



In the Matter of:

ROBERT A. MOTHERSHEAD,
COMPLAINANT,

ARB CASE NO. 10-120

ALJ CASE NO. 2007-SOX-084

v.

DATE: April 26, 2012

DELPHI CORPORATION,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert A. Mothershead, *pro se*, Grosse Pointe, Michigan

For the Respondent:

Jeffrey M. Peterson, Esq., Troy, Michigan

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under Section 806, the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson/West Supp. 2011), and its implementing regulations at 29 C.F.R. Part 1980 (2011). Robert A. Mothershead filed a complaint alleging that Delphi Corporation (Delphi) violated the SOX when it terminated his consulting relationship and refused to pay his fees. OSHA dismissed the

complaint as untimely. A Department of Labor Administrative Law Judge (ALJ) entered a Decision and Order dismissing the complaint, having determined that the claims were discharged in bankruptcy. Mothershead petitioned for review. We affirm the ALJ's decision and dismiss the complaint.

BACKGROUND

Mothershead was self-employed through his company, Azimuth North America LLC (Azimuth N.A.). Delphi hired him to do confidential consulting work from July 2001 to October 2002. During this period, Mothershead asserts that company managers harassed him after he informed them that he believed the company was “manipulating inventory records related to utilized and unutilized factory floor space.” Complainant’s Opening Brief at 2. After the contractual relationship ended, Mothershead contends that the company withheld payment on \$169,000 of work that he performed for the company. The parties eventually settled the dispute, and Mothershead received \$19,500. *Id.* at 3-4.

In April 2007, Mothershead filed a complaint with OSHA alleging that Delphi violated the SOX when it ended the consultancy arrangement with him and his company, Azimuth. OSHA dismissed the complaint because it was not filed within 90 days of the alleged discriminatory act as required by 18 U.S.C.A. § 1514A(b)(2)(D). OSHA Letter at 1. Mothershead requested a hearing before an ALJ.

In January 2008, prior to an evidentiary hearing, counsel for Delphi informed the ALJ that the company was engaged in Chapter 11 Bankruptcy proceedings, and that the company had filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York in October 2005. See *In re DPH Holdings, Corp.*, Case No. 05-44481. Prior to filing his SOX complaint, Mothershead, as sole owner of Azimuth N.A., filed a proof of claim for \$284,487 (number 15630) in Delphi’s federal bankruptcy proceeding. Transcript (Tr.) at 5-6. On December 7, 2007, the bankruptcy court entered an order that “disallowed and expunged” Azimuth N.A.’s claim “with prejudice.” *In re Delphi Corp., et al.*, Order Pursuant to 11 U.S.C. 502(b) and Fed. R. Bankr. P. 3007 Expunging With Prejudice Proof Of Claim Number 15630 (“Azimuth North America Order”), Case No. 05-44481 (Bankr. Ct. S.D.N.Y., Dec. 7, 2007) (Delphi Counsel Letter to ALJ (Feb. 3, 2010), Exh. B.); see also Tr. at 5-6.

The ALJ cancelled the hearing and stayed the administrative proceeding. ALJ Order Staying Case (dated Jan. 24, 2008). The ALJ ordered that Delphi provide semi-annual reports on the status of the Chapter 11 reorganization. *Id.* Delphi filed updates on January 7, 2008, January 21, 2009, and June 22, 2009.

The bankruptcy court entered an order confirming the First Amended Joint Plan of Reorganization of Delphi, certain affiliates, debtors, and debtors-in-possession (Confirmed Plan) on January 25, 2008. On July 30, 2009, the bankruptcy court approved certain modifications to the Confirmed Plan (Modification Approval Order). The Modification Approval Order included a Modified Plan that, at Section 11.2, provided for the discharge of debtors. That portion of the plan states:

11.2 Discharge Of The Debtors. Pursuant to section 1141(d) of the Bankruptcy Code, except as otherwise specifically provided in this Plan, Confirmation Order, or Modification Approval Order, the distributions and rights that are provided in this Plan shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of Claims and Causes of Action, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and Interests in the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to this Plan on account of such Claims, rights, and Interests, including, but not limited to, Claims and Interests that arose before the Effective Date

See <http://www.dphholdingsdocket.com/dph>, Final Modification Hearing, PDF of Orders Approved July 29, 2009, Plan Modification Order, Attachment A: Modified Plan at 11.2, p. 60.

The Modified Plan was consummated, and became “effective,” on October 6, 2009. By its terms, the Modified Plan

act[s] as an injunction against any Person commencing or continuing any action, employment of process, or act to collect, offset, or recover any Claim, Interest, or Cause of Action satisfied, released, or discharged under the Modified Plan to the fullest extent authorized by the Bankruptcy Code.

See Modified Plan at ¶ 5 (Oct. 6, 2009) (Delphi Counsel Letter to ALJ (dated Feb. 3, 2010) at Exh. A); see also Confirmation Plan, p. 38 at ¶ 12.

