No. _____

In The

Supreme Court of the United States

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BAHIG SALIBA,

Petitioner,

v.

AMERICAN AIRLINES, Inc. et, al.,

Respondents.

———— ♦ ————

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

———— ♦ ————

PETITION FOR A WRIT OF CERTIORARI

———— ♦ ————

Bahig Saliba
[redacted]
Petitioner in pro se

QUESTIONS PRESENTED

Whether the Respondent's demands for a medical treatment(s) or procedure(s) that are not required, authorized, or regulated by the Federal Aviation Administration (FAA), that directly impact the pilot medical certification standards and process, violated a right created in the law, interfered and impaired the Petitioner's ability to perform his duties, fulfil his obligations, and to make declarations reserved for the Petitioner, and whether the Federal Aviation Act of 1958 (The Act) gives him an implied private right to action to recover compensation owed to him by the air carrier.

Whether the above demands by the air carrier violate the terms and conditions of an employment contract under which the Petitioner has an obligation to provide a valid First-Class FAA medical certificate that meets FAA medical certification standards at set intervals.

LIST OF PARTIES

Petitioner and Plaintiff-Appellant Below

Bahig Saliba, pro se litigant.

Respondents and Defendants-Appellees below

- American Airlines Inc.,
- Chip Long,
- Timothy Raynor, and
- Alison Devereux-Naumann,

Individual respondents are management pilots themselves and party to this action in the trial court.

LIST OF PROCEEDINGS

Bahig Saliba v. American Airlines Inc., et al., No. 22-cv-00738-PHX-SPL, U.S. District Court for the District of Arizona.

- Judgement entered January 27, 2023.

Bahig Saliba v. American Airlines Inc., et al., No. 23-15249 United States Court of Appeals for the Ninth Circuit.

- Judgment entered April 30, 2024.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A pages 29a thru 30a to the petition.

The opinion of the United States district court appears at Appendix B pages 42a and 48a to the petition.

JURISDICTION

Judgement was entered April 30, 2024, by the Ninth Circuit court of appeals. No petition for rehearing was timely filed in the case.

Jurisdiction is found under *28 U.S.C.A. §1254(1)*

STATUTORY PROVISIONS/PUBLIC LAW

Federal Aviation Act of 1958 (The Act).

Title IV, Sec. 401 K (1) "Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and

copilots who are engaged in interstate air transportation withing the continental United States…"
and (5) "…and who is properly qualified to serve as, and hold a currently effective airman certificate authorizing him to serve as such pilot or copilot…"

Title III, Sec. 301 (b) "…Administrator shall have no pecuniary interest in or own any stock in or bonds of any aeronautical enterprise nor shall he engage in any other business, vocation, or employment."

Title VI Sec. 610 (a)(2), (3) and (5)
(a) It shall be unlawful–
(2) For any person to serve in any capacity as an airman in connection with any civil aircraft … in air commerce without an
airman certificate authorizing him to serve in such capacity, or in violation of any term,
condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title.
(3) For any person to employ for service in connection with any civil aircraft used in air commerce an airman who does not have an airman certificate authorizing him to serve in the capacity for which he is employed,
(5) For any person to operate aircraft in air commerce in violation on any other rule, regulation, or certificate of the Administrator under this title.
Title X Sec. 1005 (e)
(e) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect."

Railway Labor Act (RLA)
Sec. 2. In (4) and (5)
(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.
(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

FEDERAL REGULATIONS

14 CFR Part 1
Definition of Administrator - means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned.

14 CFR § 61.53 (a)
"…no person who holds a medical certificate issued under part 67 of this
chapter may act as pilot in command[1], or in any other capacity as a required pilot crewmember, while that person:

(1) Knows or has a reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation…"

14 CFR Part 67

[1] 14 CFR § 1.1 defines Pilot in command as the person who (1) Has the final authority and responsible for the operation and safety of the flight. (2) Has been designated as pilot in command before or during the flight, and (3) Holds the appropriate category, class, and type rating, it appropriate, for the conduct of the flight.

Sets the standards for First-, Second-, or third-class pilot medical certificates and is devoid of any required medical treatment or procedure for setting the medical standards.

14 CFR §§ 91.3 and 91.11
91.3 – Responsibility and authority of the pilot in command. (a) The pilot in command of an aircraft is directly responsible for and is the final authority as to, the operation of that aircraft.

and

91.11 – No person may assault, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated.

14 CFR §117.5 (d)
(d) – As part of the dispatch or flight release, as applicable, each flight crewmember must affirmatively state he or she is fit for duty prior to commencing flight.

14 CFR §121.383 (a)(1)(2)(i)
(a) No certificate holder may use any person as an airman nor may any person serve as an airman unless that person–
(1) Holds an appropriate current airman certificate issued by the FAA;
(2) Has in his or her possession while engaged in operations under this part –
(i) Any required appropriate current airman and medical certificates.

TSA Security Directives SD1544-21-2 and SD1542-21-01

Exempting persons from wearing masks in §F3
(3) People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

U.S. CODE

18 U.S. Code §1001 (a)(1)(2)
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact.
(2) makes any materially false, fictitious, or fraudulent statement or representation.

49 U.S. Code §114 (g)(2)
"The authority of the Administrator under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency"

49 U.S. CODE §42112
See The Act Title IV, Sec. 401 K (1) thru (5). Passages from The Act coded under 49 U.S. Code.

STATEMENT OF THE CASE

The Petitioner is an airline Captain who is engaged in air transportation and is subject to The Act and 14 CFR Parts 1, 61, 67, 91, 117, and 121.

The Respondents are an air carrier and high-level manager pilots operating under a Certificate of Convenience and Necessity issued under Public Policy. They are subject to, in addition to State contract law, The Act and the above CFRs.

The FAA is the single entity authorized by The Act to set separate and independent processes and standards for certification of pilots and air carriers. Neither The Act nor the FAA, and there is no evidence of Congressional intent, grant the air carrier authority in the determination of pilot medical standards, or any role in the process of issuance or maintenance of such certification and pilot obligations or declarations when providing transportation to the public.

The Act, in Title IV, Sec. 401(1) creates a pilot and copilot right to compensation by air carriers. Title IV, Sec. 401(5) requires that pilots and copilots are qualified, including medically certificated by the FAA, to serve in their capacity; thus, any mandate or interference that impairs or renders a pilot's FAA medical certification invalid, **attacks the right to compensation** (emphasis added). Arguably, the right demands a risk versus benefit assessment that must be reserved for the pilot, one of the reasons the FAA may not impose any medical treatment(s) or procedure(s) impairing a pilot medical certification standard.

The Petitioner secured an at-will employment contract for which improved rates of pay, work rules, and working conditions terms are detailed in a Collective Bargaining Agreement (CBA). The Petitioner's obligation, which is not a term or provision in the CBA, but detailed in the Respondents' employee manual, is that he has the responsibility to maintain and provide a valid First-Class[2] FAA medical certificate at set intervals. The Petitioner must meet his lawful and legal employment obligations by exercising authority under the medical certification process.

It is of great benefit at this point to provide a short narrative of the FAA pilot medical certification and authorities.

The pilot medical certification, a Public Policy that has been in effect for decades, is founded on self-declaration where informed consent is bedrock. The process is strictly carried out between the FAA Aeromedical Examiner (AME), a physician authorized by the FAA who conducts the examination, and the pilot applicant.

Neither The Act nor the FAA rules give the pilot authority that the pilot can then delegate to other persons in making health decision affecting the medical certification standard. In other words, the pilot has the obligation and duty, for safety reason, not to allow any other person, including the AME, to dictate any medical treatment or procedure in the performance of his job duties and must follow strict protocols laid out by the FAA. In short, the decision for any medical treatment(s)

[2] Airline pilots may operate as copilots by holding a Second-class medical certificate.

or procedure(s), or any activity impacting the FAA medical standards is strictly pilot authority that cannot be superseded under the law.

A pilot applicant makes declarations on FAA form 8500-8 under pains of 18 U.S. Code §1001. The pilot and AME then sign a Medical Certificate document indicating the applicant meets the FAA medical standards and sets the limitations and obligations of the pilot. The pilot must continually meet said standards under 14 CFR §61.53 when exercising authority. The rule in §61.53 creates pilot obligations and gives the ultimate authority, based on acquired knowledge, in assessing fitness for duty and compliance with the standard to the pilot. It states in part in (a) that:

> ***"...no person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command[3], or in any other capacity as a required pilot crewmember, while that person:***
> ***(2) Knows or has a reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation..."***

The rule is the legal interpretation that sets the bar for a pilot medical condition in planning, preparation, and for the entire time a pilot is assigned duty or is operating an aircraft.

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[3] 14 CFR § 1.1 defines Pilot in command as the person who (1) Has the final authority and responsible for the operation and safety of the flight. (2) Has been designated as pilot in command before or during the flight, and (3) Holds the appropriate category, class, and type rating, it appropriate, for the conduct of the flight.

For example, pilots are warned not to engage in scuba diving, blood donation, or consuming alcohol or over the counter drugs when planning on operating aircraft, or when they know or have a reason to know that the effects of any activity would impair their condition, down to the consumption of a meal.

Accordingly, and to eliminate any deficiency, during the announced pandemic, the Transportation Security Administration (TSA) issued an exemption in their Security Directives SD1544-21-02, aircraft, and SD1542-21-01, airport operators' series of mask orders in §F3 for

> ***"People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations."***

The exemption conforms to the pilot authority and 49 U.S. Code §114 (g)(2) where

> ***"The authority of the Administrator under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency."***

Compliance with the FAA medical standards is not optional. The Act is very clear in Title X Sec. 1005 (e):

> ***(e) It shall be the duty of every person subject to this Act, and its agents and***

> ***employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect."***

Additionally, Title VI Sec. 610 (a)(2), (3) and (5) of The Act requires in:

> ***(a) It shall be unlawful–***
>
> ***(2) For any person to serve in any capacity as an airman in connection with any civil aircraft … in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title.***
> ***(3) For any person to employ for service in connection with any civil aircraft used in air commerce an airman who does not have an airman certificate authorizing him to serve in the capacity for which he is employed,***

and in

> ***(5) For any person to operate aircraft in air commerce in violation on any other rule, regulation, or certificate of the Administrator under this title.***

Also, when performing duty, and before conducting every flight, an airline pilot must make fit-for-duty declarations as required in 14 CFR §117.5. The declaration is an interest held by, in addition to the reader

of this document and every passenger, the FAA, or the agent of the people. The declaration is also subject to 18 U.S. Code §1001. At no point during the process is the air carrier authorized by the FAA to make any such declarations. Any coerced medical procedure(s) or treatment(s) invalidates such declaration as it also does for the medical certification process, for coercion and informed consent do not coexist.

Considering the detailed FAA pilot medical certification process above, one would argue, an act of coercion to accept a medical treatment(s) or procedure(s), or any activity that impacts or impairs the FAA medical standards, followed by a fit-for-duty declaration as required by law, and operating aircraft for profit, borders on extortion by an air carrier.

Simply put, the FAA merely set the requirements demanded in The Act; therefore, pilot compliance with the FAA medical standards and obligations is rooted in The Act, and for the air carrier, it is the interference free acceptance of the FAA pilot medical certification standards and a duty to maintain compensation of said pilots who provide transportation. This is the law.

These mutual obligations themselves, which have been practiced for decades, transposed in a provision of the Respondent's employee manual by which the Respondents acknowledged their obligation of non-interference.

With the advent and as a result of the announced pandemic in late 2019, American Airlines (AA), under the coercive threat of termination, demanded that pilots comply with new procedures of restricting their breathing and that of accepting a medical treatment for continued

employment. The procedures are in contravention to the FAA medical standards, rules, and process. Informed consent was of no consequence to the Respondents.

The Petitioner viewed the Respondents' coercive demands as a threat to flight safety, a violation of the employment contract, an attack on his right and authority, and a violation of 14 CFR §91.11 which states:

> ***"No person may assault, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated."***

In compliance with his duty, the Petitioner rejected all of AA's demands.

Regardless of what is written in the employee manual, it defies logic that an employer would tie the employee's hands behind their back and expect them to fulfill their obligation. Such an employer would naturally be in violation of the employment contract or agreement. Notwithstanding the FAA pilot medical requirement, impairing the required medical standard is equivalent to tying someone's hands behind their back and expecting compliance with obligations. It is akin to impairing the vision of the reader of this document and expecting performance by a certain deadline.

A reasonable person would rationally conclude that it is the Respondents' obligation not to impair or interfere in the Petitioner's medical standard or tie his hands behind his back. A reasonable person would also conclude that, even if not written, and it is, the obligations are mutual and constitute a contractual provision in an

employment contract. There is, however, as written, a contract of mutual obligations.

As a result of his rejection, the Respondents disciplined the Petitioner and placed him in administrative leave status denying him his right to compensation at the full benefits level of rights created in the CBA, and subsequently placed him in unpaid administrative leave as of August 19, 2022, depriving him of his full right to compensation and to all the terms and provisions of the CBA, including other benefits such as medical coverage and retirement contributions.

The Respondents have the right to terminate the employment relationship but hey have not, and they have no reason to. The Respondents have kept the Petitioner on unpaid leave and in administrative limbo for almost two years. The Respondents are abusing the law to extract compliance in violation of FAA rules and regulations. The Respondents have threatened, intimidated, and interfered in the performance of the Petitioner's duties and denied him his right to compensation. A violation of The Act.

The FAA takes a dim view of safety breaches and rule violations. In *Adm'r v. Siegel* NTSB Order No. EA-3804 (Feb. 10, 1993), 1993 WL 56200, the FAA successfully invoked 14 CFR §91.11 to assess a civil penalty against a pilot who walked up to a helicopter that was on the ground preparing for takeoff, reached into the helicopter and physically assaulted the pilot." The FAA continues,

> ***"...accordingly, the rule and prior FAA interpretation, as evidenced by the Siegel case, support a finding that an individual***

does not need to be on board the aircraft to violate §91.11."

Coercing an acceptance of a medical treatment or procedure under threat of termination that compromise a pilot's medical standard is a violation of rule §91.11.

The Respondents interfered in the qualification of the Petitioner rendering him unable to provide transportation under their terms. The Petitioner refused to allow interference, or the usurpation of his authority, as dutifully required by law. The air carrier then skirted its duty to maintain rates of compensation and placed the Petitioner on unpaid status without termination. The aviation law violation itself is a matter for FAA administrative action, but it has been made a practice by the Respondents to deny rights created in The Act as the stick to achieve an objective in violation of The Act and aviation law and to usurp the Petitioner's authority. This flies in the face of Congressional intent.

The Act gives the FAA Administrator authority to conduct investigations, take administrative action and levy fines against violators of the rules created by the agency, however, it does not give the Administrator authority to recover compensation owed to pilots and copilots. In this case, the Petitioner's refusal is not a violation and there is no administrative action to take or administrative authority to recover compensation.

Recognizing this fact, the Fifth Circuit Court in *Laughlin v. Riddle Aviation Co.,* 205 F.2d 948 (5th Cir. 1953) correctly ruled that:

"In prescribing rates of compensation to be paid to and received by pilots, Congress did

> ***not intend to create a mere illusory right, which would fail for lack of means to enforce it. The fact that the statute does not expressly provide a remedy is not fatal."***

Also

> ***"…As long as Marbury v. Madison…it is a general an indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."***

And in *Peck v. Jenness,* it was recognized that*:*

> ***"A legal right without a remedy would be an anomaly in the law."***

While In *De Lima v. Bidwell,* it was said***:***

> ***"If there be an admitted wrong, the courts will look far to supply an adequate remedy."***

Pilot right to compensation itself is not created or is subject to collective bargaining under The Railway Labor Act (RLA). Collective bargaining simply improves the right. The ability to exercise this right by the Petitioner and the interference by the Respondents cannot be addressed, and a remedy in this case may not be found in the RLA grievance process. It is a matter of law and Public Policy.

In *Norris v. Hawaiian*, citing *Maher*, 125 N.J.at 474, 593 A.2d at 760 the Hawaii Supreme Court ruled

> ***"[A]rbitration is a continuation of the collective bargaining process," and the arbitrator "ordinarily cannot consider public interest and does not determine violations of law or public policy."***

The grievance process addresses contractual rights disputes created in the CBA. The pilot and copilot rights are a matter of law. That puts us back squarely in *Laughlin* where the court cited *T.& P. Ry. Co. v. Rigsby* stating

> ***"A disregard of the command of a statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."***

The court went on

> ***"…The implications and intendments of a statute are as effective as the express provisions."***

The District Court and the Ninth Circuit, however, in a split with the Fifth Circuit, were steadfast in their opinion there is no private right to action for aviation law violation.

The meaning of the words written in the law when passed do not change over time. In this case, allowing such a change will present a hazard to aviation. The Petitioner believes the Fifth Circuit ruling is as valid today as when it was written in 1953 and that the lower

courts have erred. The Act gives the Petitioner an implied private right to action under the conditions of this case.

THE EMPLOYMENT CONTRACT CLAIM

The claim of employment contract violation met the same fate. A split with the Arizona Supreme Court, en banc ruling in *Leikvold v. Valley View Community Hosp.*

The District Court declined to rule on the contract; however, it ruled that there is only one obligation and that it was the Petitioner's to provide a First-class FAA medical.

In *Leikvold,* the court agreed with the Plaintiff in that

> ***"...if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory."***

As discussed, a reasonable person would conclude that the Respondents are subject to an obligation of non-interference in the Petitioner's maintenance of an FAA medical standard that has been clearly expressed by the statements in the manual. Notwithstanding the certificate requirement by the FAA rules and regulations, the practice had been for decades that the Respondents accepted, ***without interference*** (emphasis added), the FAA medical certificate presented by the Petitioner and the Petitioner relied on the practice thereof. The

Respondents cannot suddenly impair the standard and authority and expect compliance by the Petitioner.

The District Court and the Ninth Circuit also disregarded the fact that, not only did the Respondents depart from historical practice and statements made in the manual and its intent, but also imposed conditions in violation of the terms of employment and the law when they interfered, in violation of Public Policy and in the Petitioner's responsibility and authority. Additionally, their demand was for an entirely different and distinct medical certification standard that is not FAA approved or authorized in 14 CFR Part 67 and a violation of the process that the Petitioner was not willing to violate or accept.

In short, the Respondents' coercive imposition created a distinct medical standard that is not compliant with 14 CFR Part 67 standards and deviated from the historical practice of accepting the FAA medical certification and standards which was always relied on by the Petitioner to be required and had been accepted by the Respondents on its face for decades.

An FAA medical certificate does not magically appear, it is not something acquired through purchase, it demands dedication and very close attention to everything a pilot is engaged in that affects the health of a person and it is very personal.

The District Court's observation in its ruling that a medical certificate is required by regulation anyway and that the Petitioner had missed the point is irrational and moot. Notwithstanding the law, the Respondents made it a statement in their manual and demanded a First-Class FAA medical when in fact, some pilots can operate

aircraft with a lower standard such as a Second-Class FAA medical certificate. The Court's ruling did not rely on any expert witness testimony or an understanding of how authorities are exercised. The Petitioner himself is an expert in the field after 40 years of applying aviation law.

The Respondents' demand was for an airline specific medical standard which does not exist in the law, and, considering the legal requirement, no reasonable person would expect the Petitioner to be able to comply with the obligation when the Respondents coerced the Petitioner to accept a medical treatment under threat of termination invalidating the medical certification process and standard. A violation of obligations by the Respondents occurred.

The Respondents took the liberty of creating their own medical standard and the Petitioner had the duty to reject such standard. The Respondents violated the employment contract and denied the Petitioner rights created in The Act

———— ♦ ————

This case was heard under the jurisdiction of 28 U.S. Code §1331, federal question.

———— ♦ ————

REASONS FOR GRANTING THE PETITION

This case is about the subversion of pilot authority by using the coercive threat of termination that attacks a right created by Congress. The exercise of pilot authorities is central to the safety of the traveling public as intended in The Act. Our nation cannot afford to abandon laws that have kept people safe in favor of financial incentive or expedient recovery by adopting corporate practices that undermine the very law that gives them the authority to operate aircraft in the national airspace.

There are several reasons that are rooted in the law for the Court's consideration, but the overarching reason, for all practical purposes, is the safety of the flying public. Preserving Public Policy, contractual obligations, and pilot authority preserves public safety.

REASON 1 – A TWO PRONG VIOLATION OF AVIAITON LAW

First Prong - Title III, Sec. 301(b) of The Act dictates that the

> ***"…Administrator shall have no pecuniary interest in or own any stock in or bonds of any aeronautical enterprise nor shall he engage in any other business, vocation, or employment."***

The Congressional intent here is clearly to eliminate any influence or interference, pecuniary in nature, in the Administrator's decision-making process that may adversely affect safety of flight.

In Title IV Sec. 401 (K)(1), The Act created rights for pilots and copilots, and further in §(K)(3) a provision for collective bargaining to improve such rights.

> ***(K)(1) "Every air carrier shall maintain rates of compensation, maximum hours and other working conditions and relations of all its pilots and copilots who are engaged in interstate air transportation…"***

and in

> ***"K (3) "Nothing herein contained shall be construed as restricting the right of any such pilots and copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of pay of compensation or more favorable working conditions or relations."***

A reasonable person can infer that Congress, by securing a right for pilot compensation, intended on preventing influences and interference that may adversely impact the pilot decision-making process adversely affecting safety of flight. One can also conclude that §§1.1 and 91.1 combined, as discussed below, subjects the pilots to the same duty as the FAA administrator.

