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Issue Date: 22 November 2005

CASE NUMBER: 2004-STA-00055

In the Matter of:

JOEL KING,
Complainant,

vs.

U-HAUL COMPANY OF NEVADA,
Respondent.

Order Denying Dismissal, Granting Stay and Requiring Report

U-Haul of Nevada (U-Haul) has moved to dismiss this matter on the basis of judicial estoppel. It claims the Complainant, Joel King, defrauded his creditors when he failed to disclose this proceeding as an asset in his Chapter 13 bankruptcy petition and received a bankruptcy discharge in early 2005, after the bankruptcy had been converted to a Chapter 7 liquidation. U-Haul also challenges the Complainant's standing to prosecute this matter after he filed for bankruptcy protection. The Complainant seeks a stay of this matter so he can ask the bankruptcy Trustee to prosecute (or abandon) the portion of this claim that could have been part of the bankruptcy estate.

Dismissal would be an overbroad and disproportionate penalty. This matter is stayed to permit the Complainant to ask the bankruptcy Trustee either to reopen the estate to prosecute the liability and damage portions of the whistleblower claim (*viz*., the claims for back pay and compensatory damages), or to abandon them to the Complainant. The job reinstatement claim remains his; it would produce only earnings from future labor that add no value to the bankruptcy estate.

Background

Joel King complained that U-Haul terminated him in early October 2003 in retaliation for reporting 34 work-related safety concerns to a Nevada state agency in early September 2003, that led it to inspect U-Haul's Henderson, Nevada facility later that month.[1] The Occupational Safety and Health Administration dismissed his whistleblower complaint as untimely on August 5,

[1] Employees at the Henderson, NV U-Haul facility elected King their safety representative according to his letter of Sept. 9, 2003 to Nevada's Occupational Safety and Health Chief Enforcement Officer.

2004. His response[2] of August 26, 2004 initiated this de novo proceeding. OSHA's treatment of the timeliness issue was addressed in a January 19, 2005 order that found the Complainant's claims under several environmental protection whistleblower statutes[3] were time barred, but not the one under the Surface Transportation Assistance Act of 1982 (STAA).[4]

After his termination, the Complainant and his wife petitioned for relief under Chapter 13 of the Bankruptcy Code in February 2004. A statement of the debtors' financial affairs encompassing "all legal and equitable interests of the debtor[s] in property as of the commencement of the case" is required by 11 U.S.C.A. §§ 521(1) & 541(a)(1) (West 2004). The Chapter 13 petition listed nothing in response to an instruction to disclose "suits and administrative proceedings . . . . *See* Ex. A to U-Haul's motion, pg. 49 at ¶ 4. Similarly, on the Schedule of Personal Property (Schedule B) for "other contingent and unliquidated claims of every nature" the answer was "none." *Id*. at pg. 61, ¶ 20. Comparable answers were given in the schedules for the Chapter 7 filing they executed on November 30, 2004. *Id*. at pg. 8 ¶ 20, and at pg. 21 ¶ 4. (The proceeding had been converted to a Chapter 7 liquidation in an order filed on November 24, 2004.) The court granted their discharge under § 727 of the Bankruptcy Code on March 2, 2005.

The parties stipulated to defer the trial of this STAA whistleblower matter until a decision was entered on a complaint the General Counsel of the National Labor Relations Board had issued against U-Haul. *See* Stipulation to Continue Trial filed March 5, 2005. The complaint alleged, among other things, that U-Haul terminated the Complainant in retaliation for activities protected under the National Labor Relations Act (NLRA). *U-Haul Co. of Nevada, Inc*., NLRB Case No. 28-CA-18575; 5th Amended Complaint ¶ 7(z).[5] The parties' Joint Status Report of Nov. 3, 2005 says the NLRB administrative law judge sustained the General Counsel's charge,[6] a finding that may affect the outcome here, under the Secretary of Labor's STAA whistleblower regulations. 29 C.F.R. § 1978.112(a)(2) (2004).

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[2] The Secretary's regulations denominate the response an "objection." 29 C.F.R. § 1978.105(a) (2004).

[3] These are section 1405(i) of the Safe Drinking Water Act of 1974, 42 U.S.C.A. § 300j-9(i) (West 2001); section 507(a) of the Federal Water Pollution Control Act of 1972, 33 U.S.C.A. § 1367 (West 2001); section 23 of the Toxic Substances Control Act of 1976, 15 U.S.C.A. § 2622 (West 1998); and section 322 of the Clean Air Act of 1977, 42 U.S.C.A. § 7622 (West 2003).

[4] 49 U.S.C.A. § 31105 (West 1997).

[5] The complaint served as an organizing principle for the NLRB judge's Decision. *See* footnote 6 below.