On February 3, 2010, Delphi provided a final status update on the company’s bankruptcy proceeding and informed the ALJ that the company had emerged from bankruptcy. Delphi moved to dismiss the SOX complaint arguing that the bankruptcy court’s reorganization plan and prior order expunging and dismissing Azimuth N.A.’s claims against the company had discharged any debt to Mothershead. The ALJ held a hearing on the effect of the Chapter 11 bankruptcy on the administrative proceeding on February 26, 2010. Following the hearing, the ALJ determined, based on the proceedings in the bankruptcy case, that “any claims against Delphi and/or DPH Holdings Corporation have been discharged by virtue of the Modified Plan of Reorganization, the Modified Approval Order, and 11 U.S.C. 1141, 524,” and dismissed the complaint. ALJ Dec. at 2.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. 29 C.F.R. § 1980.110(a); Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews an ALJ's grant of summary decision de novo. *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011). Under 29 C.F.R. § 18.40(d) (2011), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

DISCUSSION

Under Section 1141(d)(1)(A) of Title 11, the Bankruptcy Code, the effect of confirmation of a Chapter 11 reorganization plan "discharges the debtor from any debt that arose before the date of such confirmation." See also 11 U.S.C. 944(b)(1) ("[T]he debtor is discharged from all debts as of the time when . . . the plan is confirmed."). The discharge "operates as an injunction against the commencement or continuation of an action." 11 U.S.C. § 524(a)(2). The ALJ properly dismissed Mothershead's administrative SOX proceeding against Delphi. The determination was compelled by the terms of the bankruptcy court's December 7, 2007 Order that expressly disallowed and expunged Azimuth N.A.'s claims with prejudice, and the Confirmed Plan and subsequent Modified Plan that discharged the company's debtors and enjoined any person from "commencing or continuing any action" that was otherwise discharged. *Supra* at 2. Mothershead, as the sole-owner of Azimuth, N.A., is thus foreclosed from continuing any pre-bankruptcy actions against Delphi that stem from the contractual relationship between Azimuth and Delphi pursuant to the terms of the bankruptcy discharge orders. See *supra* at 2-3; see also www.dphholdingsdocket.com.

Mothershead contends that his whistleblower complaint was not discharged under the terms of the bankruptcy proceeding because his SOX claim, which he brought as an individual, is distinctly different from the claims discharged in bankruptcy, which were against his company of which he is sole owner. We rejected a similar contention raised in *Hafer v. United Airlines*, ARB No. 06-132, ALJ No. 2006-CAA-006 (Aug. 29, 2008), which involved a respondent that filed for Chapter 11 bankruptcy a few months after complainants filed a whistleblower complaint under AIR 21 (which was discharged in bankruptcy) and then a subsequent whistleblower complaint under the Clean Air Act stemming from the same circumstances that led to the AIR 21 complaint. In proceedings in the case, we determined that because complainant's "CAA claim ar[o]se[] from the same set of facts that gave rise to his AIR 21 claim," the "Confirmation Order discharged United from Hafer's AIR 21 claim." *Id.*, slip op. at 5; see also *Davis v. United Airlines, Inc.*, ARB No. 02-105, ALJ No. 2001-AIR-2005, slip op. at 3 (ARB Apr. 26, 2006). This ruling was affirmed on appeal. *Hafer v. Dep't of Labor*, 277 Fed. Appx. 739, 2008 WL 2111038 (9th Cir. May 9, 2008) (unpublished).

The facts in this case do not warrant a different result. Mothershead's SOX claim was filed prior to the bankruptcy action, and stems from a project that Delphi retained Azimuth N.A., Mothershead's company, to perform. See Tr. at 10 (Mothershead states: "the matter that was discharged by the bankruptcy court certainly at its core has many of the same issues as the SOX OSHA whistleblower claim . . ."). Mothershead is sole owner of Azimuth N.A., and is named in the Proof of Claim filed with the bankruptcy court. See Respondent's Reply Brief, Exh. A: Proof Of Claim No. 15630 at 2; see also Tr. at 11-12 (Mothershead). Moreover, the Proof of Claim Mothershead filed for his company, Azimuth, lists as part of the basis for the claim that Delphi used "inadequate internal controls [that] could possibly violate [SOX]." Exh. A at 3. Thus, consistent with our reasoning in *Hafer*, the circumstances here compel us to find that the "plain language of the" Confirmed Plan, Modified Plan, and in particular the December 7, 2007 Order expunging and dismissing Azimuth N.A.'s claims against Delphi "foreclose our adoption of [Mothershead's] arguments." *Hafer*, 277 Fed. App'x 739, 2008 WL 2001038 *1 (9th Cir. 2008); see also *Friday v. Northwest Airlines, Inc.*, ARB No. 04-124, ALJ Nos. 2004-AIR-016, -017 (ARB Sept. 28, 2007) (dismissing AIR complaints as "claims" that arose prior to the Effective Date of a Confirmation Order discharging debts in bankruptcy proceeding).

Mothershead's argument that his claims fall within the government exception also lacks merit. 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 governmental unit's or organization's police and regulatory power." 11 U.S.C. § 362(b)(4). However, this exception "does not apply where a complainant has brought a case as an individual." *Hafer*, ARB No. 06-132, slip op. at 6; see also *Hafer*, 277 Fed. App'x 739, 741. Since in this SOX proceeding instituted by Mothershead, the Department of Labor is "acting in a quasi-judicial capacity, seeking to adjudicate private rights" the "governmental unit exception is inapplicable." *Hafer*, ARB No. 06-132, slip op. at 6.¹

¹ Mothershead's argument that his Section 806 SOX complaint falls within the exception set out at 11 U.S.C. § 523(a)(19) that excludes debts associated with "violation of any of the Federal securities laws" also fails. The express bankruptcy orders in this case – in particular the December 7, 2007 order expunging and dismissing Azimuth N.A.'s claims against Delphi – mandate that Mothershead's complaint be dismissed.

CONCLUSION

Mothershead has failed to proffer any legally supported rationale for deviating from the relevant statutory text and bankruptcy orders. Accordingly, we dismiss the complaint.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
**Deputy Chief Administrative
Appeals Judge**