



In the Matter of:

TIM HAFER,

ARB CASE NO. 06-132

COMPLAINANT,

ALJ CASE NO. 2006-CAA-006

v.

DATE: August 29, 2008

UNITED AIR LINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Tim Hafer, *pro se*, Los Angeles, California

For the Respondent:

John C. Fish, Jr., Esq., Kevin F Chung, Esq., *Little Mendelson*, San Francisco, California

FINAL DECISION AND ORDER

This case arises under the Clean Air Act (CAA)¹ and its implementing regulations.² Tim Hafer filed a complaint alleging that United Air Lines, Inc. discharged

¹ 42 U.S.C.A. § 7622 (West 2008).

² 29 C.F.R. Part 24 (2007). These regulations have been amended since Hafer filed his complaint, but the amended regulations are not implicated in this case. 72 Fed. Reg. 44,956 (Aug. 10, 2007).

him in violation of the CAA. A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Complaint (R. D. & O.), denying Hafer's complaint. For the following reasons, we affirm the ALJ's decision and dismiss the complaint.

BACKGROUND

United employed Hafer as a Senior Staff Representative, responsible for generating warranty reimbursements, at its San Francisco, California Maintenance Base. United terminated Hafer's employment on May 30, 2001. According to United, it discharged Hafer because he copied and distributed a confidential document addressed to one of United's in-house attorneys, thereby violating company policies.³

On August 17, 2001, Hafer filed a complaint with the Occupational Safety and Health Administration (OSHA). The complaint alleged that his discharge violated the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁴ According to Hafer, United discharged him for contacting the Federal Aviation Administration and engaging in activities that AIR 21 protects.

United filed for bankruptcy protection on December 9, 2002. On January 20, 2006, the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, entered an order confirming United Airlines' Second Amended Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code ("the Confirmation Order"). The Plan took effect on February 1, 2006.

Hafer filed another complaint with OSHA on or about February 18, 2006, alleging that his May 2001 discharge violated the CAA. In that complaint he alleged that on January 27, 2006, United "revealed as a statement of fact" in a pleading in his AIR 21 case that "it had indeed fired [him] for revealing its violations of the Federal Clean Air Act."⁵ OSHA issued findings on March 30, 2006, concluding that the CAA complaint was untimely.

On April 26, 2006, the Administrative Review Board (the Board) issued a Final Decision and Order dismissing Hafer's AIR 21 complaint because the Confirmation

³ Complainant's Initial Brief, Exhibit (Ex.) 9.

⁴ 49 U.S.C.A. § 42121(a). AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air commerce safety.

⁵ Complaint at 2.

Order discharged United from Hafer's AIR 21 claim.⁶ We cited the Confirmation Order, which states that:

[e]xcept as otherwise expressly provided in the Plan . . . all Entities who have held, hold, or may hold Claims against or Interests in the Debtors or against the Released Parties and Exculpated Parties are permanently enjoined, from and after the Effective Date, from: (i) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claim against or Interest in the Reorganized Debtors, the Exculpated Parties, the Released Parties^[7]

Hafer's CAA case was assigned to an ALJ on May 2, 2006. On May 8, 2006, the ALJ instructed Hafer and United to submit briefs limited to the issue whether Hafer's CAA complaint had been discharged in bankruptcy. Both parties filed briefs. On July 28, 2006, the ALJ issued an R. D. & O. dismissing the CAA complaint because Hafer's claim had been discharged in bankruptcy.⁸ Hafer now requests review of the ALJ's dismissal of his CAA complaint.

JURISDICTION AND STANDARD OF REVIEW

The CAA authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.⁹ The Secretary has delegated authority for review of an ALJ's initial decision to the Board.¹⁰ Under the Administrative Procedure Act, the Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the CAA. The parties do not dispute the determinative facts

⁶ *Davis v. United Airlines, Inc.*, ARB No. 02-105, ALJ No. 2001-AIR-005 (ARB Apr. 26, 2006)(dismissing *Hafer v. United Airlines, Inc.*, ARB No. 02-088, ALJ No. 2002-AIR-005).

⁷ *In re UAL Corp.*, Case No. 02-B-48191, Confirmation Order para. 4(e) (Bankr. N.D. Ill. Jan. 20, 2006).

⁸ R. D. & O. at 4.

⁹ 42 U.S.C.A. § 7622(b).

¹⁰ 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

in this case. The issues presented to the Board for its consideration are issues of law of which the Board has de novo review.¹¹

DISCUSSION

The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote public health and welfare. The CAA protects from discrimination employees who commence a proceeding, or who testify in such a proceeding, or who assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of the statute.¹²

In his brief before the Board, Hafer presents three arguments regarding his CAA complaint: (1) his CAA claim was not discharged in bankruptcy; (2) his CAA complaint is timely; and (3) the Board may assert its "police and regulatory power" to exercise jurisdiction over his CAA claim. United submitted a reply brief responding to each of these arguments, which we address below.