[6] The NLRB judge found that U-Haul terminated the Complainant because he was a union supporter, in violation of § 8(a)(3) of the NLRA, and has required U-Haul to make him whole for any loss of earnings and other benefits he suffered in the "Remedy" portion of the decision. See the Decision dated September 30, 2005 in *U-Haul Co. of Nevada, Inc*., NLRB Case No. 28-CA-18575, available at http://www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD(SF)-65-05.htm.

A.

As an initial matter, I doubt that an Article I adjudicator such as the Secretary of Labor (or an administrative law judge acting on her behalf) may adjudicate the purely equitable defense U-Haul has raised. Since the merger of law and equity in the U. S. District Courts (and many state court systems), there is but one form of action, not separate actions at law and in equity. Rule 2, Fed. R. Civ. P., and the Advisory Committee Notes to Rule 1, Fed. R. Civ. 1937 Adoption, at ¶ 3. Lawyers now present equitable defenses routinely in actions that do not sound in equity. But what federal judges in the Article III district courts and courts of appeals may do is not the measure of an Article I tribunal's jurisdiction. *See e.g., C.I.R. v Gooch Milling & Elevator Co.,* 320 U.S. 418, 421 (1943) (holding an Article I tax tribunal lacked jurisdiction to entertain an equitable issue Congress had not assigned to it); *Temporary Employment Services, Inc. v. Director, O.W.C.P.,* 261 F.3d 456 (5th Cir. 2001) [holding Department of Labor administrative law judges lack authority to adjudicate common law contract claims unless they are "in respect of" a compensation claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 919(a) (West 2001)]. Neither the Administrative Procedure Act, 5 U.S.C.A. §551 *et seq*. (West 1996), nor the substantive provisions of the STAA grant the Secretary of Labor or an administrative law judge equity powers.[7] Equity courts could create and apply the doctrine of judicial estoppel, but an administrative forum has no such inherent authority. *Reynolds v. C.I.R.,* 861 F.2d 469 (6th Cir. 1988) (recognizing the issue but permitting the Tax Court to apply both equitable and judicial estoppel).

Judicial estoppel prevents a litigant who obtained relief in one case from taking an inconsistent position in another. *See e.g., Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603-604 (9th Cir. 1996) (Plaintiff had settled a workers' compensation matter in which she claimed a total inability to earn income. The court precluded her from claiming in an age discrimination action that she performed her job adequately, and that the employer's reduction of her work days from five to two or three days a week was a pretext for discrimination). The Secretary of Labor, not the Bankruptcy Court, must impose the equitable remedy U-Haul seeks. After reviewing the bases U-Haul asserts for dismissal, I would not grant it even if I have the authority to do so.

B.

As an equitable remedy, judicial estoppel is discretionary by nature. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001); *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990). The interests at stake are not U-Haul's, "[t]he interested party is the court in which the litigant takes a position incompatible with the one the litigant has previously taken." *Rissetto,* 94 F.3d at 603. It protects the integrity of the adjudicatory process by preventing a party from playing "fast and loose" with the courts through inconsistent positions about the law or about the underlying facts. *Id*. at 600-601; *Helfand v. Gerson*, 105 F.3d 530, 534-535 (9th Cir. 1997). Courts do not impose it for mistake or inadvertence. *See e.g., United States v. Hussein,* 178 F.3d 125, 130 (2nd Cir.

[7] The STAA gives the Secretary power to craft a remedy that will abate any violation of the Act, to reinstate the complainant to his former position at the same pay and terms and privileges of employment, and to award compensatory damages. 49 U.S.C.A. § 31105(b)(3)(A)(i) to (iii) (West 1997). Statutory remedies implicate no equity powers.

1999) (declining to apply the doctrine when the litigant's prior inconsistent position was a miscalculation of the date a limitations period expired); *Konstantinidis v. Chen*, 626 F.2d 933, 939-940 (D.C. Cir. 1980) (finding statements a worker made about the cause of an injury in a worker's compensation proceeding did not preclude his claims in a related medical malpractice action; he may have been mistaken about the injury's cause); *see also*, *Helfand, supra,* 105 F.3d at 536 (acknowledging the rule).

The "determinative factor" is whether the litigant "intentionally misled the court to gain unfair advantage." *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) (reversing a summary judgment for a jury to determine the credibility question that record presented about material misrepresentation). I find the Complainant has not intentionally abused the bankruptcy court or this forum. His protest about his termination bore no resemblance to a pleading in an adjudicatory tribunal under Rules 3 and 8(a) Fed. R. Civ. P.[8] Employee complaints initiate an OSHA investigation, not a trial-type adjudicatory proceeding. *Smith v. Yellow Freight System, Inc.***,** 1991-STA-45 (Sec'y Mar. 10, 1993), slip op. at 15 n. 11; *Richter v. Baldwin Associates*, 1984-ERA-9 (Sec'y Mar. 12, 1986), slip op. at 9-11.