Additionally, by entering into an agreement with the pilot union that incentivized medical treatments for pilots, the Respondents undermined and contradicted the very Congressional intent of maintaining an unadulterated decision-making process to safeguard aviation safety.

Congress, however, could have never imagined that a right they created would be used as the weapon to subvert the process of FAA pilot medical certification and pilot authority. Coercive threat of termination and informed consent cannot coexist, but the Respondents defied the intent and the will of Congress and destroyed informed consent for the majority of pilots under the threat of losing a right created by Congress.

The Respondents attacked that right to coerce the Petitioner to violate the rules and regulations and to subvert the pilot decision-making process and authority. The Respondents must not be allowed, at the detriment to a right created in The Act, to exact a certain financial outcome in contravention to authority vested in pilots. If allowed, this will not end well for aviation.

Second Prong - A pilot in command is given, in 14 CFR §§1.1 and 91.3 combined administrative and final authority as to the operation of an aircraft and that includes the physical and mental status in preparation for the operation of such aircraft. This authority must not be usurped.

> ***"14 CFR §1.1…Administrator means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned."***

and

> ***"14 CFR §91.3 Responsibility and authority of the pilot in command. (a) The pilot in command of an aircraft is directly responsible for and is the final authority as to, the operation of that aircraft"***

As discussed earlier, the Respondents interfered in the Petitioner's authority and duties in violation of §91.11. Since the pilot medical certification process is, as a matter of course and for legal and lawful reasons, cast in stone and arguably will not change as it has not for decades, practices that erode and subvert the process must be kept at bay.

In this case, rights of pilots and copilots created in The Act must be protected. They must not be allowed to be used as the stick to influence pilot decision-making. When pilot rights are protected, by extension, the FAA pilot medical certification process will also be protected and preserved.

Compromised authority in aviation equals compromised safety. Such authority embodied in the FAA pilot medical certification process, where informed consent is bedrock, ensures the solvency and validity of the process, continuity of Public Policy, and safety.

A wholesale approach under the coercive threat of termination to accept any medical treatment(s) or procedure(s) is an invasion of Public Policy, unjustifiable, and a threat to aviation. Such invasion is not limited to commercial aviation however, it migrates into the general aviation sector as a whole corrupting a system that has served aviation very well for decades. This Court must protect the exercise of authority vested in pilots and copilots by protecting their right to compensation and a private right to action is the solution in this case.

REASON 2 – FINDING REMEDY IN THE LAW AND SPLITS IN THE COURT

First Split - Now that a violation of a right has been established, it is imperative that a remedy is found. The collective bargaining agent did not and cannot create this right, nor did it create the authority vested in pilots, thus the grievance process under the RLA cannot be the path forward. As discussed in *Norris v. Hawaiian,* binding arbitration is not suited for the resolution of disputes rooted in the law or Public Policy.

There is a clear split in the Courts of Appeal. Nearly 70 years ago, the Fifth Circuit found a private right to action in The Act for a pilot to recover compensation owed to him by the air carrier. Today, the Ninth Circuit is denying the Petitioner a private right to action to recover compensation owed to him by the air carrier and, more importantly, to exercise his authority under the law. Never before has interference in the pilot FAA medical qualifications and standards, or subversion of authority on a large scale, been made a determinant resulting in an air carrier violating the duty of maintaining compensation. The soundness of the Fifth Circuit ruling in *Laughlin,* the current events, is still if not more valid today. Respectfully, after all these years, it is time to revisit the private right to action in this case.

Second Split - There is yet another split in the Courts. The Ninth Circuit, in contradiction to the Arizona State Supreme Court, upheld the District Courts decision not to rule on the employment contract and the opinion that a provision in the Respondents employee manual, that had been relied on by the Petitioner for decades, and is a well-established practice by both parties, is not a contractual term for it is only binding on the Petitioner,

concluding that there is no violation of an employment contract.

The ruling not only defies logic as discussed above but contradicts a Supreme Court ruling. In *Leikvold* the Arizona Supreme Court ruled that such terms and provisions constitute an employment contract. The District Court did not rule on the contract however, it used its discretion to arrive at the conclusion that AA has no obligation. The law disallows the Respondents interference in the Petitioners medical as it was so stated in the manual. The manual clearly stated that it is the pilot responsibility; thus, it is the pilot's authority. The intent in the manual language is very clear, the Respondents' obligation is not to interfere. The Respondents demanded an unlawful act of the Petitioner, which is not enforceable, for which he refused resulting in severe punishment delivered by the Respondents. This cannot stand under any employment contract.

The reasons for granting this petition are many but most notably, and with all due respect, considering the law surrounding the case, granting the petition will answer the question at its core. The chilling effects of the air carrier imposition of medical treatment(s) or procedure(s) not authorized, regulated, or approved, that impact FAA pilot medical certification standards and its effect on Public Policy and safety, which are inextricably tied to pilot compensation, pose a threat to aviation and the traveling public. It turns The Act and Congress's intent on its head.

In this case, the Respondents leveraged their duty for compensation under The Act to coerce the Petitioner to accept a medical treatment(s) or procedure(s) and abandon authorities vested in him in The Act. It is a

purposeful violation of the rule of law and the Congressional intent and the remedy must not be illusive as it has been made by the lower Courts who had a very good understanding of the Petitioner's filings.

The Act intended to compensate pilots and copilots by the air carrier who are only FAA medically qualified to provide transportation to the public and it must be equally as certain, it was the intent of Congress to give the pilot the right to recover what is owed.

In combination, rule 14 CFR §91.3 and Administrator definition in 14 CFR §1.1, as illustrated in detail above, give the pilot FAA administrator authority, a heavy burden and great authority that must not be compromised or eroded in any way. Against that backdrop, it is of value stating, American Airlines must not be allowed to circumvent and subvert the law and selectively and with impunity compensate pilots who are willing to bend or violate the rules, and deny compensation owed to those who refuse to in complete violation of Congressional intent in The Act.

IN CONCLUSION

This is a simple case that is deeply rooted in Public Policy and The Act. In rights and authorities of pilots and copilots created in and through The Act.

The Petitioner's claim to his right to be compensated is rooted in The Act. The regulations are simply what The Act demanded, a standard that the Respondents violated and by doing so attacked the Petitioner's right.

Manipulating, or coercing a violation of aviation law and obligations set by the FAA and Congress and subsequently denying the Petitioner his claim to his right must not go unanswered.

There are the splits in the courts, two of which are separated by 70 years, but yet here we are, conditions arose requiring a revisit.

The Petitioner has presented more than enough prima facie evidence and the lower Courts denied the Petitioner any remedy for rights violated and claimed, all the while usurping pilot authority.

For the reasons set above, the Petitioner, an airline Captain with almost 40 years of experience, believes the lower Courts are in error and respectfully asks the Court to issue a writ of certiorari.

——————— Oral argument requested. ———————

Respectfully submitted, July 23, 2024

/s/ Bahig Saliba

Bahig Saliba
10824 East Santa Fe Trail
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UNITED STATES COURT OF APPEALS APR 30 2024
MOLLY C. DWYER, CLERK
FOR THE NINTH CIRCUIT U.S. COURT OF APPEALS

BAHIG SALIBA, Plaintiff-Appellant, No. 23-15249
D.C. No. 2:22-cv-00738-SPL

v.

MEMORANDUM*
AMERICAN AIRLINES, INC.; CHIP LONG, Sr., VP of Flight; TIMOTHY RAYNOR, Director of Flight; ALISON DEVEREUX-NAUMANN, Chief Pilot, Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Submitted April 22, 2024**

Before: CALLAHAN, LEE, and FORREST, Circuit Judges.

Bahig Saliba appeals pro se from the district court's judgment dismissing his action alleging various federal and state law claims arising from his employment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. under Federal Rule of Civil Procedure 12(b)(6). Puri v. Khalsa, 844 F.3d1152, 1157 (9th Cir. 2017). We affirm.

The district court properly dismissed Saliba's claims challenging American Airlines' COVID-19 masking and vaccination policies because Saliba failed to allege facts sufficient to show that American Airlines violated a contractual obligation, acted under color of state law, or violated any federal aviation law enforceable by a private right of action. See Pasadena Republican Club v. W. Justice Ctr., 985 F.3d 1161, 1166-67 (9thCir. 2021) (explaining that 42 U.S.C. §1983liability requires a defendant to act under color of state law, which is analyzed by "whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" (citation and internal quotation marks omitted)); G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 902 (9th Cir. 1992) (explaining that there is no private right of action under the Federal Aviation Act, "particularly where plaintiff's claim is grounded in the regulations rather than the statute itself"); Graham v. Asbury, 540 P.2d656, 657 (Ariz. 1975) (setting forth elements of contract claim under Arizona law).

The district court properly dismissed Saliba's claim alleging a hostile work environment because Saliba failed to allege facts sufficient to show that

defendants took any action against him on the basis of his national origin. See Kang v. U. Lim
Am., Inc., 296 F.3d 810, 817 (9th Cir. 2002) (setting forth elements of hostile work environment claim based on national origin).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. See Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).
AFFIRMED.
3 23-15249

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bahig Saliba,

Plaintiff,

vs.

American Airlines Incorporated, et al.,

Defendants.

No. CV-22-00738-PHX-SPL

ORDER

Before the Court is Defendants' Motion to Dismiss (Doc. 43), in which they seek dismissal for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. For the following reasons, the Motion will be granted.

I. BACKGROUND

On May 2, 2022, pro se Plaintiff Bahig Saliba, a pilot for Defendant American Airlines ("American") since 1997, initiated this action alleging various claims arising out of American's company mask policy. (Doc. 1). The Complaint alleged claims against American; Chip Long, American's Senior Vice President of Flight; and Timothy Raynor, American's Director of Flight. (Doc. 1 at 1).

On September 12, 2022, the Court granted Defendants' Motion to Dismiss the Complaint. (Doc. 32). The Court dismissed Plaintiff's claims against Defendant

Long without prejudice for lack of personal jurisdiction; dismissed Plaintiff's claims for violations of aviation law and breach of the Joint Collective Bargaining Agreement without prejudice and without leave to amend for lack of subject matter jurisdiction; and dismissed Plaintiff's hostile work environment, defamation, and § 1983 claims with leave to amend for failure to state a claim. (Doc. 32 at 12). On September 30, 2022, the Court denied Plaintiff's Motion for Reconsideration. (Doc. 34).

On October 10, 2022, Plaintiff filed his First Amended Complaint, which purported to "preserve[ ] the remaining claims in the original complaint." (Doc. 35 at 1). On October 11, 2022, the Court issued an Order advising that an amended complaint supersedes the original complaint and setting a deadline if Plaintiff elected to file another amended complaint. (Doc. 36). On October 17, 2022, Plaintiff filed a Motion to Add New Defendant (Doc. 37)—specifically, Alison Devereux-Naumann, American's chief pilot for the Phoenix pilot base—followed two days later by a Second Amended Complaint that did not name Ms. Devereux-Naumann as a defendant. (Doc. 38). On October 20, 2022, the Court therefore denied the Motion to Add Defendant as moot and set a deadline for Plaintiff to file another amended complaint if he wished to do so. (Doc. 39).

On October 25, 2022, Plaintiff filed the operative Third Amended Complaint ("TAC") against Defendants American, Long, Raynor, and Devereux-Naumann. (Doc. 40). Plaintiff's claims arise from his objections to two American policies related to the COVID-19 pandemic. First was a vaccination policy that was instituted pursuant to a March 25, 2021 Letter of Agreement between American and the Allied Pilots Association, which is the union that represents American's pilots.

(Doc. 40 at 7). Plaintiff asserts that COVID-19 vaccinations "were incentivized by American and the Plaintiff was coerced, under threat of termination, into accepting medical treatment in violation of his Contract." (Doc. 40 at 7). Second was American's face mask policy. (Doc. 40 at 9). He asserts that "[f]acial masking is a procedure that interferes with the standards of issuance of [a Federal Aviation Administration ("FAA")] medical certificate," which is required by federal regulations for a pilot to fly. (Doc. 40 at 4, 9). Plaintiff refused to abide by the policy, and that disagreement came to a head on December 6, 2021. (Doc. 40 at 9). Plaintiff arrived at the Spokane International Airport for a flight to Dallas Fort Worth, and police at the airport attempted to enforce the then-existing federal mask mandate against Plaintiff. (Doc. 40 at 18). The police reported the incident to American, which initiated disciplinary proceedings against Plaintiff. (Doc. 40 at 18–19).

On January 6, 2022, Defendant Raynor conducted a disciplinary hearing and threatened Plaintiff with consequences up to and including termination. (Doc. 40 at 11). On March 30, 2022, Defendant Long conducted an appear hearing via videoconference. (Doc. 40 at 14–15). Thereafter, Plaintiff expressed that he felt he was being discriminated against. (Doc. 40 at 12). Later, Defendant Devereux-Naumann demanded that Plaintiff undergo a fitness-for-duty examination with a forensic psychiatrist under threat of termination, without providing Plaintiff a reason for the assessment. (Doc. 40 at 12–13). The examination was rescheduled several times, and Plaintiff reported sick on August 19, 2022, the day on which it was ultimately set. (Doc. 40 at 13). Defendant Devereux-Naumann issued an investigation letter for Plaintiff's failure to appear for the appointment and

placed him on unpaid leave. (Doc. 40 at 13). On September 1, 2022, Plaintiff obtained a new FAA-issued medical certificate. (Doc. 40 at 13). Plaintiff has been removed from flight status since December 6, 2021 (Doc. 40 at 25).

The TAC alleges four causes of action: (1) breach of contract; (2) hostile work environment; (3) violation of § 1983; and (4) violation of aviation law and related regulations. (Doc. 40 at 2). On November 8, 2022, Defendants filed the pending Motion to Dismiss, which has been fully briefed. (Docs. 43, 45, 46).

II. LEGAL STANDARDS

a. Personal Jurisdiction

Federal Rule of Civil Procedure ("Rule") 12(b)(2) authorizes dismissal for lack of personal jurisdiction. When a defendant moves to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that jurisdiction is appropriate." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). When the motion is based on written materials rather than an evidentiary hearing, as here, the Court must determine "whether the plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction." Id. (internal quotation marks omitted). Plaintiffs "cannot simply rest on the bare allegations of [their] complaint," but "uncontroverted allegations in the complaint must be taken as true." Id. (internal quotation marks and citation omitted).

b. Subject Matter Jurisdiction

Rule 12(b)(1) "allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction." Kinlichee v. United States, 929 F. Supp. 2d 951, 954 (D. Ariz. 2013) (internal quotation marks omitted).

