In the Matter of:

MARK S. SASSMAN, SR.,

COMPLAINANT,

v.

UNITED AIRLINES, and
ALLIANT CREDIT UNION,

RESPONDENTS.

ARB CASE NO. 05-077

ALJ CASE NO. 05-AIR-004

DATE: September 28, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark S. Sassman, Sr., pro se, *Carmel, Indiana*

For the Respondent United Airlines:
Gary S. Kaplan, Esq., Seyfarth Shaw LLP, *Chicago, Illinois*

For the Respondent Alliant Credit Union:
Dierdre K. White, Esq., Alliant Credit Union, *Chicago, Illinois*

FINAL DECISION AND ORDER

Mark S. Sassman, Sr. filed a complaint against United Airlines and Alliant Credit Union alleging that they retaliated against him and therefore violated the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] A United States Department of Labor Administrative Law Judge

[1] 49 U.S.C.A. § 42121(a) (West Supp. 2006).

(ALJ) recommended that Sassman's complaint be dismissed. Sassman appealed. We conclude that Sassman's complaint must be dismissed.

BACKGROUND

Sassman worked as a mechanic at United's Indianapolis Maintenance Center. In 1992, Sassman joined Alliant (f/k/a United Airlines Employees' Credit Union). In February 1999, Sassman purchased a 1999 Chevrolet Venture van. Alliant financed the purchase.

United discharged Sassman in December 2000. Sassman filed an AIR 21 complaint in January 2001, alleging that United fired him because he had criticized its air carrier maintenance program. United asserted that it fired Sassman because he accepted pay for time he did not work. Meanwhile, Sassman did not make required payments on the Alliant loan. Alliant repossessed the van in February 2002 and sold the van at an auction. The sale proceeds were less than Sassman owed on the loan, and Alliant sought to collect the difference between the sale proceeds and the balance of the loan.

On December 9, 2002, United filed a petition for bankruptcy protection. A Labor Department ALJ dismissed Sassman's complaint because it was discharged as part of United's bankruptcy reorganization.[2] Sassman did not appeal this order, and it became the Secretary of Labor's final decision by operation of law.[3]

On July 1, 2004, Sassman filed this AIR 21 whistleblower complaint.[4] This time Sassman named both United and Alliant. Sassman alleged that because of the safety concerns he raised in 2000, United caused Alliant to treat him more harshly than it treated other credit union members who defaulted on loans.

The ALJ assigned to this case recommended that this complaint be dismissed because it did not state a claim for which relief can be granted and because it was

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[2] *Sassman v. United Airlines*, No. 2001-AIR-007 (ALJ June 6, 2006).

[3] *See* 29 C.F.R. § 1979.110 (2007).

[4] Sassman filed this complaint in a letter he sent to Indiana's Department of Labor in Indianapolis, Indiana. Regulations that implement AIR 21 require that complaints be filed with the Area Director for the United States Department of Labor's Occupational Safety and Health Administration (OSHA) in the area where the employee resides or was employed. 29 C.F.R. § 1979.103(c). When he did not receive a response to his letter, Sassman sent a copy to the Secretary of Labor on September 20, 2004. Though Sassman initially filed his complaint with the wrong agency, like the ALJ, and for purposes of this opinion only, we will treat Sassman's July 1, 2004 letter to Indiana OSHA as a properly filed AIR 21 complaint.

untimely filed.[5] We granted Sassman's petition for review of the ALJ's recommended order of dismissal.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision.[6] We review an ALJ's conclusions of law de novo.[7] We review the ALJ's findings of fact in an AIR 21 case under the substantial evidence standard.[8]

DISCUSSION

1. Sassman's Claim Against United Was Discharged in Bankruptcy

On March 13, 2006, United informed us that the Bankruptcy Court had entered a Confirmation Order on January 20, 2006, that discharged and released United from any claims of any nature that arose before the confirmation date. On March 23, 2006, we ordered United to inform us whether and why the discharge required us to dismiss Sassman's complaint or dismiss United as a party. We also gave Alliant and Sassman an opportunity to respond to United's response.