When he filed his bankruptcy petition on February 11, 2004, OSHA had not replied to his complaint; there was nothing to disclose. His statement to the Bankruptcy Court that his filing was "true and correct to the best of [his] knowledge and belief" was accurate. The government controlled the proceeding the NLRB General Counsel's complaint initiated. NLRB staff attorneys presented evidence against U-Haul, not attorneys he retained. The relief he may receive from that proceeding is incidental to the government's sovereign authority to enforce the anti-retaliation provisions of the National Labor Relations Act against U-Haul as an employer. 29 U.S.C.A. §158(a)(3) (West 1998). It never has been his proceeding, despite U-Haul's contrary implication.

His reasons for omitting the Department of Labor whistleblower proceeding when the bankruptcy was converted to a liquidation proceeding are more than plausible, they are persuasive. OSHA summarily rejected the complaint when it spoke on the Secretary of Labor's behalf in August 2004. Counsel for both the Complainant and U-Haul believed the STAA matter likely would be determined by the outcome of the government's NLRB case,[9] and their applications for a stay had been granted on June 13, 2005, and again on October 14, 2005. The Bankruptcy Code does not appear to make an unsophisticated debtor[10] absolutely liable for good faith errors in his filings, judicial estoppel is not a creature of that code. The Complainant misapprehended the legal significance of this administrative proceeding, that was going nowhere

[8] I am uncertain whether his complaint to a Nevada state agency also served as one to the U. S. Department of Labor. It is unnecessary to decide that issue to dispose of this motion.

[9] The parties stated that "another trial of the retaliation issue here may be unnecessary as the NLRB ALJ ruling may result in the settlement of this case, or may result in a narrowing or altering of the issues to be tried here. . . .The outcome of the NLRB proceeding may need to be considered in this STAA proceeding as a result of 29 C.F.R. 1977.18(c)." *See* the Stipulations to Continue Trial filed March 7, 2005 at pg. 2 and June 6, 2005 at pg. 2.

[10] I have no reason to doubt that the Complainant is a mechanic without legal training, as his declaration asserts. It makes no difference that he was represented in bankruptcy, he did not understand there was anything he should have his lawyer disclose in the Chapter 7 schedules.

until the outcome of the NLRB case the government prosecuted. This is not a finding that whistleblower protection proceedings under the STAA need never be disclosed in bankruptcy; the determination is anchored in the unique circumstances of this case.

The unpublished decision in *Hardin v. Dolgencorp, Inc*. (Case No. 03-15697, 11th Cir. April 5, 2005) is not helpful. That bankruptcy debtor was expected to understand that an employment discrimination suit she had filed in U. S. District Court was a "suit to which the debtor is or was a party" that she had to disclosed in the Statement of Financial Affairs she filed with the Bankruptcy Court. This Complainant, by contrast, filed no proceeding in any court. His August 26, 2004 objection to OSHA's dismissal of his claim for untimeliness is a straightforward letter that bears no resemblance to a complaint seeking damages filed in a district court under Title VII of the Civil Rights Act.[11]

The decision in *Baker v. Dept. of Interior*, 125 Fed. Appx. 151 (9th Cir. 2005) is not controlling. Unpublished Ninth Circuit decisions are not precedent, and counsel for U-Haul does not claim that an exception to the court's non-citation rule applies. Ninth Circuit Rule 36-3(a), (b). That Ninth Circuit panel reviewed a summary judgment that dismissed a claim based on judicial estoppel under the lenient abuse of discretion standard. The decision hinged on the trial judge's finding that plaintiff knowingly failed to disclose an EEOC matter in her bankruptcy. The opinion does not describe why the trial judge found the debtor knew she was required to list it in her bankruptcy filings. I have found the Complainant's failure to disclose excusable. The opinion also refers to the EEOC matter variously as an "action" (typically something filed in court under Rules 2 and 3, Fed. R. Civ. P.) and as a "claim" (something less formal that may not have matured into a court filing), but I cannot tell whether these verbal distinctions are meaningful. The *Baker* decision lacks the detail required to apply it.

The dismissal U-Haul seeks would do nothing to protect the integrity of bankruptcy proceedings. No fraud on U-Haul is involved, and it makes no such claim. To be guilty of the fraud on creditors that U-Haul suggests, the Complainant would have to be prescient enough to foresee a favorable decision from the judge in the proceeding the NLRB's General Counsel filed. An even greater prescience is required, for the NLRB judge's decision is subject to review as of right before the Board and to enforcement proceedings in the Ninth Circuit. 29 U.S.C.A. § 160 (West 1998). Whether it will lead to any recovery in this Department of Labor proceeding remains to be seen, although the parties have assumed that it would. The bankruptcy Trustee can assess that uncertainty in deciding whether to pursue the STAA whistleblower claim.

C.

U-Haul also challenges the Complainant's standing to proceed with this matter, on the ground that any interest he had was transferred to the Trustee in his Chapter 7 proceeding under §§ 323(a) and 541(a) of the Bankruptcy Code. This overstates the Trustee's interest, for the

[11] Title VII of the Civil Rights Act prohibits discrimination against any employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West 2001).

potential remedy of reinstatement to his job at U-Haul that the STAA[12] creates is valuable only to the Complainant, not to his bankruptcy estate, an entity incapable of labor. Reinstatement is mandatory; he cannot choose front pay instead of being returned to his old job. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30, slip op. at 4 (ARB Mar. 31, 2005); 29 C.F.R. §1978.109(b) (2004). U-Haul's objection that reinstatement is unavailable because it closed its Henderson, NV facility ignores the relief the NLRB judge ordered. He found U-Haul closed it out of discriminatory motivation in violation of Section 8(a)(3) of the NLRA, so it must be re-opened.[13] In any case U-Haul could re-employ the Complainant at a comparable facility. The reinstatement claim cannot be dismissed for a lack of standing when the Complainant, not the bankruptcy Trustee, is the only one entitled to that relief.

On the other hand, the back pay and compensatory damage claims the STAA creates at 49 U.S.C.A. § 31105(b)(3)(A)(iii) belonged to the bankruptcy Trustee. It would be inefficient and difficult to separate out the discrete items of relief, for all depend on proof of intentional employment discrimination by U-Haul that should be determined on a single trial record.

Ultimately the standing argument gets U-Haul nowhere. The informal STAA employment discrimination claim awaiting OSHA's decision did not evaporate upon the Chapter 13 filing. The Complainant had standing to object to OSHA's findings in August 2004 to preserve his own reinstatement remedy, if nothing else. This distinguishes the matter from *Kunimoto v. Fidell*, 26 Fed. Appx. 630 (9th Cir. 2001) (another non-precedential decision) and *Turner v. Cook*, 362 F.3d 1219, 1225-1226 (9th Cir 2004), *cert. den.*, __ U.S. __, 125 S. Ct. 498 (2004) (holding a debtor lacked standing to "pursue" an appeal when the bankruptcy trustee had not followed the procedure required to abandon it). Neither the Trustee nor the Complainant has withdrawn the objection to OSHA's findings. *See* 29 C.F.R. § 1978.111(c) (2004). The Complainant has been entitled to continue as the named party here under Rule 25(c), F.R.Civ.P.[14] Even if the bankruptcy Trustee withdrew the back pay and compensatory damage claims she controlled, the Department's Administrative Review Board would have to review any withdrawal. *Ass't Sec'y & Boyd v. Palmentere Brothers Cartage Service, Inc.*, ARB No. 04-135, ALJ No. 2003-STA-40 (ARB Oct. 27, 2004), *Foley v. J.B. Hunt Transportation, Inc.*, ARB No. 04-080, ALJ No. 2004-STA-14 (ARB Oct. 27, 2004) and *Pavon v. United Parcel Service*, ARB No. 04-127, ALJ No. 2003-STA-46 (ARB Oct. 27, 2004) [the Board automatically reviews withdrawals of objections to OSHA's findings under 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)]. STAA claims cannot be dismissed or withdrawn unilaterally.

Order

The motion to dismiss this matter on the basis of judicial estoppel and for lack of

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[12] 49 U.S.C.A. § 31105(b)(3)(A)(ii).

[13] The NLRB judge ordered U-Haul to "[r]eopen and reestablish as a key city repair facility the repair shop located at 989 South Boulder Highway, Henderson, Nevada and resume operation of this facility as it existed on March 3, 2003." *See* ¶ 2(d) of the "Order" portion of the decision in *U-Haul Co. of Nevada, Inc.*, NLRB Case No. 28-CA-18575, available at http://www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD(SF)-65-05.htm.

[14] The federal rules of civil procedure apply where no rule of the Office of Administrative Law Judges governs. 29 C.F.R. § 18.1(a) (2004).

standing is denied. The Complainant will present the STAA whistleblower claim to the bankruptcy Trustee, who can decide whether to re-open the bankruptcy estate to pursue the back pay and compensatory damage claims, or to follow the procedures to abandon them. This proceeding is stayed. The Complainant shall file a report on the status of this matter within 60 days.

A

William Dorsey
Administrative Law Judge