "Safety Training Ride" forms, and "Safe Work Training Methods" forms which contain comments regarding his pre-trip methods. RX 11-17, 21-27.

A supervisor's criticism of an employee, without more, does not constitute an adverse employment action. *See, e.g., Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997). *See also Shelton v. Oak Ridge National Laboratories*, ARB Case No. 98-100 (Mar. 30, 2001), in which the Board noted that:

Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance. Federal courts ought not be put in the position of monitoring and second-guessing the feedback that an employer gives, and should be encouraged to give, an employee.

Id., slip op. at 10 (quoting *Davis v. Town of Lake Park*, 245 F.3d 1232, 1242 (11th Cir. 2001) (Title VII case)).

The aforementioned written criticisms placed in Calhoun's file at various times beginning in 1978 have not negatively impacted Calhoun's pay, terms or privileges of employment as required by 49 U.S.C. §31105(a)(1). Although the documents do contain negative comments regarding Calhoun's job performance, the purpose of the documentation was to record that training or instruction took place or to serve management as a tool; these documents do not provide the basis for subsequent employment decisions with respect to discipline, compensation, or job assignments. T. 823-25. Moreover, the comments contained therein are consistent with Calhoun's own

interpretation of his performance. *See, e.g.*, RX 21. Calhoun has failed to show that the criticism was in retaliation for his protected activity and he has failed to show how it has affected his pay, terms or privileges of employment. The Board also finds that UPS had a nondiscriminatory reason for placing these comments in Calhoun's file.

Hostile Work Environment

Calhoun's complaint alleges that, "[f]rom January 1, 1996 to the present, UPS has harassed, intimidated and humiliated [him] for his inspection of equipment and for complaining about the unsafe condition of equipment." CX 76 at 4. While we recognize that the actions discussed above may constitute cognizable claims under the STAA when considered together, the legal standard is that they must be sufficiently severe or pervasive as to alter the conditions of employment, thereby creating an abusive or hostile work environment. *See, e.g., Berkman v. United States Coast Guard Academy*, ARB Case No. 98-056, slip op. at 16-17 (ARB Feb. 29, 2000). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances surrounding a particular case. *Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92- CAA-2, et al., Sec. Dec. and Ord., Feb. 5, 1996, slip op. at 80, *aff'd sub nom. Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998). The fundamental elements of proof of a hostile work environment require that: (1) the employee engaged in protected activity and suffered intentional retaliation as a result, (2) the retaliation was pervasive and regular, (3) the retaliation detrimentally affected the employee, (4) the retaliation would have detrimentally affected other reasonable whistleblowers in that position, and (5) a basis for employer liability. *See, e.g., Varnadore*, slip op. at 80.

The Board finds that Calhoun has failed to show that the combination of actions taken by UPS to reduce Calhoun's over-allowed time constituted harassment sufficiently severe or pervasive to create a hostile work environment. Evidence establishes that the actions taken by UPS were for the sole purpose of reducing Calhoun's extreme over-allowances for "paid days." The actions were not discriminatory nor were they disciplinary in nature. They were legitimate, logical and effective measures that did reduce Calhoun's over-allowance and did result in at least one new procedure which is now used throughout the company.

In summary, we affirm the ALJ's conclusion that Calhoun has failed to show that the actions taken by UPS constitute adverse actions under the STAA. The Board holds that the actions taken in totality do not constitute harassment sufficiently severe or pervasive to create a hostile work environment. UPS presented a legitimate, non-discriminatory reason for its actions, *to wit*, that it was engaged in a process of monitoring its most over-allowed drivers, and Calhoun has not established that UPS's proffered reason was pretextual. Thus, Calhoun has failed to show that UPS's actions were in retaliation for his protected activity.

The ALJ's Analysis

We note that the ALJ recommended dismissal of the complaint before us citing Fourth Circuit case law interpreting Title VII of the Civil Rights Act of 1964, which he believes precludes harassment claims under the employee protection provision of the STAA. Specifically, the ALJ cited the Fourth Circuit's ruling in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), wherein that court stated that:

Disparate treatment theory as it has emerged in application of this and comparable provisions of Title VII . . . has consistently focused on the question whether there has been discrimination in what could

be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating

Rec. Dec. at 7, citing *Page*, 645 F.2d at 233. While we agree with the ALJ that the actions taken by UPS do not constitute adverse actions under the STAA, subsequent developments in the law have established that adverse actions need not rise to the level of “ultimate employment decisions.” See *Von Gunten v. Maryland*, 243 F.2d 858 (4th Cir. 2001)(Title VII case). In *Von Gunten* the Fourth Circuit stated that adverse action includes not only ultimate employment decisions such as firing or demotion, but also actions that result in “adverse effect[s] on the terms, conditions, or benefits of employment.” *Id.* at 866. Similarly, the STAA prohibits an employer from “discharg[ing] . . . disciplin[ing] or discriminat[ing] against an employee regarding pay, terms, or privileges of employment. . .” 49 U.S.C. §31105(a)(1).

CONCLUSION

Calhoun has failed to show that the actions taken by UPS constitute adverse actions under the STAA or that those actions, cumulatively, constitute harassment sufficiently severe or pervasive to create a hostile work environment. We also find that UPS presented a legitimate, non-pretextual and non-discriminatory reason for its actions. We therefore **DISMISS** the complaint and that Calhoun has failed to show that UPS’ reasons was pretext for discrimination.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge