

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**DARREN KOSSEN,**

**ARB CASE NO. 2022-0004**

**COMPLAINANT,**

**ALJ CASE NO. 2019-AIR-00022**

**ALJ CHRISTOPHER LARSEN**

**v.**

**DATE: July 19, 2023**

**EMPIRE AIRLINES,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Darren Kossen; *pro se*; Honolulu, Hawaii**

***For the Respondent:***

**Dale A. De Felice, Esq. and Paul S. Stewart, Esq.; *Paine Hamblen LLP*; Spokane, Washington**

**Before PUST, BURRELL, and WARREN, Administrative Appeals Judges**

**ORDER DENYING RECONSIDERATION**

**PER CURIAM:**

Darren Kossen (Complainant) filed a complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century<sup>1</sup> (AIR 21), and its implementing regulations,<sup>2</sup> alleging that his former employer, Empire Airlines (Respondent), unlawfully discriminated against him under AIR 21's whistleblower

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<sup>1</sup> 49 U.S.C. § 42121.

<sup>2</sup> 29 C.F.R. Part 1979 (2023).

protection provisions. After a hearing, an Administrative Law Judge (ALJ) found that Complainant failed to prove that Respondent violated AIR 21 and denied the complaint. On June 13, 2023, the Administrative Review Board (ARB or Board) issued a Decision and Order (D. & O.) affirming the ALJ's decision.

On June 30, 2023, Complainant filed a "Request to Administrative Review Board for Reconsideration of June 13, 2023, Decision and Order Denying Relief for Darren Kossen" (Req. for Recon.).<sup>3</sup> The Board will reconsider a decision and order only under limited circumstances. These circumstances include whether the movant has demonstrated: (i) material differences in fact or law from those presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board's decision, (iii) a change in the law after the Board's decision, or (iv) failure to consider material facts presented to the Board before its decision.<sup>4</sup>

Complainant's Req. for Recon. does not satisfy any of these requirements. Complainant argues that the Board erred by not conducting a hearing on his complaint;<sup>5</sup> however, the Board does not conduct hearings on AIR 21 complaints. Complainant is also mistaken that, because he engaged in activity protected by AIR 21, he acquired "immunity from termination."<sup>6</sup>

Complainant argues that we should reverse our ruling because Respondent committed various violations of law, destroyed evidence, falsified documents, and

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<sup>3</sup> Respondent submitted a "Response in Opposition to Complainant's Motion for Reconsideration of the Board's June 13, 2023, Decision and Order" on July 6, 2023.

<sup>4</sup> *Perkins v. Cavicchio Greenhouses, Inc.*, ARB No. 2022-0018, ALJ No. 2019-ACA-00005, slip op. at 2 (ARB Dec. 16, 2022) (Order Denying Reconsideration) (citing *Trivedi v. Gen. Elec.*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 2-3 (ARB Oct. 28, 2022) (Order Denying Reconsideration)).

<sup>5</sup> Req. for Recon. at 38 ("[T]he ARB did not afford Kossen a De nuevo [sic] hearing contrary to applicable law . . .").

<sup>6</sup> *Id.* at 46 ("Darren proves he is a whistleblower, but Empire stated it would have fired Kossen anyways after the investigation of events. This is a false statement, and categorically false, Kossen filed an ASAP report, and this gives Kossen immunity from termination under every FAA ASAP program and is federal law."); see *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 2006-0131, ALJ No. 2005-STA-00045, slip op. at 9 (ARB June 30, 2008) ("A complainant is not automatically immune to adverse action after engaging in protected activity.") (citing *Clement v. Milwaukee Transp. Serv.*, ARB No. 2002-0025, ALJ No. 2001-STA-00006 (ARB Aug. 29, 2003); other citations omitted).

operated unsafe aircraft.<sup>7</sup> But none of these assertions describe facts material to Respondent's reason for terminating Complainant's employment. Complainant alleges Respondent blacklisted him, but Complainant did not develop this blacklisting claim as an alleged adverse action before the ALJ or the ARB.<sup>8</sup>

Complainant repeats his assertion that, when he spoke to Jake Russack (Russack), Respondent's Director of Operational Support, on March 5, 2019, he threatened to report Respondent to the Federal Aviation Administration.<sup>9</sup> Russack denied that Complainant made that threat during the conversation, and the ALJ found Russack's denial of this exchange more credible than Complainant's assertion.<sup>10</sup>

Complainant states that Respondent improperly referred to his Pilot Records Improvement Act of 1996 (PRIA) records when it terminated his employment.<sup>11</sup> And he again presents documents that, according to him, were wrongfully excluded by the ALJ.<sup>12</sup> But, as we held in our D. & O., Complainant does not explain how the alleged PRIA violations or additional documents relate to the March 2019 conversations that led to his discharge.<sup>13</sup> For the same reasons we found this allegation unpersuasive in our D. & O., we continue to find it so.

Substantial evidence supported the ALJ's conclusion that Respondent discharged Complainant in response to his lack of competency and ability as a pilot in command as well as his lapses in judgment, including his unprofessional attitude and continued failure to accept responsibility for his actions. Based on the substantial evidence identified in the record and in the D. & O., Respondent had serious concerns about allowing Complainant to continue working as a pilot.<sup>14</sup>

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<sup>7</sup> See, e.g., Req. for Recon. at 3, 9, 11, 16-17, 42 (violations of law); 5, 35 (evidence hidden or destroyed); 6, 12 (falsification of documents); 6, 8, 15, 32 (unsafe aircraft).

<sup>8</sup> See, e.g., *id.* at 12, 24, 36.

<sup>9</sup> *Id.* at 5, 10.

<sup>10</sup> D. & O. at 7.

<sup>11</sup> See, e.g., Req. for Recon. at 54-59.

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> See D. & O. at 10, 11-12.

<sup>14</sup> *Id.* at 4, 8-9.

Nothing in the Req. for Recon. indicates that we should reverse the ALJ's findings. Accordingly, we **DENY** Complainant's Req. for Recon. in its entirety.

**SO ORDERED.**



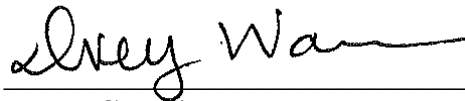
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**TAMMY L. PUST**  
**Administrative Appeals Judge**



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**THOMAS H. BURRELL**  
**Administrative Appeals Judge**



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**IVEY S. WARREN**  
**Administrative Appeals Judge**