



**In the Matter of:**

**TIM HAFER,**

**ARB CASE NO. 06-017**

**COMPLAINANT,**

**ALJ CASE NO. 2005-AIR-008**

**v.**

**DATE: January 31, 2008**

**UNITED AIRLINES, 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., *Litter Mendelson PC*, San Francisco, California**

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2007). Tim Hafer filed a complaint alleging that his former employer, United Airlines, violated AIR 21 by delaying payment of his workers' compensation disability benefits. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) denying Hafer's complaint. For the following reasons, we affirm the ALJ's decision and dismiss the complaint.

## BACKGROUND

Substantial evidence in the record supports the ALJ's comprehensive exposition of the facts. R. D. & O. at 1-8. We summarize briefly.

In 1999, Hafer was working for United as a contract administrator when he filed a workers' compensation claim against United with the California Workers' Compensation Appeals Board (WCAB). United assigned responsibility for handling the claim to Gallagher Bassett, an independent third party administrator of workers' compensation claims.<sup>1</sup> Gallagher Bassett retained Laughlin, Falbo, Levy & Moresi (Laughlin Falbo), a law firm specializing in workers' compensation cases, to represent United in its proceedings before the WCAB.<sup>2</sup> Although United is self-insured for workers' compensation claims, Gallagher Bassett is responsible for issuing the payments of compensation awards against United.<sup>3</sup>

In February 2001, Hafer contacted the Federal Aviation Administration (FAA) to complain about United's aircraft maintenance practices. United terminated Hafer's employment in May 2001. He filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the termination violated AIR 21's whistleblower protection provisions. We issued a Final Decision and Order dismissing that complaint on April 26, 2006.<sup>4</sup>

On April 14, 2004, the WCAB awarded Hafer vocational rehabilitation maintenance allowance (VRMA) payments. As a result, Gallagher Bassett was required to issue Hafer a check in the amount of \$38,896.00 within 25 days of issuance of the WCAB ruling. The check was not issued within the 25-day time period. On July 25, 2004, a Laughlin Falbo attorney directed Gallagher Bassett to issue the payment.

On August 5, 2004, Hafer filed another complaint with OSHA. In this complaint, Hafer alleged that United committed an additional violation of AIR 21's employee protection provisions because it failed to pay him his VRMA benefits. He did not contact

---

<sup>1</sup> Transcript (Tr.) at 203-04.

<sup>2</sup> *Id.* at 292.

<sup>3</sup> *Id.* at 60-61, 70.

<sup>4</sup> *Hafer v. United Airlines, Inc.*, ARB No. 02-088, ALJ No. 2002-AIR-005 (ARB Apr. 26, 2006).

United prior to filing this second complaint to complain that he had not received his VRMA benefits.<sup>5</sup>

Gallagher Bassett provided Hafer with a check for his VRMA benefits on August 10, 2004. On September 3, 2004, Hafer submitted a letter to OSHA contending that United violated AIR 21 by refusing to reimburse him for out-of-pocket medical expenses and incorrectly computing his weekly disability benefits. OSHA investigated all of Hafer's allegations and determined that United had not violated AIR 21.

Hafer requested a hearing before an ALJ. While the case was pending before the ALJ, United sought interlocutory review of three issues, including the timeliness of Hafer's complaint. Following our denial of United's interlocutory appeals,<sup>6</sup> the ALJ conducted a hearing on May 23-24 and June 27, 2005. Testimony was provided by Hafer as well as employees of United, Gallagher Bassett, and Laughlin Falbo.

The ALJ issued an R. D. & O. on November 9, 2005. The ALJ concluded that Hafer "filed a timely AIR 21 complaint concerning the late payment of his VRMA benefits by fax on August 5, 2004 and by certified mail on August 6, 2004."<sup>7</sup> The ALJ also concluded that United did not violate AIR 21 because the delay in Hafer's VRMA benefits was not retaliatory.<sup>8</sup> Hafer filed a Petition for Review of the R. D. & O. with the Board on November 21, 2005.

#### **JURISDICTION AND STANDARD OF REVIEW**

This Board has jurisdiction to review the ALJ's recommended decision.<sup>9</sup> We review an ALJ's conclusions of law de novo.<sup>10</sup> We review the ALJ's findings of fact in an AIR 21 case under the substantial evidence standard.<sup>11</sup>

---

<sup>5</sup> Tr. at 166.

<sup>6</sup> *Hafer v. United Airlines, Inc.*, ARB Nos. 05-073, 05-092, ALJ No. 2005-AIR-008 (ARB June 16, 2005).

<sup>7</sup> R. D. & O. at 11.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> 29 C.F.R. § 1979.110. *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121).

<sup>10</sup> *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004).

