

**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. 2023-0047**

**COMPLAINANT,**

**ALJ CASE NO. 2023-AIR-00001**

**ALJ CHRISTOPHER LARSEN**

**v.**

**DATE: May 30, 2025**

**ASIA PACIFIC AIRLINES,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Darren Kossen; *Pro Se*; Honolulu, Hawaii**

***For the Respondent:***

**Steven P. Pixley, Esq.; *Pixley Law Offices, LLC*; Saipan, Northern Mariana Islands**

**Before JOHNSON, Chief Administrative Appeals Judge, and THOMPSON, and KAPLAN, Administrative Appeals Judges**

**DECISION AND ORDER**

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and its implementing regulations.<sup>1</sup> Darren Kossen (Complainant) filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Asia Pacific Airlines (Respondent) unlawfully retaliated against him for engaging in protected activity. On August 8, 2023, a United States Department of Labor Administrative Law Judge (ALJ) issued an Order Granting

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<sup>1</sup> 49 U.S.C. § 42121; 29 C.F.R. Part 1979 (2024).

Summary Decision. Complainant moved for reconsideration. On August 15, 2023, the ALJ issued an Order Denying Reconsideration. Complainant petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's Order Granting Summary Decision and Order Denying Reconsideration. For the following reasons, we affirm.

## BACKGROUND

Complainant was a pilot for Respondent from October 2016 until January 12, 2018, when Respondent terminated his employment.<sup>2</sup> On September 2, 2022, Complainant filed a complaint with OSHA alleging that Respondent retaliated against him by providing inaccurate pilot record documentation to a prospective employer in June 2022.<sup>3</sup> On October 2, 2022, OSHA acknowledged that the claim was timely filed but dismissed it because Complainant had an open and pending case before the Office of Administrative Law Judges (OALJ).<sup>4</sup> Complainant appealed the OSHA determination to OALJ.<sup>5</sup>

OALJ docketed Complainant's appeal and it was assigned to ALJ Christopher Larsen. On March 2, 2023, ALJ Larsen issued a Notice of Hearing and Pre-Hearing Order. Shortly after being served this order, Complainant filed a Motion for Recusal on March 13, 2023.<sup>6</sup> In the Motion for Recusal, Complainant argued that the ALJ showed a clear bias, acted in his own self-interest, and erred in rulings from past cases involving Complainant.<sup>7</sup> Therefore, Complainant requested

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<sup>2</sup> Order Granting Summary Decision at 1.

<sup>3</sup> Notice of Docketing at 1.

<sup>4</sup> Order Granting Summary Decision at 1.

<sup>5</sup> Notice of Docketing at 1.

<sup>6</sup> The full title of Complainant's Motion for Recusal is "Amended Motion for Recusal of ALJ Larsen in Kossen V Asia Pacific Airlines Case Number 2023-AIR-00001 and Motion to for Transfer of Case Out of the OALJ San Francisco Office to Another OALJ District and ALJ."

<sup>7</sup> See Amended Motion for Recusal at 2. The Board recognizes that Complainant has prior cases before ALJ Larsen and the ARB involving Respondent and Empire Airlines. *Kossen v. Asia Pac. Airlines*, ARB No. 2021-0012, ALJ No. 2019-AIR-00011 (ARB Aug. 26, 2021) (*Kossen I*), *aff'd Kossen v. Asian [sic] Pac. Airlines*, 2023 WL 3017948 (9th Cir. Apr. 20, 2023); *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022 (ARB Feb. 25, 2021) (Order Denying Interlocutory Appeal); *Kossen v. Empire Airlines*, ARB No. 2021-0033, ALJ No. 2019-AIR-00022 (ARB May 12, 2021) (Order Denying Interlocutory Appeal); *Kossen v. Empire Airlines*, ARB No. 2022-0004, ALJ No. 2019-AIR-

the ALJ recuse himself from this case. On March 28, 2023, the ALJ issued an Order Denying Motion for Recusal. In response, on April 11, 2023, Complainant filed a Motion for Reconsideration for Recusal, which the ALJ denied on April 13, 2023.<sup>8</sup>

Thereafter, on May 30, 2023, Respondent filed a Motion for Summary Decision. In that Motion, Respondent: (1) stipulated Complainant engaged in protected activity under AIR21 on February 18, 2018; (2) noted Complainant's OSHA complaint alleged that Respondent retaliated against him on or about June 15, 2022; and (3) argued as a matter of law that the passage of four years and four months, from the date of Complainant's protected activity to the date of the alleged adverse action, was too long to establish causation, a necessary element of Complainant's prima facie case.<sup>9</sup>

In response, Complainant filed several motions, which are summarized as follows.