1. Hafer's CAA Claim Was Discharged in Bankruptcy.

The ALJ correctly held that Hafer's CAA claim is a pre-petition claim that was discharged in bankruptcy. The Bankruptcy Code provides that "the confirmation of a plan ... discharges the debtor from any debt that arose before the date of such confirmation."¹³ It also indicates that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any debt" that is discharged under the plan.¹⁴

A claim arises, for purposes of a bankruptcy discharge, at the time of the events giving rise to the claim.¹⁵ Hafer's CAA claim therefore arose on May 30, 2001, the date that United terminated his employment. This was more than a year before United filed

¹¹ See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Redweik v. Shell Explor. & Prod. Co.*, ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 7 (ARB Dec. 21, 2007).

¹² 42 U.S.C.A. § 7622(a).

¹³ 11 U.S.C.A. § 1141(d)(1).

¹⁴ 11 U.S.C.A. § 524(a)(2); see, e.g., *Davis*, slip op. at 3.

¹⁵ See, e.g., *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005)(citing *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000)).

for bankruptcy. Hafer acknowledged, in the proof of claim he filed with the bankruptcy court, that United's debt arose on the date of his discharge.¹⁶

Hafer's CAA claim arises from the same set of facts that gave rise to his AIR 21 claim. We held that the Confirmation Order discharged United from Hafer's AIR 21 claim, and our ruling was affirmed by the United States Court of Appeals for the Ninth Circuit.¹⁷ We therefore conclude that the Confirmation Order enjoins Hafer from pursuing the claim that is the subject of his CAA complaint.¹⁸

2. Hafer's CAA Complaint Is Not Timely.

A CAA complaint must be filed within 30 days after the complainant receives notice of an adverse employment action.¹⁹ Hafer alleges that his complaint is timely because United's statement in a January 26, 2006 pleading is a "new act of discrimination,"²⁰ but he provides no legal support for this allegation. The adverse employment action in this case is the termination of his employment, which occurred on May 30, 2001. Hafer did not file his CAA complaint until February 18, 2006, more than four years after the termination. His CAA complaint is therefore not timely.

Hafer argued before the ALJ that "extenuating circumstances could justify tolling the statutory filing period for [his] CAA claim."²¹ But in his brief before the Board, he provides no argument indicating that he is entitled to equitable tolling of the filing period. Hafer also fails to indicate how accepting his complaint as timely pursuant to the doctrine of equitable tolling would change the fact that the claim he presented in his CAA complaint was discharged in bankruptcy.

3. The Governmental Unit Exception Does Not Apply to Hafer's CAA Claim.

The automatic stay provision in the bankruptcy code contains an exception for the "continuation of an action or proceeding by a governmental unit" to "enforce such

¹⁶ See Respondent United Airlines, Inc.'s Reply to Complainant Tim Hafer's Initial Brief, Ex. B.

¹⁷ *Hafer v. U.S. Dept. of Labor Administrative Review Bd.*, No. 06-72817, 2008 WL 2001038 (9th Cir. 2008)(unpublished).

¹⁸ See, e.g., *Davis*, slip op. at 3-4 (citing §§ 524(a) and 1141(d) of the Bankruptcy Code).

¹⁹ 42 U.S.C.A. § 7622(b)(1).

²⁰ Complainant's Initial Brief at 11.

²¹ R. D. & O. at 2-3.

governmental unit's or organization's police and regulatory power."²² Hafer argues that this exception precludes the application of the bankruptcy discharge to his CAA claim, because the Board may exercise its police and regulatory power to participate as a prosecuting party in his case.²³ We disagree.

The governmental unit exception does not apply where a complainant has brought a case as an individual. As we stated in our decision staying proceedings in Hafer's AIR 21 case, when an administrative agency is acting in a quasi-judicial capacity, seeking to adjudicate private rights rather than effectuate public policy, the governmental unit exception is inapplicable.²⁴

CONCLUSION

Hafer has failed to proffer any legally supported rationale for deviating from the relevant statutory text and bankruptcy court orders. Accordingly, we accept the ALJ's recommendation and **DISMISS** Hafer's CAA complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

²² 11 U.S.C.A. § 362(b)(4).

²³ Complainant's Initial Brief at 17-18.

²⁴ *Davis*, slip op. at 18 (ARB May 30, 2003)(staying proceedings in *Hafer v. United Airlines, Inc.*).