## DISCUSSION

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air commerce safety. The statute prohibits air carriers, contractors, and their subcontractors from discharging or “otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)” engaged in the air carrier safety-related activities the statute covers.<sup>12</sup>

An AIR 21 complainant must prove that he was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected him to an unfavorable personnel action; and that the protected activity was a “contributing factor” in the unfavorable personnel action.<sup>13</sup> The complainant is then entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.<sup>14</sup>

The ALJ articulated the proper legal standard and concluded that Hafer “failed to show by a preponderance of the evidence that the delay [in his VRMA payments] was attributable to retaliatory motives.”<sup>15</sup> We read the ALJ’s decision to mean Hafer did not meet his burden of proving that his protected activity was a contributing factor in the delay of his VRMA benefits. For the following reasons, we agree with the ALJ’s conclusion that Hafer failed to meet his burden of proof.

In his Petition for Review, Hafer “take[s] exception to the three reasons given for dismissing his AIR-21 complaint,”<sup>16</sup> but we conclude that these reasons are supported by

---

<sup>11</sup> 29 C.F.R. § 1979.110(b).

<sup>12</sup> 49 U.S.C.A. § 42121(a).

<sup>13</sup> 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.104(b)(1)(i)-(iv).

<sup>14</sup> § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int’l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004).

<sup>15</sup> R. D. & O. at 13.

<sup>16</sup> Petition for Review at 4. Hafer also states in his Petition for Review that “United Airlines has refused to pay Complainant’s ‘out-of-pocket medical expenses.’” Petition for Review at 2. We do not consider this to be a challenge to the ALJ’s ruling that the only timely allegation presented by Hafer involves his VRMA benefits. R. D. & O. at 11. Hafer

the record. First, substantial evidence supports the ALJ's decision to credit the testimony of employees from United, Gallagher Bassett, and Laughlin Falbo, who indicated that they were not involved in any efforts to intentionally delay the payment of Hafer's VRMA benefits. Second, substantial evidence supports the ALJ's finding that deliberately delaying the payment of Hafer's VRMA benefits would have been an illogical way of retaliating against him, because the delay would result in an increase in the amount United would be required to pay to Hafer. Third, substantial evidence supports the ALJ's finding that the delay was likely due to inadvertence and clerical errors.<sup>17</sup>

Hafer also contends that the ALJ erred by not concluding that United failed to meet its burden to "[demonstrate] by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of any protected behavior."<sup>18</sup> However, this burden arises only if the complainant has proven that the respondent took adverse action in part because of the complainant's protected activity.<sup>19</sup> In this case, Hafer failed to prove that his protected activity was a contributing factor to the delay in payment of his VRMA benefits. Therefore, we need not proceed to the additional analysis cited by Hafer.

In addition to his Petition for Review, Hafer submitted to the Board a "Motion to Consider Declaration of Mark Malter and to Subpoena the Testimony of Crystal D'Amico [sic]"<sup>20</sup> (Motion), dated January 4, 2006. Mark Malter is the attorney representing Hafer in his workers' compensation claim, and his declaration describes his efforts to forward the WCAB ruling to Gallagher Bassett and Laughlin Falbo. Crystal D'ammico was a claims examiner at Gallagher Bassett who was one of the individuals responsible for Hafer's workers' compensation claim.

The record in this case was closed on June 27, 2005.<sup>21</sup> The Board will not accept the Motion's declaration unless it constitutes new and material evidence that was not

---

also fails to challenge United's contention that his request for out-of-pocket medical expenses was a matter within the exclusive jurisdiction of the WCAB. R. D. & O. at 7, citing RX 9.

<sup>17</sup> R. D. & O. at 13-14.

<sup>18</sup> Petition for Review at 7.

<sup>19</sup> See 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.104(c); *Peck*, slip op at 18-19, n 7.

<sup>20</sup> The ALJ found that the correct spelling of the claims examiner's name is "D'ammico." R. D. & O. at 3, n 2.

<sup>21</sup> Tr. at 354.

readily available prior to the closing of the record.<sup>22</sup> Malter's declaration asks us to "consider [the] facts" contained therein, but his statements do not constitute new and material evidence that was unavailable prior to the closing of the record. We therefore deny Hafer's request to consider the declaration.

We also deny Hafer's request that we "reconsider Judge Mapes' subpoena ruling in this AIR-21 case," which we assume is the mechanism by which we would subpoena the testimony of D'ammico.<sup>23</sup> None of the subpoena requests that were the subject of that ruling sought testimony from D'ammico, and the ALJ did not err by concluding that Hafer was not entitled to the subpoenas he requested.<sup>24</sup>

### CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's finding that United did not delay Hafer's VRMA payments because of his protected activity. Therefore, the ALJ correctly concluded that United did not violate AIR 21. Furthermore, we have considered, but rejected, Hafer's additional arguments on appeal. Accordingly, we **DENY** the complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

---

<sup>22</sup> See, e.g., *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001).

<sup>23</sup> Motion at 4.

<sup>24</sup> See January 18, 2005 letter from Judge Mapes to Hafer regarding subpoena requests; see also Plaintiff's First Request for Production of Documents (seeking issuance of subpoenas to the FAA, OSHA, and the U.S. Department of Transportation).