On June 9, 2023, Complainant filed a Motion for Extension of Time<sup>10</sup> requesting additional time to file an opposition to Respondent's Motion for Summary Decision. On June 12, 2023, the ALJ granted Complainant's Motion, permitting him to file an opposition to Respondent's Motion for Summary Decision by July 17, 2023.

On June 30, 2023, Complainant filed a second Motion for Reconsideration for Recusal<sup>11</sup> again requesting, in part, for the ALJ to recuse himself. The ALJ denied that request on July 3, 2023.

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00022 (ARB June 13, 2023) (Decision and Order); *Kossen v. Empire Airlines*, ARB No. 2022-0004, ALJ No. 2019-AIR-00022 (ARB July 19, 2023) (Order Denying Reconsideration).

<sup>8</sup> The full title of Complainant's Motion for Reconsideration for Recusal is "Motion for Reconsideration for Recusal of ALJ Larsen in Kossen V Asia Pacific Airlines Case Number 2023-AIR-00001 and Motion to for Transfer of Case Out of the OALJ San Francisco Office to Another OALJ District and ALJ."

<sup>9</sup> Order Granting Summary Decision at 6.

<sup>10</sup> The full title of Complainant's first Motion for Extension of Time is "Kossen's Motion for Extension of Time from 6/13/23 to 7/15/23 for Kossen's Response Asia Pacific Airlines 5/30/23 Motion for Summary Decision."

<sup>11</sup> The full title of Complainant's second Motion for Reconsideration for Recusal is "Motion for Reconsideration of 6/12/23 Order Denying Motion to Compel, and Order Granting In Part, and Denying In Part, Motion for Protective Order and Motions for Self-Recusal of ALJ Larsen for Newly Found Evidence."

On July 17, 2023, Complainant filed a second Motion for Extension of Time requesting additional time to file an opposition to Respondent's Motion for Summary Decision.<sup>12</sup> On July 18, 2023, the ALJ ordered the parties to appear via Microsoft Teams for argument on Complainant's second Motion for Extension of Time.<sup>13</sup>

On July 31, 2023, prior to the virtual hearing, Complainant filed a Motion to Stay the Proceedings.<sup>14</sup> However, at the virtual hearing, the ALJ advised that he would not rule on any pending motions<sup>15</sup> until he ruled on Respondent's Motion for Summary Decision.<sup>16</sup> Following the virtual hearing, the ALJ ordered Complainant to file his opposition to the Motion for Summary Decision no later than August 7, 2023.<sup>17</sup>

Complainant did not file an opposition to the Motion for Summary Decision. Instead, Complainant filed two more motions to stay the proceedings with the ALJ<sup>18</sup>

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<sup>12</sup> The full title of Complainant's second Motion for Extension of Time is "Kossen's Motion for Extension of Time from 7/17/23 to 8/31/23 for Kossen's Response Asia Pacific Airlines 5/30/23 Motion for Summary Decision, to Find Counsel and to be Afforded Time to Depose APA Witnesses."

<sup>13</sup> Notice of Video Hearing for Extension of Time at 1.

<sup>14</sup> The full title of Complainant's Motion to Stay Proceedings is "Motion for Stay in Kossen v APA 2023-AIR-00001 Until Kossen v APA 9th Circuit En Banc Appeal Filed 7/31/23 is Adjudicated Based on It's [sic] Merits."

<sup>15</sup> In addition to Complainant's second Motion for Extension of Time, the other pending motions included: (1) "Kossen's Motion to Compel Deposition of APA's Adam Ferguson, Joseph San Agustin, and Richard Brown" (Motion to Compel Deposition); (2) "Kossen's Amended Motion to Compel Deposition of APA's Adam Ferguson, Joseph San Agustin, and Richard Brown" (Amended Motion to Compel Deposition); and (3) "Interlocutory Appeal for Recusal of Administrative Law Judge Christopher Larsen in Kossen v. Asia Pacific Airlines Case Number 2023-AIR-00001 and Motion to for Transfer of Case Out of the Office of OALJ San Francisco to Another OALJ District and ALJ."

<sup>16</sup> July 31, 2023 Video Conference Transcript (Tr.) at 30. At the virtual hearing, Complainant also alleged a new adverse action taken against him—Respondent failed to re-hire Complainant after he applied for a job a week before the virtual hearing. *Id.* at 8.

<sup>17</sup> Order Denying Motion for Extension of Time at 1.

<sup>18</sup> On August 7, 2023, Complainant filed "8/7/23 Motion for Stay in Kossen V APA 2023-AIR-00001 Until Kossen V APA Appeal to United States Supreme Court is Heard, and All Levels of Adjudication are Exhausted" and "Amended Motion for Stay in Kossen V APA 2023-AIR-00001 Until Kossen V APA Petition for Review to United States Supreme Court

and a Petition for Interlocutory Appeal with the Chief Administrative Law Judge and the ARB.<sup>19</sup> In the Petition for Interlocutory Appeal, Complainant requested to stay the proceedings, extend the response date to Respondent's Motion for Summary Decision, and require Respondent to provide discovery and depositions.<sup>20</sup>

While the Petition for Interlocutory Appeal was pending before the ARB, the ALJ issued an Order Granting Summary Decision. In the Order Granting Summary Decision, the ALJ held that Complainant's failure to re-hire claim was "not relevant" as Respondent had legitimate grounds not to hire Complainant regardless of any protected activity he may have taken in the past.<sup>21</sup> The ALJ also determined that as a matter of law, the passage of four years between Complainant's protected activity and Respondent's delivery of pilot records to a potential employer does not support a retaliatory inference under AIR21.<sup>22</sup> The Order Granting Summary Decision also denied Complainant's other pending motions as moot.<sup>23</sup>

On August 14, 2023, Complainant filed a Motion for Reconsideration with the ALJ.<sup>24</sup> In the Motion for Reconsideration, Complainant argued that the ALJ should reconsider the Summary Decision Order because: (1) he filed a petition for

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is Heard, and All Levels of Adjudication are Exhausted" (Motion to Stay the Proceedings II).

<sup>19</sup> The full title of Complainant's Petition for Interlocutory Appeal is "Interlocutory Appeal for 7-31-23 Order Denying Kossen's 7/17/23 Motion for Extension of Time to File Response to APA's 5/30/23 Motion for Summary Decision."

<sup>20</sup> Petition for Interlocutory Appeal at 4. On August 22, 2023, the Board issued an Order of Non-Acceptance of Untimely Interlocutory Appeal. *Kossen v. Asia Pacific Airlines*, ARB No. 2023-0041, ALJ No. 2023-AIR-00001 (ARB Aug. 22, 2023) (Order of Non-Acceptance of Untimely Interlocutory Appeal). The Board did not accept the interlocutory appeal because the filing date was well outside the ten business-day deadline; alternatively, even if it was timely filed, Complainant failed to meet the requirements for collateral review of the subject Order. Order of Non-Acceptance of Untimely Interlocutory Appeal at 1.

<sup>21</sup> Order Granting Summary Decision at 6-7.

<sup>22</sup> *Id.* at 17.

<sup>23</sup> *Id.*

<sup>24</sup> The full title of Complainant's reconsideration is "Motion Reconsideration of 8/8/23 ALJ Decision Granting APA Summary Decision because on 8/7/23 (the Day Before) Kossen Filed Interlocutory Appeal with ARB and Copy to ALJ and Filed Motions with ALJ and ARB to Stay Case Pending Outcome of Interlocutory Appeal."

interlocutory appeal with the ARB before the ALJ issued the Order Granting Summary Decision; (2) he filed motions to stay with the ALJ and ARB; and (3) discovery was not completed as there were three depositions outstanding.<sup>25</sup> The ALJ issued an Order Denying Reconsideration on August 15, 2023.

On August 28, 2023, Complainant timely filed a Petition for Review with the Board. The Board issued an Order Regarding Proof of Service, Notice of Appeal Acceptance, Electronic Filing Requirements, and Briefing Schedule (Briefing Order) on September 11, 2023. In the Briefing Order, the Board accepted Complainant's appeal and required Complainant to submit an opening brief not exceeding 50 double-spaced pages by October 10, 2023.<sup>26</sup> Despite multiple opportunities and extensions, Complainant repeatedly submitted overlength briefs in violation of the Board's orders, prompting partial acceptance of Complainant's Opening Brief, dated November 16, 2023.<sup>27</sup> On January 3, 2024, Respondent timely filed its Response Brief. On February 5, 2024, Complainant untimely filed his Reply Brief.<sup>28</sup>

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

The Secretary of the Department of Labor has delegated authority to the Board to review appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.<sup>29</sup> The Board reviews an ALJ's grant of summary decision de

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<sup>25</sup> Motion for Reconsideration at 2.

<sup>26</sup> Briefing Order at 4.

<sup>27</sup> See Order Rejecting Complainant's Amended Brief at 2-4 (summarizing Complainant's motions pertaining to the ARB's briefing deadline and page limitation, accepting compliant portion of Complainant's opening brief, and rejecting amended briefs, a motion for reconsideration, and an amended motion for reconsideration).

<sup>28</sup> Per the Board's Briefing Order, Complainant's Reply Brief was due within 14 calendar days of the filing of Respondent's Response Brief. Briefing Order at 4. On January 17, 2024, the day Complainant's Reply Brief was due, Complainant filed an 11th-hour request for extension of time. On January 22, 2024, the Board issued an order denying Complainant's request. On January 29, 2024, Complainant filed a motion for reconsideration, which the Board denied on February 5, 2024.

<sup>29</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

novo under the same standard the ALJ applies.<sup>30</sup> The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.<sup>31</sup>

## DISCUSSION

Generally, Complainant argues the following on appeal:<sup>32</sup> (1) the ALJ abused his discretion in granting Respondent's Motion for Summary Decision while Complainant's Petition for Interlocutory Review and other motions were pending;<sup>33</sup> (2) the ALJ erred in granting Respondent's Motion for Summary Decision;<sup>34</sup> (3) the ALJ erred in denying Complainant's motions for recusal;<sup>35</sup> and (4) the ALJ erred in denying Complainant's Motion for Reconsideration.<sup>36</sup> We consider Complainant's arguments in turn.

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<sup>30</sup> *Jahanbin v. The Boeing Co.*, ARB No. 2024-0035, ALJ No. 2023-AIR-00023, slip op. at 3-4 (ARB Mar. 13, 2025) (citing *Xanthopoulos v. Mercer Inv. Consulting*, ARB No. 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 10 (ARB Sept. 28, 2023)).

<sup>31</sup> *Xia v. Lina T. Ramey & Assocs., Inc.*, ARB No. 2023-0046, ALJ No. 2022-LCA-00013, slip op. at 7 (ARB Oct. 7, 2024) (citing *Adm'r Wage and Hour Div., U.S. Dep't of Lab. v. Strates Shows, Inc.*, ARB No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 3 (ARB Aug. 16, 2017)).

<sup>32</sup> The Board "construes arguments for self-represented litigants liberally in deference to their lack of training in the law,' while 'also refrain[ing] from becoming an advocate for the pro se litigant.'" *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 7 n.43 (ARB Jan 17, 2023) (citation omitted). However, the Board recognizes that before the ALJ, Complainant did not file a response to Respondent's Motion for Summary Decision even after the ALJ provided Complainant extensions to file an opposition. The Board generally declines to consider arguments that a party raises for the first time on appeal. *Xia*, ARB No. 2023-0046, slip op. at 21-22 n.117 (citing *Bagri v. Erection & Welding Contractors, LLC*, ARB No. 2020-0033, ALJ No. 2020-LCA-00003, slip op. at 2 n.5 (ARB Jan. 29, 2021)). Upon reviewing Complainant's Opening Brief and Reply Brief, significant portions of those filings are devoted to raising new arguments on appeal or relitigating past cases before the OALJ, ARB, and Ninth Circuit. *See* Complainant's Opening Brief (Comp. Br.) at 16-41, Complainant's Reply Brief (Comp. Reply Br.) at 7-16. Therefore, the Board declines to consider those arguments in this appeal.

<sup>33</sup> Comp. Br. at 3-4, 46-47.

<sup>34</sup> *Id.* at 2-4.

<sup>35</sup> *Id.* at 4-5, 46.

<sup>36</sup> *Id.* at 2-5, 47, 49.

## 1. Order Granting Summary Decision

Summary decision is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”<sup>37</sup> In considering a motion for summary decision, the Board views the evidence, and makes all reasonable inferences, in the light most favorable to the non-moving party.<sup>38</sup> If the moving party demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of litigation.<sup>39</sup> The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which the non-moving party would bear the ultimate burden of proof.<sup>40</sup> If the non-moving party fails to show an essential element to their case, there can be no “genuine issue as to any material fact,” since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.<sup>41</sup>

Here, the ALJ determined: (1) Respondent had legitimate grounds to not re-hire Complainant regardless of any protected activity he may have taken in the past;<sup>42</sup> and (2) as a matter of law, the passage of four years between Complainant’s protected activity and Respondent’s delivery of pilot records to a potential employer did not support a retaliatory inference under AIR21, an essential element to his case.<sup>43</sup> Complainant argues on appeal that the ALJ abused his discretion in granting Respondent’s Motion for Summary Decision while Complainant’s Petition for Interlocutory Review and other motions were pending and erred in granting Respondent’s Motion for Summary Decision by ignoring Supreme Court and First Circuit Court of Appeals’ precedent.<sup>44</sup>

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<sup>37</sup> 29 C.F.R. § 18.72(a).

<sup>38</sup> *Jahanbin*, ARB No. 2024-0035, slip op. at 4 (citing *Feldman v. Risk Placement Servs., Inc.*, ARB No. 2020-0068, ALJ No. 2019-SOX-00052, slip op. at 4 (ARB Sept. 29, 2021)).

<sup>39</sup> *Id.* (citation omitted).

<sup>40</sup> *Id.* (citation omitted).

<sup>41</sup> *Id.* (citation omitted).

<sup>42</sup> Order Granting Summary Decision at 6-7.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> Comp. Br. at 2-4, 14, 46-47.



A. *The ALJ Did Not Abuse His Discretion in Granting Respondent's Motion for Summary Decision While Complainant's Petition for Interlocutory Review and Other Motions Were Pending*

During the proceedings below, Complainant filed two Motions to Stay the Proceedings, a Motion to Compel Deposition, an Amended Motion to Compel Deposition with the ALJ, and a Petition for Interlocutory Appeal with the Chief Administrative Law Judge and the Board. These motions and petitions were all pending when the ALJ issued the Order Granting Summary Decision. Complainant argues the ALJ abused his discretion by granting summary decision while these motions were pending, and requests the Board vacate the Order Granting Summary Decision.

ALJs abuse their discretion if they: (1) base the decision on an error of law or use the wrong legal standard; (2) base their decision on a clearly erroneous factual finding; or (3) reach a conclusion that, though not necessarily the product of a legal error or a clearly erroneous finding, cannot be located within the range of permissible decisions.<sup>45</sup>

Complainant has not demonstrated that the ALJ abused his discretion by issuing the Order Granting Summary Decision while several motions remained pending. First, the ALJ addressed the pending motions in the Order Granting Summary Decision and denied them as moot.<sup>46</sup> Second, at the July 31, 2023 virtual hearing, the ALJ advised Complainant that he would not rule on any pending motions until ruling on Respondent's Motion for Summary Decision.<sup>47</sup> The ALJ then instructed Complainant to file the opposition by August 7, 2023.<sup>48</sup> Complainant elected to ignore the ALJ's forewarning and, instead, opted to submit other motions and filings with the ALJ and Board. Third, since the Order Granting Summary Decision, the Board has reviewed Complainant's Petition for Interlocutory Appeal and issued an Order of Non-Acceptance of Untimely Interlocutory Appeal. Thus, even if the ALJ erred by issuing the Order Granting Summary Decision while the Petition for Interlocutory Appeal was pending before the Board, this error was harmless, and the issue is now moot, as the Board did not accept Complainant's

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<sup>45</sup> *Xia*, ARB No. 2023-0046, slip op. at 7-8 (citing *Petitt v. Delta Air Lines, Inc.*, ARB No. 2019-0087, ALJ No. 2018-AIR-00041, slip op. at 5 (ARB Aug. 26, 2020)).

<sup>46</sup> Order Granting Summary Decision at 17.

<sup>47</sup> Tr. at 30.

<sup>48</sup> Order Denying Motion for Extension of Time at 1.

Petition. Accordingly, we hold that the ALJ did not abuse his discretion in granting Respondent's Motion for Summary Decision while Complainant's Petition for Interlocutory Review and other motions were pending.

*B. The ALJ Did Not Err in Granting Respondent's Motion for Summary Decision*

In the Order Granting Summary Decision, the ALJ held: (1) Respondent had legitimate grounds to not hire Complainant regardless of any protected activity he may have taken in the past;<sup>49</sup> and (2) as a matter of law, the passage of four years between Complainant's protected activity and Respondent's delivery of pilot records to a potential employer did not support an inference of retaliation under AIR21.<sup>50</sup>

As an initial matter, Complainant's Petition for Review, Opening Brief, and untimely Reply Brief do not address the ALJ's conclusion pertaining to Complainant's failure to re-hire claim. The Board considers objections not raised by parties waived on appeal.<sup>51</sup> Thus, we focus our attention on whether the ALJ erred in concluding as a matter of law that the passage of four years between Complainant's protected activity and Respondent's delivery of pilot records to a potential employer does not support a retaliatory inference under AIR21.

To prevail in a retaliation claim under AIR21, complainants must prove by a preponderance of evidence that they engaged in protected activity and that the protected activity was a contributing factor in the adverse action taken against them.<sup>52</sup> The ALJ determined that Complainant could not demonstrate that his protected activity in 2018 contributed to the alleged adverse action four years later, in 2022. Specifically, the ALJ ruled that, as a matter of law, the passage of four

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<sup>49</sup> Order Granting Summary Decision at 6-7.

<sup>50</sup> *Id.* at 17.

<sup>51</sup> 29 C.F.R. § 1979.110(a). Even if the Board opted to examine this determination, the Board has similarly upheld an employer's decision not to rehire a former employee after a relationship "had been damaged beyond all reasonable hope of repair." *Bauche v. Masimo Corp.*, ARB Nos. 2023-0016, -0031, ALJ Nos. 2022-SOX-00010, -00026, slip op. at 12 (ARB July 31, 2024). In the present case, Complainant has accused Respondent of the following: making a false police report against him; committing perjury; colluding with another airline to denigrate Complainant's professional skills; hiring unqualified pilots; and engaging in a continued pattern of retaliation against Complainant. Order Granting Summary Decision at 6 n.4.

<sup>52</sup> 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a).

years between Complainant’s protected activity and Respondent’s delivery of pilot records to a potential employer did not support a retaliatory inference under AIR21. Because Complainant failed to offer any other evidence to support that Complainant’s alleged protected activity influenced Respondent’s conduct several years later, the ALJ dismissed his claim.

We agree with the ALJ. As cited by Respondent,<sup>53</sup> the present case is analogous to *Villiarimo v. Aloha Airlines*.<sup>54</sup> In *Villiarimo*, a former employee asserted that his former employer terminated his employment in retaliation for complaining about sexual harassment in violation of Title VII.<sup>55</sup> The Ninth Circuit Court of Appeals determined the former employee failed to establish a prima facie case because he did not demonstrate causation.<sup>56</sup> Specifically, the former employee argued only that his termination followed his protected activity.<sup>57</sup> In rejecting the former employee’s argument, the Ninth Circuit noted that the former employee’s termination occurred eighteen months after his complaint and cited to several cases where the gap between protected activity and adverse action was too long.<sup>58</sup> In the present case, the alleged adverse action occurred four years and four months after Complainant’s protected activity, more than twice the time in *Villiarimo*.

The Board has similarly recognized that a “significant gap makes it unreasonable to infer, from temporal proximity alone, that protected activity contributed to adverse employment action.”<sup>59</sup> Thus, the four-year and four-month

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<sup>53</sup> Respondent’s Response Brief at 11.

<sup>54</sup> *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002).

<sup>55</sup> *Id.* at 1060.

<sup>56</sup> *Id.* at 1064.

<sup>57</sup> *Id.* at 1065.

<sup>58</sup> *Id.* (citing *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000) (one year gap was too long, by itself, to give rise to an inference of causation); *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir. 1999) (four-month gap was too long); *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998) (eight-month gap was too long); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998) (five-month gap was too long); *Conner v. Schnuck Mkts.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (four-month gap was too long)).

<sup>59</sup> *Bauche*, ARB Nos. 2023-0016, -0031, slip op. at 11 n.54 (citing to *Villiarimo* and other Ninth Circuit Court of Appeals decisions); *see also Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, ALJ No. 2013-FRS-00070, slip op. at 9 (ARB Nov. 5, 2020)

gap between Complainant’s protected activity and adverse employment action in this case, without more, makes it unreasonable to infer that the protected activity contributed to the adverse action.

Complainant asserts that the ALJ erred in his causation analysis by ignoring United States Supreme Court precedent.<sup>60</sup> Complainant cites to *Robinson v. Shell Oil*<sup>61</sup> and claims that the Court held that there is no limit to temporal proximity and “protects [against] retaliation long after separation.”<sup>62</sup> Complainant’s interpretation is misguided. In *Robinson*, the Court examined the definition of an “employee” under Title VII.<sup>63</sup> The Court held that the term “employees” include former employees, and that the statutory language contains “no temporal qualifier” to limit coverage under the statute.<sup>64</sup> Nowhere in the opinion did the Court discuss temporal proximity as it relates to establishing causation in a whistleblower claim as alleged by Complainant.

Complainant also cites to *Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de Puerto Rico*<sup>65</sup> and claims that the First Circuit Court of Appeals held that retaliation could happen years later.<sup>66</sup> Complainant is partially correct. In *Muñoz*, the First Circuit concluded that filing an ADEA complaint more than five years before an adverse employment action is not too remote to establish causality if there is other evidence to support the claim.<sup>67</sup> However, at the same time, the First Circuit also recognized that if there was no additional evidence, a five-year gap was too remote to establish causality and cited several cases in support.<sup>68</sup> *Muñoz* is

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(noting that the “probative value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens . . .”).

<sup>60</sup> Comp. Br. at 3.

<sup>61</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

<sup>62</sup> Comp. Br. at 3.

<sup>63</sup> *Robinson*, 519 U.S. at 339.

<sup>64</sup> *Id.* at 341, 346.

<sup>65</sup> *Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 671 F.3d 49 (1st Cir. 2012).

<sup>66</sup> Comp. Br. at 14.

<sup>67</sup> *Muñoz*, 671 F.3d at 56-57.

<sup>68</sup> *Id.* at 56 (citing *Rodriguez v. Boehringer Ingelheim Pharm., Inc.*, 425 F.3d 67, 84 (1st Cir. 2005) (a two-month gap was too remote to establish causality under the ADEA); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 828 (1st Cir. 1991) (a nine-month gap was too

clearly distinguishable to the present case because the employee in *Muñoz* presented other evidence to support his claim.<sup>69</sup> Comparatively, Complainant did not oppose Respondent’s Motion for Summary Decision, leaving the ALJ to evaluate causation solely based on the temporal proximity from February 2018, the date of Complainant’s protected activity, and June 2022, the date Respondent sent Complainant’s pilot record documentation to the prospective employer. On this information alone, the ALJ properly determined that the passage of four years and four months from Complainant’s protected activity and the alleged adverse action, was too long to infer retaliation under AIR21.

Accordingly, we **AFFIRM** the ALJ’s Order Granting Summary Decision.<sup>70</sup>

## 2. Complainant’s Other Motions and Allegations

### A. Motions to Recuse ALJ

On appeal, Complainant asserts that the ALJ erred in denying the motions to recuse himself from the proceedings below.<sup>71</sup> Complainant essentially alleges that the ALJ had a personal bias against him, received improper benefits from one of Respondent’s business partners, and was not impartial in past rulings.<sup>72</sup> For each motion, the ALJ concluded that Complainant failed to provide any evidence of bias or partiality.

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remote causality under the ADEA); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110-11 (1st Cir. 1988) (a thirty-four month gap was too remote causality under Title VII)).

<sup>69</sup> *Id.* at 56-57.

<sup>70</sup> While we affirm the ALJ’s conclusion, we caution against using a specified time as a determinative criterion. “A rule that any period over a certain time is per se too long (or conversely, any period under a certain time is per se short enough) would be unrealistically simplistic.” *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003).

<sup>71</sup> See Petition for Review at 64, 72-96; Comp. Reply Br. at 11-12. The compliant portion of Complainant’s Opening Brief does not address the motions to recuse.

<sup>72</sup> These allegations include, but are not limited to: (1) the ALJ receives flight benefits from United Airlines, an alleged business partner of Respondent; (2) the ALJ’s son is employed by United Airlines; (3) Respondent’s disregard to pilot qualifications; (4) Respondent “subtly threatened [the] ALJ’s son’s career[;]” (5) the ALJ had an emotional outburst directed at Complainant; (6) the ALJ’s unfavorable rulings and consideration of evidence in past proceedings against Respondent and Empire Airlines. *Id.*

An ALJ may recuse him or herself if their “impartiality might reasonably be questioned” or they have “a personal bias or prejudice concerning a party.”<sup>73</sup> The Board presumes ALJs “to be impartial,” and the party moving for recusal has a ‘substantial burden’ to prove otherwise.”<sup>74</sup> Generally, unfavorable rulings and possible legal errors are insufficient to prove bias.<sup>75</sup>

In his various filings before the ALJ and the Board, Complainant has not shown that the ALJ had any personal bias against him based on any extra-judicial source of bias. Complainant’s allegations against the ALJ involve actions within the scope of regulating, managing, and adjudicating the proceedings below through a proper exercise of the powers granted<sup>76</sup> and are not supported by evidence. Complainant may not have liked the ALJ’s administration of this case or past cases, but Complainant failed to meet his burden to demonstrate the bias or prejudice necessary for disqualification. Accordingly, the ALJ properly considered Complainant’s motions for recusal, determined that they lacked merit, and continued presiding over this case.

#### *B. Motion for Reconsideration*

Before the ALJ, Complainant filed a Motion for Reconsideration and argued that the Order Granting Summary Decision should be vacated because discovery was not completed, there were outstanding depositions, and “the interlocutory appeal and motion for stay stays the case awaiting ARB ruling[.]”<sup>77</sup> On appeal, Complainant reiterates the same arguments.<sup>78</sup>

Granting a motion for reconsideration is appropriate when the tribunal clearly made a mistake of fact or law or when the factual situation has changed

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<sup>73</sup> *Manoharan v. HCL America, Inc.*, ARB No. 2021-0060, ALJ Nos. 2018-LCA-00029, 2021-LCA-00009, slip op. at 16 (ARB Apr. 14, 2022) (citation omitted).

<sup>74</sup> *Id.* (citation omitted).

<sup>75</sup> *Matthews v. Ametek, Inc.*, ARB No. 2011-0036, ALJ No. 2009-SOX-00026, slip op. at 5 (ARB May 31, 2012) (quoting *Powers v. Paper, Allied-Indus., Chem. & Energy Workers Int’l Union*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip op. at 17 (ARB Aug. 31, 2007)).

<sup>76</sup> See 29 C.F.R. 18.12(b) (listing ALJ’s powers necessary to conduct fair and impartial proceedings).

<sup>77</sup> See Motion for Reconsideration at 2.

<sup>78</sup> Comp. Br. at 3-4.

materially since the previous decision.<sup>79</sup> The Board reviews ALJ rulings on reconsideration under an abuse of discretion standard.<sup>80</sup>

Complainant did not allege any factual changes between the dismissal and the motion for reconsideration, and the ALJ did not make an error of fact when dismissing the case. And as previously discussed, any error the ALJ made by issuing the Order Granting Summary Decision before the ARB ruled on the Interlocutory Appeal was harmless as the Board did not accept Complainant's Petition for Interlocutory Review. Therefore, the ALJ did not abuse his discretion in denying reconsideration.<sup>81</sup>

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<sup>79</sup> *Gladden v. The Proctor and Gamble Co.*, ARB No. 2022-0012, ALJ No. 2021-SOX-00012, slip op. at 26 (ARB May 9, 2023) (citing *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2006-0078, ALJ Nos. 2006-AIR-00004, -00005, slip op. at 8 n.13 (ARB June 28, 2007)).

<sup>80</sup> *Id.* (citing *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 719 (11th Cir. 2020)).

<sup>81</sup> While the Board respects an ALJ's authority to effectively manage its docket to achieve orderly and expeditious dispositions, ALJs should cautiously proceed in summarily issuing orders without any legal analysis, explanation, or citations as it leaves the parties and the Board scrambling to divine by guesswork the reasoning and outcome. Courts will reconsider a decision under limited circumstances which include: (i) material differences in fact or law of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, or (iv) failure to consider material facts presented to the court before its decision. *DeBuse v. Corr Flight S.*, ARB No. 2023-0036, ALJ No. 2020-AIR-00015, slip op. at 3 (ARB Feb. 28, 2025) (citing *Rosenfeld v. Cox Enters., Inc.*, ARB No. 2016-0026, ALJ No. 2014-SOX-00033, slip op. at 2-3 (ARB May 26, 2017)). Before the ALJ, Complainant did not address the relevant reconsideration factors. Motion for Reconsideration at 1-2.

**CONCLUSION<sup>82</sup>**

For the reasons stated above, we **AFFIRM** the ALJ's Order Granting Summary Decision and Order Denying Reconsideration. Accordingly, Complainant's complaint is **DENIED**.

**SO ORDERED.**

**RANDEL K. JOHNSON**  
**Chief Administrative Appeals Judge**

**ANGELA W. THOMPSON**  
**Administrative Appeals Judge**

**ELLIOT M. KAPLAN**  
**Administrative Appeals Judge**

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<sup>82</sup> In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).