United responded and reiterated its argument that, pursuant to 11 U.S.C.A. § 1141(d)(1)(A), the entry of the Confirmation Order discharged it from "any debt that arose before the date of such confirmation." Furthermore, United pointed out that under 11 U.S.C.A. § 524(a)(2), the 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 such debt as a personal liability of the debtor."[9]

Sassman responded to United's response. The essence of Sassman's response is that "the current case occurred" after United filed for bankruptcy and therefore United

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[5] March 8, 2005 Order Dismissing Complaint.

[6] 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).

[7] *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-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).

[8] 29 C.F.R. § 1979.110(b).

[9] Response to March 23, 2006 Order.

was not discharged from his present claim. Sassman cited no authority to support this argument.[10]

We find that Sassman's claim against United, whether characterized as a pre-petition claim or as a post-petition claim, was discharged in bankruptcy because it arose before the Confirmation Order was entered on January 20, 2006. Therefore, we dismiss Sassman's claim against United.

We will, however, proceed to decide whether Alliant violated the Act. Sassman argues that Alliant is liable with United because "United Airlines Credit Union [Alliant's predecessor] Employees were employed by United Airlines, received benefits from United Airlines, received office space within the United Airlines facilities at no charge, [and] used United Airlines Computer systems and acted as a common entity."[11] We are cognizant of Alliant's argument that since it is not an air carrier or contractor or subcontractor of an air carrier, it is not a covered employer under AIR 21.[12] And Alliant also submitted an affidavit from Lee Schafer, an Alliant Senior Vice President, who states that Alliant is and has always been an entity separate and distinct from United.[13] But since Sassman has not yet had an opportunity for discovery to prove his "common entity" theory, we will assume without finding that Alliant is an AIR 21-covered employer.

2. The AIR 21 Legal Standard

AIR 21 prohibits air carriers and their contractors and subcontractors from taking an adverse employment action against an employee (or former employee) because the employee provided the employer or the Federal Government information relating to a violation of any federal air carrier safety law.[14] To prevail on an AIR 21 whistleblower complaint, the employee must prove by a preponderance of the evidence 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 a materially

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[10] Complainant's Response at 3.

[11] Brief at 2-3.

[12] Alliant Brief at 5-11; 49 U.S.C.A. § 42121(a) ("No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee . . . .").

[13] Affidavit of Lee Schafer (Exhibit C to United Airlines Response to Complainant's Appeal of Order Dismissing Complaint).

[14] 49 U.S.C.A. § 42121(a)(1).

adverse action, and that the protected activity was a contributing factor in the employer's decision to take the adverse action.[15]

3. Failure To State a Claim

The ALJ found that Sassman's complaint did not "articulate an unfavorable personnel action." Thus, he concluded that it failed to state a claim upon which relief can be granted and therefore should be dismissed.[16] Sassman argues that he was a member of Alliant, a credit union that serves United employees and former employees, and that membership is a privilege of employment with United. Sassman then correctly notes that AIR 21 prohibits employers from taking adverse action against former employees with respect to "compensation, terms, conditions, or *privileges* of employment."[17] According to Sassman, Alliant and United took an adverse action against him in June 2004 when Alliant's collection attorney sent him a letter threatening to sue him for the balance owed on the loan agreement.[18] Sassman claims that Alliant, in concert with United, treated him differently than other credit union employees who defaulted on loans. Sassman argues, in essence, that the ALJ erred in finding that his complaint did not articulate an unfavorable personnel action.[19]

The ALJ did not provide discussion or analysis for his finding. And, arguably, on its face, Sassman's argument has merit. But even if we assume that Sassman's membership in Alliant constitutes a privilege of employment with United, and even assuming that Alliant's actions to enforce the loan agreement were materially adverse to Sassman, the complaint must be dismissed because Sassman did not timely file it.

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[15] *See* 49 U.S.C.A. § 42121(b)(2)(B)(i), (iii); 29 C.F.R. § 1979.104 (b)(1)(i)-(iv); *Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 03-AIR-047, slip op. at 7-12 (ARB Jan. 31, 2007).

[16] Order Dismissing Complaint at 2, para. 6.

[17] Brief at 1-2.

[18] Sassman characterizes the letter as a "threat." According to Alliant, the collection attorney used the letter to "contact" Sassman about the delinquent account. The letter is not part of the record. We can safely assume that the letter at least indicated that Alliant was continuing to pursue its collection efforts.

[19] Brief at 1-2.