"A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may attack either the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction, or the existence of subject matter jurisdiction in fact." Renteria v. United States, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006); see also Edison v. United States, 822 F.3d 510, 517 (9th Cir. 2016). "When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Renteria, 452 F. Supp. 2d at 919. "When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact." Id. "A plaintiff has the burden of proving that jurisdiction does in fact exist." Id.

c. Failure to State a Claim

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (internal quotation marks omitted). A claim is facially plausible when it contains "factual content that allows the court to draw the reasonable inference" that the moving party is liable. Id. Factual allegations in the complaint should be assumed true, and a court should then "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. Facts should be viewed "in the
light most favorable to the non-moving party." Faulkner v. ADT Sec. Servs., Inc., 706 F.3d 1017, 1019 (9th Cir. 2013).

A pro se complaint must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal quotation marks omitted).

II. DISCUSSION

Plaintiff's TAC alleges four causes of action: (1) breach of employment contract; (2) hostile work environment; (3) violation of 42 U.S.C. § 1983 by violating Plaintiff's Fourteenth Amendment rights; and (4) violation of aviation law and regulations. (Doc. 40 at 2). Defendants argue that Plaintiff has failed to meet the pleading standard for any of his claims, and Defendant Long argues that the Court lacks personal jurisdiction over him. The Court will begin by addressing personal jurisdiction, then will address each claim in turn.

a. Personal Jurisdiction as to Defendant Long

When no federal statute is applicable to govern personal jurisdiction, as is the case here, "the district court applies the law of the state in which the district

court sits." Id. at 800. "Arizona's long-arm jurisdictional statute is co-extensive with federal due process requirements; therefore, the analysis of personal jurisdiction under Arizona law and federal due process is the same." Biliack v. Paul Revere Life Ins. Co., 265 F. Supp. 3d 1003, 1007 (D. Ariz. 2017).

For a court to exercise personal jurisdiction, federal due process requires that a defendant have "certain minimum contacts" with the forum state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Personal jurisdiction can be general or specific. Biliack, 265 F. Supp. 3d at 1007. A court may exercise general jurisdiction "only when a defendant is essentially at home in the State." Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (internal quotation marks omitted). That is plainly inapplicable here, where Defendant Long is alleged only to have responded to an email from and conducted a videoconference disciplinary appeal hearing for Plaintiff, who was located in Arizona.

The Ninth Circuit applies a three-prong test for specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802. Plaintiff bears the burden of establishing the first two prongs. Id. If Plaintiff satisfies them, the burden shifts to Defendant "to present a compelling case that the exercise of jurisdiction would not be reasonable." Id. (internal quotation marks omitted).

Regarding the first prong, Plaintiff argues that Defendant Long purposefully directed his activity at Arizona. "Purposeful direction requires that the defendant have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1142 (9th Cir. 2017) (internal quotation marks and alteration omitted). "An intentional act is one denoting an external manifestation of the actor's will[,] not including any of its results, even the most direct, immediate, and intended." Id. (internal quotation marks and alterations omitted). When considering whether a defendant's conduct is expressly aimed at the forum state, the Court must look at "contacts that the defendant himself creates with the forum" and "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." Id. at 1143 (internal quotation marks omitted). "[R]andom, fortuitous, or attenuated contacts are insufficient to create the requisite connection with the forum." Id. at 1142 (internal quotation marks omitted).

As noted, the only allegations regarding Defendant Long's contacts with Arizona are that (1) he

responded to an email from Plaintiff, and (2) he held an appeal hearing for Plaintiff using videoconference. (Doc. 40 at 14–16). A defendant's injurious communications with a plaintiff known to reside in the forum state give rise to personal jurisdiction even if the defendant himself was out of state. For example, in Atkins v. Calypso Systems, Inc., the plaintiff alleged that a defendant "intentionally called and emailed a person in Arizona, and those communications caused injury." No. CV-14-02706-PHX-NVW, 2015 WL 5856881, at *7 (D. Ariz. Oct. 8, 2015). The Court found those allegations sufficient for specific personal
jurisdiction. Likewise, here, Plaintiff alleges that Defendant Long intentionally emailed and held a videoconference with Plaintiff, a known Arizona resident, and that those communications caused injury. Plaintiff has therefore satisfied the first two prongs of the personal jurisdiction test, and Defendant Long makes no argument that the exercise of jurisdiction would be unreasonable. Accordingly, the Court has personal jurisdiction over Defendant Long.

b. Breach of Contract Claim

Plaintiff's breach of contract claim alleges that "Defendants created and implemented a mandatory health-related company policy . . . that directly violated the employment Contract between Plaintiff and Defendant American that the Plaintiff rejected." (Doc. 40 at 2). To state a breach of contract claim under Arizona law, "a plaintiff must allege that (1) a contract existed, (2) it was breached, and (3) the breach resulted in damages." Steinberger v. McVey ex rel. County of Maricopa, 318 P.3d 419, 435 (Ariz. Ct. App. 2014).

Defendants argue that Plaintiff has failed to plead either of the first two elements.

The TAC alleges that Plaintiff has an employment contract with American, pointing to certain documents attached as Exhibit A "in support of Plaintiff's employment contract." (Doc. 40 at 3). Those documents include Plaintiff's employment application, a pre-employment notification, notes from his job interview, and excerpts of an employee handbook and flight operations manuals. (Doc. 40-2). Pre-hiring documents certainly do not establish the existence of an employment contract, but employee handbooks or manuals can create contractual promises, depending on the circumstances.
See Bollfrass v. City of Phoenix, --- F. Supp. 3d ---, 2022 WL 4290591, at *8–9 (D. Ariz. Sept. 16, 2022). The Court assumes without deciding that Plaintiff has sufficiently alleged that the attached employee handbook and flight operations manuals are contractual, because Plaintiff's failure to allege a breach of any of the terms contained therein—or elsewhere—is dispositive.

The TAC alleges that American's mask policy breached terms in the flight operations manual requiring pilots "to maintain a current medical certificate appropriate for the crew position he/she currently holds" and to "bar themselves from flight duty and advise the Chief Pilot's office immediately . . . any time they know themselves to be unable to meet the medical or physical standards required by regulation or common sense for their crew position." (Doc. 40-2 at 11; Doc. 40 at 3). These terms plainly impose obligations on Plaintiff, not Defendants. American's implementation of a mask policy simply does not violate these terms.

Plaintiff's arguments to the contrary are unavailing. He argues that "[a]ny imposition by

American of any medical procedure is . . . a violation of the very term of the employment contract." (Doc. 45 at 7). This argument is utterly baseless. The terms at issue merely bar Plaintiff from flying if he lacks the appropriate certification or is not in the requisite condition to do so. They do not prevent American from imposing a policy that Plaintiff personally believes affects his certification or ability to meet the medical or physical standards. Plaintiff also misses the point with his argument that his "pilot and medical certificates are contractual terms of the employment contract benefiting American, without either one there is no contract to provide air transportation." (Doc. 45 at 8). Of course, Plaintiff cannot fly without the proper certificates, pursuant to both American policies and federal regulations. But Plaintiff has not established any contractual term that would prevent American from imposing additional requirements, such as its mask and vaccination policies, even if Plaintiff believed those requirements would affect his certificates. Thus, the TAC fails to allege any breach of contract.
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c. Hostile Work Environment Claim

Plaintiff's hostile work environment claim alleges that "Defendants created and continue to create a hostile work environment and wrongfully invoked a disciplinary process reserved for disputes rooted in terms and conditions agreed to in Collective Bargaining Agreements."[4] (Doc. 40 at 2). Title VII prohibits

[4] To the extent Plaintiff attempts to state a claim for breach of the Joint Collective Bargaining Agreement, that claim was already dismissed without leave to

discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment because of his race, color, religion, sex, or national origin." Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003). To state a hostile work environment claim based on national origin, a plaintiff must allege that "(1) [he] was subjected to verbal or physical conduct of a harassing nature that was based on [his] national origin . . . , (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." Nagar v. Found. Health Sys., Inc., 57 F. App'x 304, 306 (9th Cir. 2003). Moreover, to establish subject matter jurisdiction over a Title VII claim, however, a plaintiff must exhaust his administrative remedies "by filing a timely charge with the [Equal Employment Opportunity Commission ("EEOC")], or the appropriate state agency." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002) (citing 42 U.S.C. § 2000e-5(b)). Defendants argue that Plaintiff's hostile work environment must be dismissed both because he failed to exhaust his administrative remedies and he fails to state a claim.
d. Section 1983 Claim e. Aviation Law Claim

First, it is true that the TAC does not plead exhaustion, as it makes no mention of an EEOC charge. This is despite the fact that the Court previously dismissed the hostile work environment claim in Plaintiff's Complaint based on the exhaustion

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amend for lack of subject matter jurisdiction due to preemption by the Railway Labor Act. (Doc. 32 at 9–10).

requirement. (Doc. 32 at 8). Still, "[t]he Supreme Court has held that failure to exhaust is an affirmative defense that does not require a Plaintiff to specifically plead or demonstrate
exhaustion in the complaint." Cabrera v. Serv. Emps. Int'l Union, No. 2:18-cv-00304-RFB-DJA, 2020 WL 2559385, at *5 (D. Nev. May 19, 2020) (citing Jones v. Bock, 549 U.S. 199, 216 (2007)). Attached to Plaintiff's Response to the Motion to Dismiss is a Notice of Right to Sue letter issued by the EEOC to Plaintiff on November 30, 2022, so the Court will not dismiss the hostile work environment claim for failure to exhaust. (Doc. 45-3).

Moving to the merits, Plaintiff fails to state a claim because he does not allege that he experienced harassing conduct based on his national origin. In fact, the only reference to Plaintiff's national origin in the TAC is the allegation that "the police report that was offered to [American] by the Spokane Airport police . . . referenced the plaintiff as a Middle Eastern individual under race and Plaintiff contends that racial profiling by the police was passed on to [American]." (Doc. 40 at 19). But there is no basis on which to infer that any Defendant took any action against Plaintiff because of his national origin. Although Plaintiff alleges that he "felt he was being discriminated against," he provides no basis for that belief, and belief alone is insufficient to state a plausible claim for relief. (Doc. 40 at 12); see Ashcroft, 556 U.S. at 678 (stating that a complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," not "naked assertions devoid of further factual enhancement" (internal quotation marks omitted)).

Instead, in the "hostile work environment" section of the TAC, Plaintiff specifically alleges that he "feels he is being targeted for refusing to accept an amendment to his employment contract." (Doc. 40 at 10; see also Doc. 40 at 14 ("Plaintiff is being targeted by the Defendants and he can only conclude that every one of the Defendants[']) actions is calculated to exert maximum pressure to force the plaintiff into submission and surrendering his authority over his medical Certificate.")). The facts alleged in the TAC support an inference that Plaintiff was disciplined due to his refusal to comply with American's mask policy, which is not, of course, a protected characteristic under Title VII. This further detracts from Plaintiff's bare assertion of national-origin discrimination. See Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations . . . [p]laintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible."). Given the lack of facts suggesting national origin discrimination and Plaintiff's own allegations about why he was disciplined, Plaintiff has failed to plead a plausible hostile work environment claim.

d. Section 1983 Claim

Plaintiff's § 1983 claim alleges that "Defendants became State actors by their actions following the event of December 6, 2021, violating Plaintiff's constitutional rights, namely his Fourteenth Amendment rights." (Doc. 40 at 2). "To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was

violated, and (2) that the alleged violation was committed by a person acting under the color of State law." Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). Defendants argue that this claim must be dismissed because they are not state actors. Indeed, the "defendants as state actors" section of the TAC is largely taken word-for-word from Plaintiff's Response to Defendants' first Motion to Dismiss. (Compare Doc. 40 at 18–20 with Doc. 30 at 9–11). The Court has already rejected those arguments in its September 12, 2022 Order, but because there are at least some additional allegations in the TAC, the Court will address them anew. (Doc. 32 at 10–12).

Plaintiff alleges that "[o]n December 6, 2021, the Defendants['] interests and that of the police officers at the Spokane International Airport aligned, that is enforce the facial masking on Plaintiff at any cost and protect the travel service provided by the airline" and that "the police were in violation of the Plaintiff['s] Fourteenth Amendment rights and . . . the violation continued by the Defendants." (Doc. 40 at 18–19). Courts use four tests to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotation marks omitted).

First, the public function test applies only when a private entity is "endowed by the State with powers or functions" that are "both traditionally and exclusively governmental." Id. at 1093 (internal quotation marks omitted). The TAC alleges that "police power was delegated to the defendants and only the defendants could have continued targeted police action against the plaintiff on [American] property." (Doc. 40). But Plaintiff does not allege any specific government power that was

delegated; rather, the allegations make clear that American was enforcing its own mask policy using its own disciplinary procedures. As the Court stated in its previous Order, "[a] private employer's disciplinary proceedings against its employee are certainly not a traditional and exclusive government function." (Doc. 32 at 11).

Second, the joint action test applies "when the state knowingly accepts the benefits derived from unconstitutional behavior." Kirtley, 326 F.3d at 1093 (internal quotation marks omitted). The TAC alleges that "the Defendants jointly with the Spokane police carried on what the police had started, a benefit the police were intending on receiving, lawfully or unlawfully is immaterial here, they intended on forcing the Plaintiff to use facial masking." (Doc. 40 at 19). In short, Plaintiff argues that the joint action test applies because American's actions were designed to make Plaintiff wear a mask—which, at the time, was required by federal law (see Doc. 40 at 17)—and the Spokane Police accepted that benefit. But the TAC makes no effort to explain how American's efforts use of its disciplinary process in response to Plaintiff's noncompliance with company policy and federal law amounted to unconstitutional behavior with benefits knowingly accepted by the Spokane Police.

Third, "[t]he compulsion test considers whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action." Id. at 1094. The TAC alleges that "[t]he Police compelled the Defendants to pursue the Plaintiff" by notifying American of their encounter on December 6, 2021 and following up with a manager. (Doc. 40 at 19), Specifically, Plaintiff cites to the police report and an email from a police officer providing

information about how to request public records and body camera footage "if investigated" and offering to provide additional information. (Doc. 40-8). The Court finds no authority suggesting that the mere provision of factual information—or any other contact alleged between the police and American in the TAC—amounts to coercion or significant encouragement. Nothing in the TAC leads to an inference that American's decision to pursue disciplinary proceedings against Plaintiff was influenced by the government rather than by independent, internal decision-making.

Closely related is the nexus test, which "asks whether there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." Kirtley, 326 F.3d at 1094–95 (internal quotation marks omitted). Again, given the relatively minimal contact between the airport police and American, there is no such nexus. Because Plaintiff has failed to plead that Defendants were acting under color of state law, his § 1983 claim must be dismissed.

e. Aviation Law Claim

Finally, the TAC alleges that Defendants violated aviation law and regulations. The Court previously dismissed this claim without leave to amend, finding that there is no private right of action under the Federal Aviation Act or its associated regulations. (Doc. 32 at 7–8). The Court reaffirmed that finding in its Order denying reconsideration. (Doc. 34 at 4–5). There is no need for the Court to repeat itself a third time; Plaintiff's aviation law claims must be dismissed.

III. CONCLUSION

"A district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (internal quotation marks omitted). Here, Plaintiff has had ample opportunity to amend his complaint and has repeatedly failed to state a plausible claim for the same or similar reasons. Thus, the Court finds that the deficiencies of the TAC cannot be cured, and this case will be dismissed with prejudice. See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 n.3 (9th Cir. 1987).

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 43) is granted and this case is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly and terminate this action.

Dated this 27th day of January, 2023.

Honorable Steven P. Logan

United States District Judge

PUBLIC LAW 85-726-AUG. 23, 1958

AN ACT

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act, divided into titles and sections according to the following table of contents, may be cited as the "Federal Aviation Act of 1958"

Title IV, Sec. 401 K

COMPLIANCE WITH LABOR LEGISTLATION

(K) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation withing the continental United States (not including Alaska) so as to conform with decision numbers 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less,

upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Noting herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as use in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and hold a currently effective airman certificate authorizing him to serve as such pilot or copilot.

RAILWAY LABOR ACT

AN ACT to provide for the prompt disposition of disputes between carriers and their employees and for other purposes

SEC. 2. The purposes of the Act are:
(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein.
(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization.
(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act.
(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.
(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

APPENDIX D

SD1542-21-02 and SD1544-21-02

F.

This SD exempts the following categories of persons from wearing masks:

1. Children under the age of 2.
2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).[7]
3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

APPENDIX E

FEDERAL AVAITION REGUALTIONS

§1.1 General definitions

Administrator. means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned.

§61.1 Applicability and definitions.

(a)(1) The requirements for issuing pilot, flight instructor, and ground instructor certificates and ratings; the conditions under which those certificates and rating are necessary; and the privileges and limitation of those certificates and ratings.

§67.1 Applicability.

This part prescribes the medical standards and certification procedures for issuing medical certificates for airmen and for remaining eligible for a medical certificate.

§91.1 Applicability.

(a) Except as provided in paragraphs (b), (c), (e), and (f) of this section and §§91.701 and 91.703, this part prescribes rules governing the operation of aircraft within the United States, including the waters within 3 nautical miles of the U.S. coast.

§117.1 Applicability.
This part prescribes flight and duty limitations and rest requirements for all flightcrew members and certificate holders conducting passenger operations under part 121 of this chapter.

§121.1 Applicability.
This part prescribes rules governing
The domestic, flag, and supplemental operations of each person who holds or is required to hold an Air Carrier Certificate or Operating Certificate under part 119 of this chapter.
(b) Each person employed or used by a certificate holder conducting operations under this part including maintenance, preventive maintenance, and alteration of aircraft.
(c) Each person who applies for provisional approval of an Advanced Qualification Program curriculum, curriculum segment, or portion of a curriculum segment under subpart Y of this part, and each person employed or used by an air carrier or commercial operator under this part to perform training, qualification, or evaluation functions under an

Advanced Qualification Program under subpart Y of this part.

(d) Nonstop Commercial Air Tours conducted for compensation or hire in accordance with § 119.1(e)(2) of this chapter must comply with drug and alcohol requirements in §§ 121.455, 121.457, 121.458 and 121.459, and with the provisions of part 136, subpart A of this chapter by September 11, 2007. An operator who does not hold an air carrier certificate or an operating certificate is permitted to use a person who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to anti-drug and alcohol misuse prevention programs to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would otherwise be required to transport the aircraft more than 50 nautical miles further than the repair point closest to the operator's principal base of operations to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to FAA-approved programs can perform the repairs.

(e) Each person who is on board an aircraft being operated under this part.

(f) Each person who is an applicant for an Air Carrier Certificate or an Operating Certificate under part 119 of this chapter, when conducting proving tests.

(g) This part also establishes requirements for operators to take actions to support the continued airworthiness of each aircraft.

APPENDIX F

18 U.S. Code § 1001 - Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1)
falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2)
makes any materially false, fictitious, or fraudulent statement or representation; or
(3)
makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

APPENDIX G

49 U.S.C. § 42112 - U.S. Code - Unannotated Title 49. Transportation § 42112. Labor requirements of air carriers

(a) Definitions.--In this section--

(1) "copilot" means an employee whose duties include assisting or relieving the pilot in manipulating an

aircraft and who is qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a copilot.

(2) "pilot" means an employee who is--

(A) responsible for manipulating or who manipulates the flight controls of an aircraft when under way, including the landing and takeoff of an aircraft; and

(B) qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a pilot.

(b) Duties of air carriers.--An air carrier shall--

(1) maintain rates of compensation, maximum hours, and other working conditions and relations for its pilots and copilots who are providing interstate air transportation in the 48 contiguous States and the District of Columbia to conform with decision number 83, May 10, 1934, National Labor Board, notwithstanding any limitation in that decision on the period of its effectiveness;

(2) maintain rates of compensation for its pilots and copilots who are providing foreign air transportation or air transportation only in one territory or possession of the United States; and

(3) comply with title II of the Railway Labor Act (45 U.S.C. 181 et seq.) as long as it holds its certificate.

(c) Minimum annual rate of compensation.--A minimum annual rate under subsection (b)(2) of this section may not be less than the annual rate required to

be paid for comparable service to a pilot or copilot under subsection (b)(1) of this section.

(d) Collective bargaining.--This section does not prevent pilots or copilots of an air carrier from obtaining by collective bargaining higher rates of compensation or more favorable working conditions or relations.

APPENDIX H

49 U.S.Code 114 (g)(2)

(g)National Emergency Responsibilities.—
(1)In general.—Subject to the direction and control of the Secretary of Homeland Security, theAdministrator, during a national emergency, shall have the following responsibilities:
(A)
To coordinate domestic transportation, including aviation, rail, and other surface transportation, and maritime transportation (including port security).
(B)
To coordinate and oversee the transportation-related responsibilities of other departments and agencies of the Federal Government other than the Department of Defense and the military departments.
(C)
To coordinate and provide notice to other departments and agencies of the Federal Government, and appropriate agencies of State and local governments, including departments and agencies for transportation,

law enforcement, and border control, about threats to transportation.

(D)

To carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe.

(2)Authority of other departments and agencies.—

The authority of the Administrator under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency.

APPENDIX I