4. Sassman's Complaint Is Time-Barred

The ALJ found that Sassman did not timely file this complaint. AIR 21 whistleblower complaints must be filed within 90 days of the alleged adverse action.[20] The 90-day limitation period begins to run on the date that the employer communicates to the employee its intent to implement an adverse employment decision, not the date that the employee experiences the consequences of the adverse action.[21]

As noted, Sassman's complaint alleges that on June 2, 2004, United and Alliant took adverse action against him when Alliant's collection attorney sent the letter to him. Sassman appears to argue that since he filed his complaint on July 1, 2004, (albeit with Indiana's Department of Labor), he filed within 90 days of the adverse action and, therefore, his complaint is not time-barred.[22]

But Sassman's argument fails because, as Alliant points out, the June 2, 2004 letter was only a "step" in Alliant's repossession and debt collection process. Alliant asserts, and Sassman does not contest, that it repossessed the van on February 2, 2002. Thereafter, on February 5, 2002, it notified Sassman in writing that it had repossessed the van because of his default, informed him of the deficiency balance, indicated that it would sell the van, and that the proceeds would go toward the deficiency. According to Alliant, this letter also advised Sassman that he would owe any difference between the balance owed and the sale proceeds. Alliant also asserts that it sent another letter on March 20, 2002, advising Sassman of the amount he owed after the sale and that it would take "other action" if Sassman did not contact Alliant about settling the balance due.[23] Sassman has provided no evidence that contradicts Alliant's argument that the June 2, 2004 letter was but a step in its debt collection process.

We find that the June 2, 2004 letter informing Sassman about Alliant's continuing collection efforts was a consequence of the action Alliant initiated and communicated to Sassman in February and March 2002. Alliant's continuing collection effort was not, therefore, a separate, actionable adverse action. Accordingly, since Sassman did not file an AIR 21 complaint within 90 days of when he received Alliant's February 5 or March 20, 2002 letters informing him of its intentions, his complaint is time-barred.

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[20] 49 U.S.C.A. § 42121(b)(1).

[21] *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-019, slip op. at 5 (ARB Feb. 26, 2004) (citing *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated)).

[22] Brief at 3-6.

[23] Alliant Brief at 11-12. The February 2 and March 20, 2002 letters are not part of the record.

This Board has recognized three situations in which we will toll a statute of limitations and accept an untimely complaint: (1) when the employer has actively misled the complainant regarding his whistleblower rights; (2) when the complainant has in some extraordinary way been prevented from filing a complaint; and (3) when the complainant has filed the complaint in the wrong forum.[24] Sassman has presented no argument or evidence that the first two situations apply here. His brief implies that since he filed his complaint with the Indiana Department of Labor, his complaint is timely.[25] But as we indicated earlier, we are treating Sassman's July 1, 2004 Indiana filing as a properly filed AIR 21 complaint.[26] Therefore, we find no grounds upon which to toll the 90-day limitations period.

Sassman also argues that under the "continuing violation" doctrine, the July 2004 complaint was timely filed. In support of this argument, Sassman seems to say that since he continued to engage in protected activity in 2003 when he criticized United's maintenance program to the FAA, the Mayor of Indianapolis, and on CBS news, his July 2004 compliant is not time-barred.[27] But the continuing violation doctrine has nothing to do with protected activity or when such activity occurred. Instead, under that doctrine, courts held that certain adverse actions, though occurring outside of the statute of limitations, could nevertheless constitute a "course of discriminatory conduct" and thus be actionable.[28] Sassman confuses protected activity with adverse action. Moreover, the United States Supreme Court has rejected the continuing violation doctrine.[29] Thus, this argument has no merit.

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[24] *See Higgins v. Glen Raven Mills, Inc.,* ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB Sept. 29, 2006).

[25] Brief at 3-6.

[26] See n.4.

[27] Brief at 6-8.

[28] *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107 (2002) (internal citations omitted).

[29] *See Morgan*, 536 U.S. at 114-115; *see also Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 8-9 (ARB Jan. 31, 2006) (continuing violation doctrine does not apply to AIR 21 whistleblower cases).

CONCLUSION

Sassman's claim against United was discharged in bankruptcy. Therefore, we **DISMISS** the complaint against United. Sassman's claim against Alliant was not filed within 90 days of the alleged adverse action that Alliant and United took against Sassman. Therefore, that claim is time-barred and also must be **DISMISSED.**

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge