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United States Court of Appeals
for the Ninth Circuit

Case: 21-70283 (DOL 2020-0067/2012-AIR-017)
Title: *Mawhinney v.*
U.S. Department of Labor, et al.

Case: 21-70039 (DOL 2019-0018/2012-AIR-014)
Title: *Mawhinney v.*
U.S. Department of Labor, et al.

Date: Nov. 22, 2022

Ninth Circuit Judges: William C. Canby; Consuelo M. Callahan; Bridget S. Bade.

MEMORANDUM

Robert S. Mawhinney petitions pro se for review of the Department of Labor's Administrative Review Board's ("ARB") decisions and orders dismissing his whistleblower complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). We have jurisdiction under 49 U.S.C. § 42121(b)(4)(A). We review the ARB's decisions in accordance with the Administrative Procedure Act ("APA"), "under which the ARB's legal conclusions must be sustained unless they are arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, and its findings of fact must be sustained unless they are unsupported by substantial evidence in the record as a whole." *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004. We deny the petitions.

The ARB properly granted summary decision against Mawhinney on his AIR21 claim against American Airlines, Inc. ("Airline") because this

court has already affirmed the arbitrator's award in favor of the Airline on his claim. *See Am. Airlines, Inc. v. Mawhinney*, No. 19-55566, 807 F, App'x 720 (9th Cir. June 2, 2020). Mawhinney's challenge to the propriety of the decision to compel arbitration of his AIR21 claim against the Airline likewise fails because this court has already affirmed the order compelling arbitration of this claim. *See Am. Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018).

The ARB properly granted summary decision against Mawhinney on his AIR21 claim against Transport Workers Union, Local 591 ("Union") because the Union was not an air carrier, or a contractor or subcontractor of an air carrier, under AIR21. See 49 U.S.C. § 42121(a) (2020) (providing that AIR21 bars retaliation by an "air carrier or contractor or subcontractor of an air carrier"); *id.* § 42121(e) (defining a "contractor" as a company that performs safety-sensitive functions by contract for an air carrier"); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (noting that the standard of review under the APA is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision" (citation and internal quotation marks omitted)).

We reject as without merit Mawhinney's contention that his due process rights were violated.

PETITIONS FOR REVIEW DENIED

United States Court of Appeals
for the Ninth Circuit

Case: 21-70283 (DOL 2020-0067/2012-AIR-017)
Title: *Mawhinney v.*
U.S. Department of Labor, et al.

Case: 21-70039 (DOL 2019-0018/2012-AIR-014)
Title: *Mawhinney v.*
U.S. Department of Labor, et al.

Date: Feb. 22, 2023

Ninth Circuit Judges: William C. Canby; Consuelo M. Callahan; Bridget S. Bade.

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Mawhinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No, 55 in Appeal No. 21-70039; Docket Entry No. 50 in Appeal No. 21-70283) are denied.

Tranport Workers Union, Local 591's motion to sever and issue mandate (Docket Entry No. 58 in Appeal No. 21-70039; Docket Entry No. 53 in Appeal No. 21-70283) is denied as unnecessary.

No further filings will be entertained in this closed case.

U.S. Department of Labor,
Administrative Review Board

Case: 2020-0067/2012-AIR-017

Title: *Mawhinney v. American Airlines, Inc.*

Date: Feb. 4, 2021

Appeals Judges: James D. McGinley, Chief AAJ;
Thomas H. Burrell, AAJ;
Randel K. Johnson, AAJ.

DECISION AND ORDER

Per Curiam. This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[1] Complainant Robert Steven Mawhinney filed a complaint alleging that Respondent American Airlines violated AIR 21 by terminating his employment in retaliation for reporting safety concerns. On September 3, 2020, an Administrative Law Judge (ALJ) issued and Amended Order Granting Motion for Summary Decision (Order), dismissing the complaint. Mawhinney filed a Petition for Review of the Order.

The Administrative Review Board has jurisdiction to review the Order.[2] The Board reviews an ALJ's grant of summary decision de

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[1] 49 U.S.C. § 42121 (2000). AIR21's implementing regulations are found at 29 C.F.R. Part 1979 (2018).

[2] 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. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

novo.[3] Under the regulation governing the entry of summary decision, judgment must be entered if the pleadings, affidavits, material obtained in discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[4] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party, and the ALJ may not weigh the evidence or determine the truth of the matter.[5]

Upon review of the Order and the parties' arguments, we conclude that the ALJ's decision is in accordance with the law and is well reasoned. We also conclude that Mawhinney's briefs on appeal fail to satisfy hos burden to show that the ALJ erred in granting summary decision. As a result, we **ADOPT** and **ATTACH** the Order and, accordingly, we **DISMISS** Mawhinney's complaint.[6]

SO ORDERED.

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[3] *Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 2 (ARB Feb. 14, 2017).
[4] 29 C.F.R. § 18.72.
[5] *See, e.g., Vudhamari v. Advent Glob. Sols.*, ARB No. 2019-0061, ALJ No. 2018-LCA-00022, slip op. at 3 (ARB July 30, 2020).
[6] Our ruling is limited to the specific facts of this case.

U.S. Department of Labor,
Office of Administrative Law Judges

Case: 2012-AIR-017

Title: *Mawhinney v. American Airlines, Inc.*

Date: Sept. 3, 2020

Administrative Law Judge: Paul C. Johnson, Jr.

AMENDED ORDER GRANTING MOTION for SUMMARY DECISION[1]

This matter arises under the employee-protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century("AIR21"), 49 U.S.C. § 42121 et seq. and its implementing regulations found at 29 C.F.R. § 1979. Now pending after a long and complex procedural history are a renewed motion to dismiss and a motion for summary decision filed by Respondent AA Airlines ("Respondent" or "AA"). As AA's motion to dismiss is supported by evidence outside the four corners of the complaint, it is deemed to be a motion for summary decision. For the reasons set forth below, it will be granted.

Procedural History[2]

[1] This Amended Decision and Order is issued to include the appeal rights that were omitted from the initial Decision and Order. There are no substantive changes.

[2] This procedural history address only the captioned case. Another case, *Mawhinney v. Transport Workers Union, Local 591*, ALJ No. 2012-AIR-00014, was for a time consolidated with this one, but was eventually severed and has been concluded.

First DOL AIR21 Complaint

Respondent terminated the employment of Complainant Robert Steven Mawhinney ("Complainant" or "Mr. Mawhinney") in 2001. Mr. Mawhinney files a complaint under AIR21, which was ultimately settled. Under the approved settlement, the parties agreed that Mr. Mawhinney would be restored to his employment with AA, and that future employment disputes were required to be addressed in arbitration.

Current DOL AIR21 Complaint

AA discharged Complainant again in 2011. Mr. Mawhinney filed a complaint under AIR21 with the Occupational Safety and Health Administration, alleging that his termination was in retaliation for reporting safety concerns. After an OSHA investigation, the complaint was dismissed on a finding that the termination did not violate AIR21. Mr. Mawhinney objected to the findings, and requested a hearing before an administrative law judge. The complaint was forwarded to the Office of Administrative Law Judges, where it was assigned to me on June 27, 2012.

On July 19, 2012, I stayed this matter after being informed that Respondent had filed a petition in bankruptcy. After the bankruptcy proceedings concluded, I lifted the stay by order dated February 3, 2014.

On May 14, 2014, I granted Respondent's motion to dismiss and to compel arbitration on the grounds that, under the terms of the settlement of

a previous AIR21 complaint by Complainant, all employment-related matters between Mr. Mawhinney and AA were required to be arbitrated. Mr. Mawhinney appealed that order to the Administrative Review Board.

On January 21, 2016, the Administrative Review Board vacated my order dismissing this complaint and compelling arbitration, and remanded for further proceedings, because the settlement agreement in the earlier case could not be enforced by an administrative law judge, but by a U.S. District Court. The parties engaged in further litigation before me, but, as discussed below (*see infra* discussion under "second arbitration"), the district court issued an order compelling Mr. Mawhinney to engage in arbitration specifically regarding this AIR21 complaint. After the court did so, this matter was placed in abeyance pending the outcome of the arbitration proceedings.

First Arbitration

Mr. Mawhinney invoked the arbitration clause of his earlier settlement agreement to address his allegations of retaliation and wrongful termination. After a six-day hearing (held during the time period that the ARB was considering my dismissal order), the arbitrator ruled in favor of AA on all issues ("First Arbitration"). The arbitrator found, with respect to the charge of retaliation, that Mr. Mawhinney" was not terminated in retaliation for engaging in any protected activity." Complainant thereafter filed a petition to vacate the arbitration award in district

court, and AA filed a cross-petition to confirm it. The district court granted AA's cross-petition. The Ninth Circuit affirmed the district court's order. *Mawhinney v. AA Airlines, Inc.*, 692 Fed. App'x 937 (July 3, 2017).

Second Arbitration

After the ARB vacated my order dismissing the complaint and compelling arbitration, AA initiated arbitration proceedings and served a demand on Mr. Mawhinney to participate . When Mr. Mawhinney did not respond., AA filed an action in district court, requesting an order compelling Mr. Mawhinney to arbitrate the claims raised in this complaint. The district court did so, and the arbitrator was asked to address (1) whether the doctrines of res judicata and/or collateral estoppel bar Respondent's pending employment retaliation claim under 49 U.S.C. § 42121; (2) whether AA violated 49 U.S.C. § 42121 with regard to Mr. Mawhinney's employment; and (3) whether AA breached the terms of the 2002 settlement agreement. AA filed a motion for summary decision on the first issue. On December 20, 2017, the arbitrator granted summary decision, finding that the doctrines of res judicata and/or collateral estoppel apply to prevent Mr. Mawhinney "from pursuing any further relief based upon claims of employment retaliation and/or wrongful termination." AA filed a petition to confirm the arbitrator's award, which the district court granted. On June 5, 2020, the Ninth Circuit affirmed the district court's confirmation of the arbitration award. *Mawhinney v. AA*

Airlines, 807 Fed. App'x 720 (9th Cir. June 5, 2020).[3]

Discussion

Under Rule 18.72(a) of the OALJ procedural rules, the administrative law judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." There is no dispute over the procedural facts discussed above; they are a matter of public record and, as Complainant did not dispute them, I accept them as true. 29 C.F.R. § The issue is whether, as a matter of law, the arbitral and federal-court decisions preclude Mr. Mawhinney from pursuing his AIR21 claim in the Department of Labor. I find and conclude that they do.

Pursuant to the terms of the settlement agreement reached in the 2001 AIR21 complaint, Mr. Mawhinney invoked arbitration on the issues of retaliation and wrongful termination. After a six-day hearing at which a number of witnesses testified, and in which a number of exhibits were introduced, the arbitrator determined that Mr.

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[3] AA asserts that Mr. Mawhinney's motion for reconsideration, rehearing, and rehearing en banc was denied on June 26, 2020; however, the order denying that motion was issued in the Ninth Circuit case addressing the first arbitration, which was closed in 2018. It appears that Mr. Mawhinney's similar motion in the second arbitration is still pending before the Ninth Circuit. Given the basis for the panel's affirmance of the district court judgment, I deem it unnecessary to wait for the Court to address Complainant's motion, or for the results of any further appeal.

Mawhinney "was not terminated in retaliation for engaging in any protected activity," and issued an award in favor of AA. The district court confirmed the arbitration award, the Ninth Circuit affirmed, and the Supreme Court denied *certiorari*.

After the ARB vacated and remanded my earlier dismissal of this matter, AA sought and obtained an order compelling Mr. Mawhinney to arbitrate certain matters, including whether the first arbitration award precluded him from pursuing his AIR21 complaint on the grounds of res judicata or collateral estoppel. The arbitrator granted AA's motion for summary decision on that issue, and the district court confirmed the award. Mr. Mawhinney appealed the district court order to the Ninth Circuit, which affirmed the district court.

Under the Federal Arbitration Act, a judgment confirming an arbitration award "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13 (c). Thus, the judgments entered on the two arbitrations are final judgments of a district court, and it is established that (1) Mr. Mawhinney was not terminated in retaliation for engaging in protected activity, and (2) Mr. Mawhinney may not further pursue his AIR21 claim. The latter final judgment is sufficient to grant AA's motion. And because the judgments confirming the arbitration awards have the same force and effect as a judgment in a civil action, I need not determine whether the

arbitrator's findings alone form a basis for granting summary decision based on res judicata; the arbitration proceedings resulted in the equivalent of a judicial judgment in favor of Respondent, which has been affirmed, and Complainant has no further recourse.

Because I am granting summary decision based on the preclusive effect of the arbitration awards, as confirmed by the judgments of the district court that were themselves affirmed by the Court of Appeals, I need not and do not address Respondent's argument regarding collateral estoppel. And the grant of summary decision on the merits.

ORDER

For the foregoing reasons, IT IS ORDERED:

1. The motion of Respondent for dismissal is deemed to be a motion for summary decision is GRANTED;
2. Respondent's motion for summary decision on the merits is DENIED as moot; and
3. This matter is DISMISSED.

SO ORDERED.

s/ Paul C. Johnson, Jr.

U.S. Department of Labor,
Administrative Review Board

Case: 2019-0018/2012-AIR-014

Title: *Mawhinney v. TWU, Local 591*

Date: Dec. 9, 2020

Appeals Judges: James D. McGinley, Chief AAJ;
Thomas H. Burrell, AAJ;
Randel K. Johnson, AAJ.

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).[1] Complainant Robert Steven Mawhinney filed a complaint alleging that Respondent Transport Workers Union Local 591 (TWU) violated AIR 21 by colluding with American Airlines and several individuals to discharge him from employment.[2]

TWU seeks dismissal as a party pursuant to two motions. On September 30, 2016, it filed a "Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591 & Memorandum of Law in Support of It Motion, Pursuant to Rule §18.72." On November 16, 2018,

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[1] 49 U.S.C. § 42121 (2000). AIR21's implementing regulations are found at 29 C.F.R. Part 1979 (2018).

[2] Mawhinney's retaliation claim proceeded as two consolidated cases before the Office of Administrative Law Judges. The ALJ severed the cases and considered TWU's motion as ALJ Case No. 2012-AIR-00014.

TWU filed a "Motion for Dispositive Action & Memorandum of Law in Support of Its Motion, On All Claims Against Transport Workers Union, Local 591, Pursuant to Rule § 18.70(c)." On December 27, 2018, an Administrative Law Judge (ALJ) issued an "Order Granting Respondent's Motion for Dispositive Action and Order Granting Respondent's Motion for Summary Decision" (Order), dismissing TWU.

The Administrative Review Board has jurisdiction to review the Order.[3] The Board reviews an ALJ's grant of a motion for dispositive action de novo. The regulation governing such motions states that "[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness,"[4] In considering a motion to dismiss for failure to state a claim, we accept the non-movant's factual allegations as true and draw all reasonable inferences in his favor.[5]

The Board also reviews an ALJ's grant of summary decision de novo.[6] Under the regulation

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[3] 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)), 86 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

[4] 29 C.F.R. § 18.70.

[5] *Tyndall v. U.S. EPA*, ARB No. 1996-0195, ALJ Nos. 1993-CAA-00006, 1995-CAA-00005, slip op. at 2 (ARB Feb. 14, 1996).

[6] *Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 2 (ARB Feb. 14, 2017).

governing the entry of Summary decision, judgment must be entered if the pleadings, affidavits, material obtained in discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that aa party is entitled to summary decision.[7] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party, and the ALJ may not weigh the evidence or determine the truth of the matter.[8]

Upon review of the Order and the parties' arguments, we conclude that the ALJ's decision is in accordance with the law and is well-reasoned. As a result, we **ADOPT** and **ATTACH** the Order and , accordingly we **DISMISS** Mawhinney's case against the TWU.

SO ORDERED.

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[7] 29 C.F.R. § 18.72

[8] *See, e.g., Vudhamari v. Advent Glob. Sols.*, ARB No. 2019-0061, ALJ No. 2018-LCA-00022, slip op. at 3 (ARB July 30, 2020).

U.S. Department of Labor,
Office of Administrative Law Judges
Case: 2012-AIR-014
Title: *Mawhinney v. TWU, Local 591*

Date: Dec. 27, 2018

Administrative Law Judge: Paul C. Johnson, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR DISPOSITIVE ACTION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century("AIR21"), 49 U.S.C. § 42121 et seq. and its implementing regulations found at 29 C.F.R. § 1979. The purpose of AIR21 is to protect employees who report alleged violations of air safety from discrimination and retaliation by their employer. Complainant, Mr. Robert Mawhinney, filed a complaint against American Airlines and Respondent , the Transportation Workers Union Local 591 (TWU). Complainant alleges he was "threatened, ignored, abandon, and subjected to a hostile work environment" and ultimately terminated from employment on September 23, 2011, by American Airlines acting in concert with TWU.[1]

[1] Mawhinney Complaint filed October 5, 2011 (2011 Complaint).

To prevail in an AIR21 claim, a complainant[2] must prove by a preponderance of the evidence that he engaged in protected activity, and the respondent subjected him to the unfavorable personnel action alleged in the complaint because he engaged in protected activity. *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, ARB No. 16-035, 2016 WL 6024269, ALJ No. 2014-FRS-00154 (ARB Sep. 30, 2016); §42121(b)(2)(B)(iii).

Mr. Mawhinney was an employee of American Airlines when he previously filed a whistleblower claim, which was resolved by settlement on January 23, 2003. The settlement included reinstatement of Mr. Mawhinney's position at American Airlines. In the present claim, he challenges that since returning to work he has been subjected to threats and wrongful termination. Complainant contends TWU is liable for the acts of its members who were acting on behalf of the union in the course of their duties at American Airlines.

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[2] Complaints and filings by pro se litigants should be construed "liberally in deference to their lack of training in the law." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010). However, "while adjudicators must accord a pro se complainant 'fair and equal treatment, [a pro se complainant] cannot generally be permitted to shift the burden of litigating his case to the [trier of fact], nor avoid the risks of failure that attend his decision to forego expert assistance.' *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29,2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983)." *Cummings v. USA Truck , Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2, n.2 (ARB Apr. 26, 2005).

ISSUE PRESENTED

Whether there is a genuine issue of material fact that summary decision should not be granted; whether TWU is a proper party or the case should be dismissed for failure to state a claim upon which relief can be granted.

Background[3]

On September 30, 2016, counsel for TWU filed a Motion for Summary Decision and Order of Dismissal of all claims in this case. The motion includes a Declaration in support and evidentiary Attachments A through G. TWU contend there is no genuine dispute as to any material fact and cites the following reasons for granting summary decision.

(1) Complainant has failed to allege that Local 591 is a successor to Local 564, and the undisputed facts do not support successor liability;
(2) Local 591 never functioned as a "contractor" or "subcontractor" as defined by AIR21;
(3) Local 591 never functioned as Complainant's employer:
(4) Complainant's claims are time-barred;
(5) Complainant has not provided any evidentiary basis for his allegation that TWU was involved in the disciplinary actions taken by American Airlines; and
(6) The claims are subject to collateral estoppel as an arbitration decision determined that

[3] As the parties are aware, this case has a long and complex procedural history. The history summarized herein is limited to matters relevant to this Order.

Complainant never engaged in protected activity under AIR21.

TWU's arguments for summary decision are essentially as follows: (1) TWU is not a proper party to Complainant's claim; and/or (2) the claim was not filed within the statute of limitations; and/or (3) collateral estoppel prevents Complainant from litigating the issues of his AIR21 claim that were decided against him in arbitration.

On October 17, 2016, Complainant filed a response opposing the Motion for Summary Decision with Exhibits A through WW. Complainant argues the material cited by TWU does not establish the absence of a genuine dispute, and the Complainant has provided confirmation that a genuine dispute does exist.

On January 19, 2017, I stayed the proceedings in this matter pending the resolution of the issue of whether arbitration was properly compelled in this matter and, on September 26, 2018, the Ninth Circuit held that it was not. TWU thereafter dismissed its pending petition in U.S. District Court to confirm an arbitration award in its favor. In light of the Ninth Circuit's decision and TWU's dismissal of its petition to confirm the arbitration award in its favor, I vacated the stay in this matter. In light of the time that has passed, and in light of the new procedural posture of this case, the parties were given the opportunity to supplement their prior pleadings, or to file new or amended dispositive motions by December 14, 2018, and any response thereto within thirty days of service of any such pleading. On November 16, 2018, counsel

for TWU Local 591 filed a supplemental brief in support of summary decision and a motion for dispositive action requesting that all claims against TWU Local 591 in this action be dismissed with prejudice.

TWU asserts that since the stay order issued January 19, 2017, "two substantive developments" have occurred which provide additional support for the pending summary decision motion. These two developments are the January 26, 2018 Arbitrator's ruling, and the September 26, 2018 Ninth Circuit Court of Appeals decision. TWU asserts that these two developments particularly support the following three grounds:

(2) Local 591 never functioned as a "contractor" or "subcontractor" as defined by AIR21;
(3) Local 591 never functioned as Complainant's employer;
(6) The Complaint is subject to dismissal on collateral estoppel grounds in view of the prior determination of Arbitrator Sullivan that Complainant never engaged in protected activity under AIR21, and that there was no evidence that AA's termination of the Complainant was influenced by any conspiracy amongst the complainant's co-workers.

On November 29, 2018, Mr. Mawhinney filed a Response to TWU's Combined Motion for Dispositive Action & Memorandum of Law, as well as a Response to TWU' Supplemental Memorandum of Law in Support of its Motion for Summary Decision on All Claims. Mr. Mawhinney

also filed a Declaration in Support of these two responses on November 29, 2018.

APPLICABLE STANDARD

Summary Decision

An Administrative Law Judge may grant summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact, and the moving party is entitled to prevail as a matter of law. 29 C.F.R. § 18.72. 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 a genuine issue of material fact that could affect the outcome of the litigation. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ Case No. 2003-AIR-00014 (ARB Sept. 30, 2004), citing *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

The non-moving party may not rely on allegations, speculation, or denials of the moving party's pleadings, but rather must identify specific facts on each issue for which he bears the ultimate burden of proof. *Id.* citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to establish a genuine issue of material fact, dismissal is appropriate as " a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.*, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Motion for Dispositive Action

Disposition Without Hearing § 18.70 Motions for dispositive action.

(a) In general. When consistent with statute, regulation or executive order, any party may move under § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter.
(b) Motion to remand. A party may move to remand the matter to the referring agency. A remand order must include any terms or conditions and should state the reason for the remand.
(c) Motion to dismiss. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.
(d) Motion for decision on the record. When the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

DISCUSSION

Transport Workers' Union, Local 591 (TWU) argues in its September 30, 2016 Motion for Summary Decisions and Order of Dismissal of All Claims that the record does not include any evidence supporting Complainant's position that TWU participated in or influenced American Airlines' disciplinary actions and ultimate

termination decision. Further, TWU asserts that any alleged threats from union members constitute independent acts for which TWU is not liable. TWU argues that even if these alleged acts were attributable to official TWU activity, they are time-barred as they occurred more than 90 days prior to Complainant's October 5, 2011 claim. TWU argues that the claim is also barred by collateral estoppel based on the November 24, 2014 arbitration decision by Arbitrator Sullivan between Complainant and American Airlines.

TWU made additional arguments in two November 16, 2018 filings. In its Supplemental Brief in Support of the Motion for Summary Decision, TWU argues that the claim against TWU is also barred by collateral estoppel based on the Adler arbitration and so should be summarily dismissed. In its Combined Motion for Dispositive Action and Memorandum of Law in /support of its Motion On All Claims Against Transport Workers Union, Local 591, TWU argues Complainant has failed to state a claim upon which relief can be granted, and that there is a lack of subject matter jurisdiction, because Local 591 was not Complainant's employer, and neither is it a "carrier," "contractor," or "subcontractor" as defined by AIR21. Therefore, TWU asserts that Local 591 is not a covered entity under AIR21.

As a preliminary matter, I first address the statute of limitations argument made by Complainant. Complainant asserts in his Response to TWU's Supplemental Memorandum in Support of its Motion for Summary Decision that "TWU's attempt to raise the ARB's decision of September

18, 2014, now, on November 14, 2018, exceeds the statute of limitations within the proceedings of the DOL."[4] Complainant cites to § 1979.112(a) in support of this assertion. In fact, the ARB's September 18, 2014 decision remanded the case to the OALJ for further consideration. On November 19, 2014, I ordered that discovery commence between Complainant and TWU. Complainant and TWU commenced the discovery process. On September 30, 2016, TWU filed a Motion for Summary Decision. Complainant's case against TWU eventually went to arbitration, and then to the Court of Appeals for the Ninth Circuit. On January 17, 2018, I stayed the proceedings pending the outcome of the Ninth Circuit decision. On September 26, 2018, the Ninth Circuit issued an opinion reversing the district court's order compelling arbitration. Based on the opinion, I issued an order vacating the stay in the case against TWU, and granting the parties time to file supplemental briefs and responses thereto. The parties did so, and I now consider those briefings in this order. This case is properly before me on remand from the ARB, and TWU's November 18, 2014 filing does not exceed any statute of limitations.

I. Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted §18.70(c)

[4] Complainant's Response to "Respondent Transport Workers Union, Local 591's Supplemental Memorandum of Law in Support of its Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591, Pursuant to Rule § 18.72" at 5.

The employee protection provision of AIR21 provides:

(a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

....

(e) CONTRACTOR DEFINED. In this section, the term 'contractor' means a company that performs safety-sensitive functions by contract for the air carrier.

i. TWU is not an Air Carrier

An AIR21 claim against TWU is only made if TWU is an "air carrier or contractor or subcontractor of an air carrier." TWU is not an air carrier. It is a labor organization. It does not provide air transportation. Thus, TWU is not covered by the Act as an "air carrier."

ii. TWU is not a Contractor or Subcontractor under AIR21

In my August 23, 2012 Order of Dismissal, I found that TWU is not a contractor subject to liability under AIR21. I noted that "[a] contractor or (by extension) an subcontractor of an air carrier is defined as a "company that performs safety-

sensitive functions by contract for an air carrier."[5] I found that TWU "is not a company; it is an labor organization formed for the purpose of representing its members in forming a collective bargaining agreement with American."[6] In its Decision and Order Vacating and Remanding, the Administrative Review Board (ARB) held that TWU may be a "contractor" under AIR21.[7] The ARB noted that Black's Law Dictionary defines "company" as "a corporation – or, less commonly, an association, partnership, or union – that carriers on a commercial or industrial enterprise." *Mawhinney*, ARB No. 12-108, citing BLACK'S LAW DICTIONARY at 318 (9th ed. 2009). The ARB also found that since there is a collective bargaining agreement between TWU and American Airlines, and according to Black's Law Dictionary, a collective bargaining agreement is defined as "a contract between an employer and labor union regulating employment conditions, wages, benefits, and grievances," and "contractor" is defined as "a party to a contract," TWU may be a "contractor."[8] The ARB held that the question to be determined on remand is "whether the CBA or any other

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[5] *Mawhinney v. Transportation Workers Union, Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznaric, Jose Motes, Larry Costanza, and Ken Mactiernan*, 2012-AIR-00014.

[6] *Id.*

[7] *Mawhinney v. Transportation Workers Union, Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznaric, Jose Motes, Larry Costanza, and Ken Mactiernan*, ARB No. 12-108, ALJ No. 2012-AIR-00014 (ARB Sept. 18, 2014).

[8] *Mawhinney*, ARB No. 12-108.

contract between the TWU and AA provides for the performance of safety-sensitive functions."

When this case reached the Ninth Circuit, the court did not decide the issue of whether the Union was a "contractor" for purposes of AIR21, stating that this was a separate matter not before the court. *Transport Workers Union, Local 591 v. Mawhinney*, No 16-56643 (9th Cir. September 26, 2018). However, the Ninth Circuit stated in a footnote:

> It may well be that the Union is no more a "contractor" under AIR21 than it is an "agent" under the Agreement. The ARB view, under which any party to a contract is a "contractor," is strangely literal, and seems to confuse contracting *out* or *for* something with simply being a party to any contract. *Cf. Contractor, Webster's Third New International Dictionary* (2002) ("[O]ne that formally undertakes to do something for another ...; one that performs work...or provides supplies on a large scale...according to a contractual agreement...."). In any event, AIR21 itself defines "contractor" narrowly, as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121 (e). There is little reason to believe the Union meets that definition – that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, "performs safety-sensitive functions" *for* the Airline.
>
> *Id.* at 21-22 n. 10.

In its Motion for Dispositive Action, TWU asserts that Local 591 is not a company, it has not been incorporated in any jurisdiction; it is a certified labor union under the Railway Labor Act. TWU asserts that Local 591's contracts with American Airlines regulate "rates of pay, rules, and working conditions of its members who are in the employ of American Airlines."

TWU asserts that "previous ALJ decisions in analogous whistleblower contexts support the conclusion that Local 591 is not a contractor or subcontractor as those terms are intended under AIR21."[9] TWU cites to *Dumaw v. International Bhd. Of Teamsters, Local 690*, ALJ No. 2001-ERA-00006 at 20 (ALJ June 4, 2002) ("The fact that a union enters into a collective bargaining agreement...does not make it a 'contractor' or 'subcontractor' in the sense of the words as they are used in [the Energy Reorganization Act'"); *Vincent v. Laborers' International Union Local 348*, ALJ No. 2000-ERA-00024 at 6 (ALJ April 2, 2002) ("a labor organization such as Respondent is not a covered respondent in a whistleblower discrimination case unless the union is acting as an employer in relations to the complaining employee.").

The evidence establishes that TWU is a labor union which acts as a representative for its members in collective bargaining with their employer. In this instance, TWU represents the interests of union members in creating collective

[9] TWU Brief in Support of Summary Decision at 16.

bargaining agreements between American Airlines and union members.

a. TWU Does Not Perform Safety-Sensitive Functions by Contract for American Airlines

AIR21 does not define "safety-sensitive functions." It does, however, include in "Title V – Safety" a variety of airline safety provisions. See AIR21 §§ 501-520, Pub. L. No. 106-181. These provisions address airplane emergency locators, cargo collision avoidance systems deadlines, landfills interfering with air commerce, life-limited aircraft parts, counterfeit aircraft parts, prevention of frauds involving aircraft or space vehicle parts in interstate or foreign air commerce, transporting of hazardous material, employment investigations and restrictions, criminal penalty for pilots operating in air transportation without an airman's certificate, flight operations quality assurance rules, penalties for unruly passengers, deputizing of state and local law enforcement officers, air transportation oversight system, runway safety areas, precision approach path indicators, aircraft dispatchers, improved training for airframe and powerplant mechanics, small airport certification, protection of employees providing air safety information and occupational injuries of airport workers.

In *Dos Santos v. Delta Airlines, Inc.*, Chief Administrative Law Judge Purcell discussed the focus of AIR21. *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020 (January 11, 2013). He held "the predominant purpose of Section 42121 is detection

of aviation safety hazards and airline non-compliance with FAA safety laws, rules and regulations." *Dos Santos* at 24.

> [t]he Congress that passed AIR21 recognized that the FAA's regulation of airline activities is essential to the mission of safeguarding the Nation's aviation system. *See* 146 Cong. Rec. H1002-01 at H1012 (statement of Rep. Oberstar) (the United States maintains safe airspace "because year after year the FAA does its job overseeing the airlines, the airlines do their part, and our air traffic control system maintains safety in the air and on the ground."). So while the legislative history supports that the general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal *by regulating the air carriers that operate within the domestic aviation system and under the purview of the FAA regulations.*

Id. at 22 (emphasis added)

Turning then to the Federal Aviation Act FAA), the FAA does define safety-sensitive functions. The FAA has established an aviation industry alcohol misuse prevention program, which includes requirements for an alcohol testing program for air carrier employees who perform safety-sensitive duties, either directly or by contract for aviation FAA-certificated employers. The regulations state:

Safety-sensitive functions means a function listed in section II of this appendix.

....

II. *Covered Employees* Each employee who performs a function listed in this section directly or by contract for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance or prevention duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

59 FR 7380, 14 CFR § 120.105.

The evidence does not show that TWU performed safety-sensitive functions by contract for American Airlines.

Collective Bargaining Agreement (CBA)

The Preamble to the collective bargaining agreement between American Airlines and TWU, as representative of the aviation maintenance technicians and plant maintenance employees of American Airlines states that the agreement is

> In the mutual interests *of the employees and of the Company [American Airlines]* to promote the safety and continuity of air transportation, to further the efficiency and economy of

> operations, and to provide orderly collective bargaining relations between the Company and its employees, a method for the prompt and equitable disposition of grievances, and for the establishment of fair wages, hours and working conditions for the employees covered hereunder. In making the Agreement, *both the Company and the employees* hereunder recognize their duty to comply with the terms hereof and to cooperate fully, both individually and collectively, for the accomplishment of the intent and purpose of this Agreement.[10]

In Article 28(b), the CBA states:

> The Union recognizes that the Company will have sole jurisdiction of the management and operation of its business, the direction of its working force, the right to maintain discipline and efficiency in its hangars, stations, shops, or other places of employment and the right of the Company to hire, discipline, and discharge employees for just cause, subject to the provisions of this Agreement. It is agreed that the rights enumerated in the Article will not be deemed to exclude other preexisting rights of management not enumerated which do not conflict with other provisions of this Agreement.[11]

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[10] Respondent Transport Workers Union, Local 591'a Combined Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591 & Memorandum of Law in Support of Its Motion, Attachment AA.

[11] Respondent Transport Workers Union, Local 591'a Combined Motion for Summary Decision on All Claims

The collective bargaining agreement between TWU and American Airlines establishes that it is an agreement made in the mutual interests of the employees represented by TWU and American Airlines. The CBA reserves sole jurisdiction over management, hiring, discipline, and discharge to American Airlines. The relationship that is created by the CBA between TWU and American Airlines is for the sole purpose of collective bargaining between American Airlines and TWU, on behalf of its members, regarding the members' employment with American Airlines. The CBA does not create a relationship in which TWU performs safety-sensitive functions for American Airlines.

Aviation Safety Action Program (ASAP)

Complainant asserts that TWU participates in an "Aviation Safety Action Partnership" (ASAP)[12]" between American Airlines, the Federal Aviation Administration, and TWU. Complainant attached a Notice regarding the ASAP program as Exhibit LL to his October 13, 2016 Declarations in Support of his Response to TWU's Combined Motion doe Summary Judgment. This was issued by TWU and states that TWU strongly advises its members to contact a TWU "expert" prior to bringing any information that may be appropriate for ASAP. The notice indicates that TWU "is working diligently to ensure that the integrity of the ASAP program is restored." TWU's Memorandum in Support of its Motion for Summary Decision includes as Exhibit

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Against Transport Workers Union, Local 591 & Memorandum of Law in Support of Its Motion, Attachment BB

[12] The correct name is "Aviation Safety Action Program." https://www.faa.gov/about/initiatives/asap/

G a declaration by Gary Peterson, President of Local 591. Regarding the ASAP program, he states:

> Mr. Mawhinney references the TWU's temporary policy of screening its members' submissions to the Aviation Safety Action Program (ASAP) as part of the grounds for his action against Local 564. The ASAP program is premised on the concept of encouraging Aviation Maintenance Technicians to volunteer information regarding potential safety violations in exchange for a measure of immunity from disciplinary and license action. The TWU's determination to screen its members' participation in the ASAP program was based on its concern that the FAA's commitment to AMT immunity was not being honored. Participation in the ASAP program is not a local union decision, but rather a decision by the Air Transport Division under the auspices of the TWU International.

TWU's Combined Motion for Summary Decision on All Claims against Transport Workers Union, Local 591 & Memorandum of Law is Support of its Motion, Exhibit G at 4.

While it appears that TWU participated in ASAP, there is no evidence of a contract related to ASAP which obligates TWU to perform safety-sensitive functions for American Airlines. Rather, ASAP is a voluntary reporting program, for which TWU was choosing to screen its members' participation based on a concern for their immunity.

iii. TWU Was Not Complainant's Employer

Complainant argues in his November 29, 2018 filings that he received compensation from TWU "to assist in the organization of Union meetings," and therefore, TWU's assertion that Local 591 does not employ Complainant and never did is false. However, Complainant does not point to any evidence in the record in support of this assertion. In fact, as pointed out by TWU in its Memorandum of Law in /support of its Motion for Summary Decision on All Claims, TWU is prohibited from exercising employer-level control over Complainant, as "[t]he RLA requires that, on a continuing basis the employees' collective representation be free from the employer's 'interference, influence, or coercion'.[13] TWU notes that the National Mediation Board must ensure that unions participating in a representational dispute are independent of the carrier.[14] The undisputed evidence shows the Complainant was employed by American Airlines[15], not TWU; TWU was the union that represented Complainant and other members in collective bargaining for employment with American Airlines.

II. TWU, Local 591 is not an Air Carrier, Contractor, or Subcontractor Covered by AIR21

[13] TWU's Combined Motion for Summary Decision on All Claims against TWU & Memorandum of Law in Support of Its Motion at 14, citing 45 U.S.C. § 152, Third; *NLRB v. Penn. Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938).

[14] *Id.*; *see Orion Lift Service, Inc.*, 15 N.M.B. 358, 365 (1988); *Air Florida*, 9 N.M.B. 181 (1982).

[15] *See, e.g.*, TWU's Combined Motion for Summary Decision on All Claims against TWU & Memorandum of Law in Support of Its Motion Exhibit C October 5, 2011 Complaint.

The evidence shows that TWU did not perform safety-sensitive functions within the meaning of the Act by contract with American Airlines or any other carrier. I find that TWU is not a contractor or subcontractor covered by AIR21. Nor was TWU Complainant's employer. As YWU is not a covered air carrier or contractor or subcontractor under AIR21, I find that Complainant has failed to state a claim upon which relief can be granted. Further, Complainant has failed to establish an essential element of his case; that the Respondent, TWU is an air carrier, contractor, or subcontractor to an air carrier, and thus a proper party to Complainant's AIR21 claim.

ORDER

Based on the foregoing, IT IS ORDERED:

The Respondent's Motion for Dispositive Action and Summary Decision on All Claims Against TWU are GRANTED and Complainant's case against TWU is DISMISSED.

SO ORDERED.

s/ Paul C. Johnson, Jr.

United States Court of Appeals
for the Ninth Circuit

Case: 19-55566 (CASD 3:18-cv-0731)
Title: *American Airlines, Inc. v. Mawhinney*

Date: June 5, 2020

Ninth Circuit Judges: Edward Leavy;
Richard A. Paez;
Mark J. Bennett.

MEMORANDUM

Robert Steven Mawhinney appeals pro se from the district court's judgment granting American Airlines, Inc.'s petition to confirm an arbitration award. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1065 (9th Cir. 2010). We affirm.

In his opening brief, Mawhinney challenges only the propriety of the decision to compel arbitration of his claim for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. However, the order compelling arbitration of his AIR21 claim has already been affirmed in *American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir, 2009).

AFFIRMED

United States Court of Appeals
for the Ninth Circuit

Case: 19-55566 (CASD 3:18-cv-0731)
Title: *American Airlines, Inc. v. Mawhinney*

Date: Sept. 22, 2020

Ninth Circuit Judges: Edward Leavy;
Richard A. Paez;
Mark J. Bennett.

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

Mawhinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No, 13) are denied.

No further filings will be entertained in this closed case.

United States District Court
Southern District of California
Case: 3:18-cv-0731
Title: *American Airlines, Inc., v. Mawhinney*

Date: Apr. 29, 2019

U.S. District Judge: Barry Ted Moskowitz

ORDER GRANTING MOTION FOR LEAVE TO RESPOND TO NOTICE OF SUPPLEMENTAL AUTHORITIES AND GRANTING PETITION TO CONFIRM ARBITRATION AWARD

I. INTRODUCTION

Pending before the Court is American Airline's Petition to Confirm Arbitration Award. For the reasons set forth below, the Court GRANTS the Petition. (ECF No. 4).

II. BACKGROUND

Robert Mawhinney is an aircraft maintenance technician who worked at American Airlines ("American"). America first fired Mawhinney in 2001. (ECF No. 4-1, Exh. 3). Mawhinney alleged he was wrongfully terminated in retaliation for whistleblowing, and initiated a civil action and administrative action before the U.S. Department of Labor. (ECF No. 4-1, "Hayashi Decl." ¶ 2). In 2002, Mawhinney and American settled both actions. (Hayashi Decl. ¶ 2). The 2002 settlement agreement contained an arbitration clause, which required that all future employment disputes between Mawhinney and American be resolved

exclusively through private arbitration. (ECF No. 4-1 Exh. 1).

Mawhinney continued to work for American Airlines until 2011, when American again terminated his employment. (Hayashi Decl. ¶ 3). Mawhinney viewed his firing as retaliation for whistleblowing about airline safety in 2010 and 2011. (Hayashi Decl. ¶ 3; Exh. 3 at 1-3). Mawhinney initiated two separate proceedings, requesting private arbitration pursuant to the 2002 settlement agreement and filing an administrative complaint with the Department of Labor against American. (Hayashi Decl. ¶ 3; Exh. 3 at 3).

The subsequent procedural history of the two actions is lengthy and exhaustively outlined in the Ninth Circuit's opinion affirming the order to compel arbitration. *See American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018). The Court incorporates the facts set forth by the Ninth Circuit, and details only the proceedings relevant to American's petition to confirm the arbitration award; specifically, the first arbitration, second arbitration, and Mawhinney's appeals concerning whether the district court erred by compelling the second arbitration.

A. First Arbitration

For six days in September 2014, the parties privately arbitrated Mawhinney's claims against American for employment retaliation, wrongful termination, and breach of contract. (ECF No. 4-1, Exh. 3 at 14-15). American prevailed on those claims. (ECF No. 4-1, Exh. 3 at 15). The presiding district court denied Mawhinney's petition to

vacate the award, and granted the cross-petition to confirm the arbitration award. *Mawhinney v. American Airlines*, No. 15-cv-0259-MMA-BLM, 2015 WL 13604265 at *1 (S.D. Cal. Aug. 13, 2015). The court denied Mawhinney's motion to alter or amend the judgment in December 2015, and the Ninth Circuit affirmed. *Mawhinney v. American Airlines, Inc.*, 692 Fed. App'x 937 (July 3, 2017).

However, the district court denied American's motion to enjoin the administrative action, or alternatively, to compel the parties to arbitrate the claims in the administrative action. *Mawhinney v. American Airlines*, Case No. 15-cv-0259-MMA-BLM, EXF No. 45 (Aug. 23, 2016). Because the court "did not consider the merits of Mawhinney's claims underlying the first arbitration," the court concluded it was "unable to enforce the arbitrator's judgment or determine the preclusive effect of the arbitrator's judgment in the [administrative] action." *Id.* at 6. The court stated, "to the extent American wishes to file a petition to compel arbitration pursuant to 9 U.S.C. § 4, it must file its petition as a new case, not as an alternative request in a motion to enforce judgment." *Id.* at 5.

B. Second Arbitration

American filed a new civil action and moved to compel arbitration in the administrative action. *American Airlines, Inc. v. Mawhinney*, No 16-cv-2270-MMA-BLM, ECF No. 5. The motion to compel the second arbitration was granted. *See American Airlines, Inc.*, 904 F.3d at 1119. Mawhinney appealed. *Id.*

The Ninth Circuit denied Mawhinney's motions to obtain a stay of arbitration, and the second arbitration went forward during the pendency of the appeal. (ECF No. 4-1 ¶ 24; Exh. 5). Mawhinney failed to appear at the second arbitration, and did not file an opposition brief. (ECF No. 4-1, Exh. 5). Mawhinney did file a supplemental brief requesting a stay of the arbitration, notwithstanding the Ninth Circuit's contrary order denying Mawhinney's request for a stay. (Id.) American moved for summary disposition, arguing that Mawhinney's claims of employment retaliation and wrongful termination were already decided in the first arbitration and therefore barred under the doctrines of res judicata and collateral estoppel, (Id.). American prevailed and an arbitration award was entered in its favor on December 20, 2017. (Id.). Unlike the first arbitration, Mawhinney did not move to vacate, amend, or correct the second arbitration award by the three month deadline set forth in 9 U.S.C. § 12. The Airline petitioned this Court to grant the second arbitration award in April 2018. (ECF Nos. 1, 4).

C. Appeals

On September 26, 2018, while American's petition was pending before this Court, the Ninth Circuit held that the claims between Mawhinney and American were properly subject to arbitration, affirming the district court. *See American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir, 2018). The Ninth Circuit denied Mawhinney's petition for rehearing en banc, and the U.S. Supreme Court denied Mawhinney's petition for a writ of certiorari. *See American Airlines, Inc. v. Mawhinney*, No. 16-

55006 (9th Cir. Nov. 5, 2018); *Mawhinney v. American Airlines, Inc.*, No. 18-1032 2019 WL 485453 (Mem) (U.S. Apr. 1, 2019).

III. DISCUSSION

Mawhinney, proceeding pro se, filed a Response, Sur-reply, and Amended Sur-reply opposing the Petition. (ECF Nos. 8-1, 11, 13). Mawhinney also filed a Request for Leave to Respond to Petitioner's Notice of Supplemental Authorities, accompanied by a responsive briefing. (ECF No. 17). The Court grants that request and has considered Mawhinney's response. (ECF No. 17). Mawhinney asks this Court to deny American's Petition to Confirm Arbitration Award and order that Mawhinney's administrative action be allowed to proceed. (ECF No. 17) at 6). American argues the Petition to Confirm Arbitration Award should be granted because Mawhinney lost his appeals challenging the underlying motion to compel arbitration, and he failed to timely challenge the arbitration award itself. (ECF No. 15), The Court agrees with American.

Mawhinney's challenges to the Petition are unavailing. Mawhinney primarily argues that the Court should not confirm the arbitration award because the underlying decision to compel arbitration was erroneous. (ECF Nos. 11, 13, 17). But, as discussed above, the Ninth Circuit held that the claims between Mawhinney and American were properly subject to arbitration. Mawhinney nevertheless urges the Court to reject the Ninth Circuit's "fallacious" and "erroneous" conclusion, and allow the action to be litigated before an

Administrative Law Judge. (ECF No. 17 at 3, 4, 6). This argument reflects a fundamental misunderstanding of the relationship between trial and appellate courts. As a lower court, this Court defers to the Ninth Circuit and the U.S. Supreme Court, and is bound by those courts' decisions. Here, Mawhinney has lost his appeal before the Ninth Circuit, and the Supreme Court denied certiorari. The underlying decision to compel arbitration is thus no longer disputable.

As for the arbitration award itself, Mawhinney did not move to vacate or otherwise challenge the award by the three month deadline. *See* 9 U.S.C. § 12 ("Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."). The second arbitration award was issued on December 20, 2017. *ECF No. 4-1, Exh. 5). Mawhinney missed the three-month window to move to vacate the award, and cannot do so now through his opposition. *See, e.g., AG La Mesa LLC v. Lexington Ins. Co.*, No. 10-CV-1873 AJB-BGS, 2012 WL 2961264, at *2 (S.D. Cal. July 19, 2012) (holding failure to timely file motion to vacate arbitration decision cannot be cured through opposition to petition to confirm arbitration award).

Although Mawhinney proceeds *pro se* and thus is entitled to some leniency with procedural matters, Mawhinney was not unaware of this procedure, as he properly moved to vacate the first arbitration. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (holding pro se litigants held to less stringent standards); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se litigants must follow

the same rules of procedure that govern other litigants."); *Mawhinney v/ American Airlines*, No. 15-cv-0259-MMA-BLM, 2015 WL 13604265 at *1 (S.D. Cal. Aug. 13, 2015) (denying Mawhinney's petition to vacate first arbitration award). This was a tactical decision - Mawhinney admits he chose not to engage in the second arbitration and instead relied on his challenge to the underlying motion to compel the arbitration (See ECF No. 13 at 12). To the extent Mawhinney now challenges the arbitrator's ruling that res judicata and collateral estoppel apply to the administrative action, the arguments are untimely and unavailing. (ECF No. 11 at 3-5; ECF No. 13 at 10-13).

IV. CONCLUSION

The Petition to Confirm Arbitration Award is GRANTED. The Clerk shall enter final judgment.

IT IS SO ORDERED. s/ Barry Ted Moskowitz

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN AIRLINES, INC., *Plaintiff-Appellee,* v. ROBERT STEVEN MAWHINNEY, *Defendant-Appellant.*	No. 16-56638 D.C. No. 3:16-cv-02270- MMA-BLM
TRANSPORT WORKERS UNION, LOCAL 591, *Plaintiff-Appellee,* v. ROBERT STEVEN MAWHINNEY, *Defendant-Appellant.*	No. 16-56643 D.C. No. 3:16-cv-02296- MMA-BLM OPINION

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted July 11, 2018
Pasadena, California

Filed September 26, 2018

Before: Marsha S. Berzon and N. Randy Smith, Circuit Judges, and P. Kevin Castel,* District Judge.

Opinion by Judge Berzon

SUMMARY**

Labor Law / Arbitration

In two related appeals concerning claims for whistleblowing retaliation under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the panel denied motions to dismiss the appeals, affirmed the district court's order compelling arbitration of the plaintiff's claim against his employer, and reversed its order compelling arbitration of the plaintiff's claim against his union.

Denying the motions to dismiss, the panel held that it had jurisdiction over the appeals because the district court's orders compelling arbitration were no longer interlocutory once the district court dismissed the actions and entered judgment.

Affirming as to the AIR21 retaliation claim against the employer, the panel held that the employer did not waive its right to arbitrate by waiting to move to compel until after an

* The Honorable P. Kevin Castel, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

agency investigation into its conduct was complete. The panel held that private AIR21 retaliation claims are not inherently nonarbitrable. The panel also held that arbitration was not barred by the state statute of limitations or by the Federal Arbitration Act.

Reversing as to the retaliation claim against the union, the panel concluded that the union was not a party to the arbitration provision at issue and was not otherwise entitled to enforce the provision under agency law.

COUNSEL

Robert Steven Mawhinney (argued), La Jolla, California, pro se Defendant-Appellant.

John D. Hayashi (argued), Morgan Lewis Bockius LLP, Costa Mesa, California; Robert Jon Hendricks, Morgan Lewis Bockius LLP, San Francisco, California; for Plaintiff-Appellee American Airlines, Inc.

Lee Saham (argued) and Lucas K. Middlebrook, Seham Seham Meltz & Petersen LLP, White Plains, New York; Nicholas P. Granath, Seham Seham Meltz & Petersen LLP, Minneapolis, Minnesota; for Plaintiff-Appellee Transport Workers Union, Local 591.

OPINION

BERZON, Circuit Judge:

In these related appeals, we consider whether the district court properly compelled arbitration of Robert Steven Mawhinney's claims for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. With respect to the retaliation claim against Mawhinney's employer, American Airlines ("the Airline"), we affirm. The Airline did not waive its right to arbitrate by waiting to move to compel until after an agency investigation into its conduct was complete, nor is there reason to believe private AIR21 retaliation claims are inherently nonarbitrable. With respect to the retaliation claim against Mawhinney's union, Transportation Workers Union, Local 591 ("the Union"), we reverse. The Union is not a party to the arbitration provision at issue in these cases and is not otherwise entitled to enforce the provision.

I

Mawhinney is an aircraft maintenance technician formerly employed by American Airlines in San Diego. He was fired by the Airline in 2001 — according to Mawhinney, in retaliation for protected whistleblowing activity. Shortly after his discharge, Mawhinney filed a complaint with the Department of Labor ("DOL"), invoking the whistleblower protections of AIR21.

As here relevant, AIR21 bars air carriers from firing or otherwise penalizing workers for alerting the air carrier or federal agencies to "any violation or alleged violation of any

order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety." 49 U.S.C. § 42121(a)(1). "A person who believes that he or she has been discharged . . . may . . . file . . . a complaint with the [DOL] alleging such discharge . . . ." 49 U.S.C. § 42121(b)(1). AIR21 provides that DOL must then issue, for each retaliation complaint it resolves, "a final order providing . . . relief . . . or denying the complaint." 49 U.S.C. § 42121(b)(3)(A). If the order is later violated, "[a] person on whose behalf" the order was issued may invoke AIR21 in federal district court to "commence a civil action . . . to require compliance with [the] order." 49 U.S.C. § 42121(b)(6)(A).

In December 2002, Mawhinney reached a settlement agreement ("the Agreement") with the Airline on his retaliation complaint. DOL issued an order formally approving the Agreement. The Agreement reinstated Mawhinney to his former position. *See Mawhinney v. Am. Airlines*, No. 15-cv-0259-MMA (BGS), 2015 WL 13604265, at *1 (S.D. Cal. Aug. 13, 2015). It also contained an arbitration provision:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the Released Parties, and any [of] their past, present or future successors, and their past, present or future officers, directors, employees, agents and representatives) involving Plaintiff's employment which may lawfully be the subject of pre-dispute

> arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court. . . . The arbitrator shall have the authority to order any legal and or equitable relief or remedy which would be available in a civil or administrative action on the claim.

Also included in the Agreement was a California choice-of-law clause.

Between 2010 and 2011, Mawhinney received several disciplinary letters related to his management style. These disciplinary letters culminated in a "career decision advisory" in which Mawhinney was given the choice of (1) signing a letter committing to abide by the Airline's policies, (2) resigning with severance in exchange for a promise not to exercise grievance rights, or (3) being fired without relinquishing grievance rights. Mawhinney refused to accept the career decision advisory, believing it motivated by his renewed whistleblowing activities in 2010 and 2011. Mawhinney was then terminated.

In September and October of 2011, Mawhinney initiated parallel proceedings based on his new allegations of retaliation. One proceeding was an arbitration covering state law claims for retaliation, wrongful termination, breach of

contract, fraud, harassment, and intentional infliction of emotional distress. The other was an administrative proceeding before DOL, again invoking the whistleblower protections of AIR21. In his complaint to DOL, Mawhinney named as respondents both the Airline and the Union, as Mawhinney believed the two joined in the alleged retaliation against him.

The arbitration and DOL proceedings unfolded separately, both along bumpy paths. In November 2011, the Airline petitioned for bankruptcy. The arbitration was then stayed, but DOL's independent investigation of Mawhinney's AIR21 retaliation complaint was not. In mid-2012, DOL concluded that there was "no reasonable cause to believe" the Airline or the Union retaliated against Mawhinney, as the Airline had supplied clear and convincing evidence that Mawhinney's disciplinary action was the result of his "poor judgment and deficient leadership." *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. §§ 1979.104(c), 1979.105(a). DOL advised Mawhinney that he had the right to "appeal" DOL's investigation by making objections and requesting a hearing before an administrative law judge ("ALJ"). *See* 29 C.F.R. § 1979.106(a). However, DOL also noted that, as it had not reached a finding in his favor, it would not conduct any further investigation on its own, and any adversary proceedings against the Airline or Union would be Mawhinney's sole responsibility. *See also* 29 C.F.R. § 1979.108.

Mawhinney pursued adversary proceedings against the Airline and Union by filing objections to DOL's investigation and requesting a hearing before an ALJ. The ALJ then split the retaliation action. As to the Airline, the ALJ stayed the case in view of the pending bankruptcy. As to the Union, the

ALJ dismissed Mawhinney's claim, concluding that the Union fell outside the scope of AIR21. As here relevant, AIR21 bars retaliation by an "air carrier or contractor or subcontractor of an air carrier." 49 U.S.C. § 42121(a). A "contractor" is defined as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). According to the ALJ, the Union was not a "company" within the meaning of AIR21.

Mawhinney appealed the ALJ's decision in his now-separate retaliation action against the Union to DOL's Administrative Review Board ("ARB"). The ARB reversed and remanded to the ALJ for reconsideration, reasoning that, at their broadest, the generic terms "contractor" and "company" can include labor unions. In particular, the ARB concluded that a "contractor" is potentially *any* party to a contract, and so a union may be a "contractor" by virtue of being party to a collective bargaining agreement with an employer.

With respect to the Airline, proceedings resumed, both in arbitration and before the ALJ, after the bankruptcy stay was lifted in late 2013. The arbitration of Mawhinney's state law claims was resolved in short order; in November 2014, the Airline prevailed in full. The Southern District of California then confirmed the arbitral award, and a panel of this court affirmed. *Mawhinney v. Am. Airlines, Inc.*, 692 F. App'x 937 (9th Cir. 2017).

The proceedings before DOL, however, turned more complex. In April 2014 — several months after the bankruptcy stay was lifted, and while the arbitration of the state law claims was still pending — the Airline filed a motion to compel arbitration of the action pending before the

ALJ. The Airline argued that, like the factually related state law claims, the administrative action fell within the 2002 Agreement approved by DOL. The ALJ granted the motion to compel arbitration the following month. Mawhinney then appealed the order compelling arbitration to the ARB, which in January 2016 reversed.

In reversing, the ARB reasoned that the Airline's demand for arbitration could be viewed equally as a breach of the Agreement or as a breach of the DOL order approving it.[1] With respect to the former, the ARB concluded that the issue was essentially one of contract "construction and enforcement . . . dictated by principles of contract law," such that the proper forum for addressing the Airline's demand was a judicial rather than an administrative proceeding. With respect to the latter, the ARB noted that, under AIR21, the only specified federal forum for enforcing a DOL order disposing of a retaliation complaint is a district court, *see* 49 U.S.C. § 42121(b)(6)(A); the statute makes no mention of enforcement of a DOL order in proceedings before an ALJ. The ARB therefore remanded Mawhinney's AIR21 retaliation action to the ALJ for consideration of the merits, but noted that the Airline retained the option of attempting to compel arbitration in court.

[1] DOL's order approving the 2002 Agreement does not expressly incorporate the terms the Agreement. DOL regulations currently treat "[a]ny settlement approved" as "the final order of the Secretary." 29 C.F.R. § 1979.111(e); *see also* 29 C.F.R. § 1979.113. Although these regulations came into effect in 2003, after the DOL order approving the 2002 Agreement, DOL's 2016 order treated the 2002 settlement and the DOL order approving it as one, consistent with the later agency regulations. The parties do not dispute the point, and we have no reason to question DOL's 2016 interpretation of its own 2002 order. We therefore treat the 2002 DOL order as incorporating the settlement.

In response, the Airline initiated a *second* arbitration, limited to the claim of retaliation under AIR21. Mawhinney refused to abandon his ongoing administrative action in favor of arbitration, so the Airline filed suit in the Southern District of California for breach of contract, invoking both the Agreement and the district court's authority, under AIR21, to enforce the DOL order approving the Agreement. The Union, which had also lost at the ARB, brought a similar action.

Soon after filing their complaints, the Airline and the Union moved to compel arbitration.[2] The district court granted both motions. It then dismissed the underlying actions and entered judgment. Mawhinney filed timely appeals.

II

We consider first the pending motions to dismiss. Both the Airline and the Union have moved to dismiss Mawhinney's appeals for lack of appellate jurisdiction, on the theory that the Federal Arbitration Act "generally permits immediate appeal of orders [refusing] arbitration, whether the orders are final or interlocutory, but bars appeal of interlocutory orders [enforcing] arbitration." *Green Tree Fin.*

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[2] Strictly speaking, neither the Airline nor the Union moved to compel arbitration of the claims brought in district court; they moved to compel arbitration of the underlying AIR21 retaliation action. In a sense, then, the motion to compel was incorrectly styled. It was in fact a motion for judgment on the pleadings, seeking the relief demanded in the complaint — enforcement of the Agreement or of the DOL order approving it. We nonetheless refer to the dispositive motion as one to compel arbitration, as that is the terminology the parties have used. As we explain in the next section, the distinction does not matter; we have jurisdiction even if the motion is viewed as one to compel arbitration of the retaliation claim.

Corp.-Ala. v. Randolph, 531 U.S. 79, 86 (2000); *see also* 9 U.S.C. § 16(b)(2).

The motions fail because we are not here presented with interlocutory appeals. As we have repeatedly held, an order compelling arbitration is no longer interlocutory once a district court — like the district court in this case — dismisses the action and enters judgment. *See* 9 U.S.C. § 16(a)(3); 28 U.S.C. § 1291; *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001). That factually related claims may be pending in some other forum, such as at DOL, has no impact on the finality of the district court's decision. Nor does it matter that dismissal is without prejudice. *See Interactive Flight*, 249 F.3d at 1179; *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994). The motions to dismiss are denied.

III

We turn next to Mawhinney's appeal involving the Airline.

Mawhinney does not dispute that, absent some provision of law providing otherwise, his AIR21 retaliation action falls within the scope of the Agreement's arbitration clause. Nor can he, given that he himself invoked the arbitration clause to resolve a parallel claim for retaliation under state law. Mawhinney argues instead that arbitration is unavailable for the AIR21 action, either because a defense to enforcement of the settlement applies or because the Federal Arbitration Act ("FAA") or AIR21 precludes an arbitration order in this instance.

The district court rejected Mawhinney's arguments for avoiding arbitration. We review the district court's decision de novo, *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008), and affirm.

A

Mawhinney argues first that the Airline waived its right to arbitrate his AIR21 action by participating in the initial investigation of Mawhinney's complaint at DOL. As Mawhinney notes, litigation on the merits is a common basis for finding a waiver of the right to arbitrate on the merits. Litigating in court is inconsistent with asserting one's arbitration right. Litigation may also expose the opposing party to prejudice — for example, prolonged or duplicative proceedings, or a risk of inconsistent rulings — if arbitration is later demanded. *See United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1124–26 (9th Cir. 2008); *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1196 (2003).

In this case, however, there was no "litigation" at DOL from which to infer a waiver.[3] The AIR21 complaint Mawhinney filed did not initiate adversarial proceedings before an ALJ. It initiated a DOL investigation, *see* 29 C.F.R. § 1979.104, in which DOL had an independent interest. Had DOL's investigation come out in Mawhinney's favor, DOL would have issued an administrative order

[3] The district court did not make a factual finding regarding waiver. However, as the relevant facts are not in dispute, we address the issue de novo. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1409 (9th Cir. 1990).

providing statutorily and regulatorily defined remedies, *see* 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.105(a)(1), which DOL would have been entitled to enforce in its own name, 49 U.S.C. § 42121(b)(5). The Agreement between Mawhinney and the Airline does not extend to a proceeding of that kind, which concerns not a dispute between the parties to the Agreement, but a potential enforcement action by the government. *Cf. E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). "[A]rbitration agreements will not preclude [the agency] from bringing actions seeking . . . relief." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

As the Airline could not have compelled arbitration of DOL's independent investigation, the Airline cannot be faulted for failing to have sought to do so. The Airline's demand for arbitration, filed with the ALJ shortly after the bankruptcy stay was lifted, reflects a timely and diligent assertion of the right to arbitrate, and so precludes a finding of waiver.

B

Mawhinney next argues that his AIR21 action cannot be arbitrated because AIR21 itself forbids it. In support of this proposition, Mawhinney points to no statutory language so stating, as there is none. Instead, he emphasizes the importance of DOL's role in hearing and resolving retaliation complaints under AIR21.

Mawhinney misconceives the administrative process provided by the statute. DOL's independent interest in Mawhinney's AIR21 retaliation complaint — grounded in its responsibility for assuring the safety of air travel, *see* H.R.

Rep. No. 106-167, pt. 1, at 100 (1999) — ceased once its investigation concluded with a finding of no violation. At that point, DOL's investigatory role was complete, *see* 29 C.F.R. §§ 1979.104, 1979.105(a). An administrative AIR21 action did remain, as Mawhinney elected to pursue his complaint against the Airline in a hearing before an ALJ, as he was entitled to do. *See Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 868 (2010) (observing that the procedure available following DOL's unfavorable investigation was "a full de novo trial-like hearing before an ALJ"). But as DOL emphasized in its letter to Mawhinney regarding his post-investigation "appeal" right, the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in advancing the public interest in airline safety. Once DOL found no violation, that is, the agency provided only the forum, but was not a party to the dispute. The proceeding before the ALJ was therefore squarely controlled by the arbitration provision in the Agreement.

Williams v. United Airlines, Inc., 500 F.3d 1019 (9th Cir. 2007), does not support a contrary conclusion. There, we rejected the argument that an implied private right of action exists in federal district court for a claim brought under AIR21. We so concluded because AIR21 reflects "a carefully-tailored administrative scheme" for adjudicating retaliation claims, with federal district court actions available only for "suits brought to enforce the [DOL]'s final orders." *Id.* at 1024. It does not follow from the absence of a private right of action in federal district court that other forums for dispute resolution — in this case, arbitration — are foreclosed if agreed upon by the parties. As the Supreme Court has explained, federal claims are generally amenable to arbitration unless there exists a "contrary congressional

command." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). Such a command need not be express, *see Gilmer*, 500 U.S. at 29, but it must consist of more than just entrusting the resolution of purely private claims to an executive agency adjudicator in the first instance, *see id.* at 28–29; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

C

Finally, Mawhinney argues that arbitration is barred either by the state statute of limitations, or the FAA. Neither argument survives scrutiny.

1

In California, the limitations period for a breach of contract — including breach of a covenant to arbitrate — is four years. Cal. Civ. Proc. Code § 337(1); *Wagner Constr. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 29 (2007). According to Mawhinney, the Airline exceeded this limitations period because its action in district court, filed in September 2016, came more than four years after Mawhinney's AIR21 complaint with DOL, filed in October 2011.

Mawhinney mistakes the point at which the limitations period began to run. Under California law, the limitations period on an arbitration demand begins to run when "a party . . . can allege not only the existence of the [arbitration] agreement, but also that the opposing party refuses to arbitrate." *Spear v. Cal. State Auto. Ass'n*, 2 Cal. 4th 1035, 1041 (1992) (emphasis omitted). Mawhinney did not refuse to arbitrate when he filed his AIR21 complaint. He refused

to arbitrate in early 2014, when, after the bankruptcy stay was lifted, he refused the Airline's request to fold his AIR21 claim into the then-pending arbitration. At that point the Airline had no option but to move to compel. The Airline's action in district court was filed within four years of that date, and is therefore not time-barred.[4]

2

With respect to the FAA, Mawhinney argues that the Agreement falls within the statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

As an initial matter, it is doubtful the FAA's interstate exemption for contracts of employment in foreign or interstate commerce applies in this case. The Agreement was not the contract under which Mawhinney was hired. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335–36 (1944) (observing that a contract of employment, at its most basic, is an "act of hiring"). Nor was it a contract setting the terms and conditions of employment. *See Am. Postal Workers Union of L.A. v. U.S. Postal Serv.*, 861 F.2d 211, 215 n.2 (9th Cir. 1988) (per curiam) (suggesting that collective bargaining agreements, which do not "hire" workers, but which do set the terms and conditions of employment, also fall within the

[4] The district court concluded that Mawhinney did not refuse arbitration until September 2016, after the Airline initiated an arbitration in which Mawhinney refused to participate. That determination was incorrect. California law does not require that an arbitration be initiated before the limitations period starts running; only a refusal to arbitrate is required. *See Spear*, 2 Cal. 4th at 1041.

section 1 exemption); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (so assuming). Instead, the Agreement was a contract settling a dispute between the parties, albeit an employment-related one, by restoring the status quo ante and providing for the resolution of later disputes. *Cf. Gilmer*, 500 U.S. at 25 n.2 (concluding that the section 1 exemption does not extend to an agreement simply because it was reached in furtherance of or in relation to one's employment).

More to the point, though, recourse to the FAA is not a condition of enforcing the arbitration agreement in this case. The FAA governs requests to enforce *contractual* arbitration provisions, *see* 9 U.S.C. § 2, not the enforcement of a governmental order to arbitrate a particular dispute. As discussed, *see supra* note 1, the DOL's order provides an independent basis for enforcing arbitration. The order incorporates the terms of the Agreement, including the arbitration provision for future disputes, and is *separately* enforceable under 42 U.S.C. § 42121(b)(6)(A).[5]

In sum, Mawhinney's private retaliation claim was a proper subject of arbitration, which the Airline timely requested.

IV

We turn to the appeal involving the Union.

[5] We do not address the district court's holding that airline mechanics, unlike "seamen" or "railroad employees," are not "engaged in foreign or interstate commerce." *See* 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

A

The key question in the Union's case is the Union's relationship to the Agreement. If the Union is neither a party to nor a beneficiary of the Agreement, it cannot enforce the arbitration provision within the Agreement by way of a direct action on the contract. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *The H.N. & Frances C. Berger Found. v. Perez*, 218 Cal. App. 4th 37, 43 (2013).[6] Nor can it enforce the Agreement by way of DOL's order approving the Agreement, as AIR21 only allows private enforcement of DOL orders by "[a] person on whose behalf" the order was issued.[7] 49 U.S.C. § 42121(b)(6)(A). On the other hand, if the Union is in some sense a party to or a beneficiary of the Agreement (and therefore of the DOL order, *see supra* note 1), it may validly compel arbitration of Mawhinney's AIR21 retaliation claim, just as the Airline did.[8]

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[6] We apply California law because the Agreement included a California choice-of-law provision. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–76 (1989).

[7] The Union could not maintain an action in federal court on the Agreement alone, as the Union and Mawhinney are not diverse, *see Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 n.9 (1980), and the FAA does not create federal question jurisdiction for a request to compel arbitration, *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009). However, the Union has nonfrivolously invoked the provision in AIR21 permitting enforcement of a final DOL order concerning an AIR21 retaliation complaint. *See* 49 U.S.C. § 42121(b)(6)(A). The statute is therefore a basis for federal jurisdiction, even if the Union's claim ultimately fails on the merits. *See Cement Masons Health & Welfare Tr. Fund for N. Cal. v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999).

[8] The Union does not contend that the threshold question of its authority to enforce the arbitration provision is itself arbitrable.

The Union recognizes that it is not named as a party to the Agreement or to its arbitration provision.[9] It nonetheless contends that it can enforce the arbitration provision because it qualifies, at least for the purposes of Mawhinney's AIR21 action, as an "agent" of the Airline, a category of third parties specifically authorized in the Agreement to enforce the arbitration provision against signatories.

The Union's theory of agency is convoluted: The Union notes that the ARB reversed and remanded the ALJ's dismissal of the Union from Mawhinney's retaliation claim. The ARB's thesis was that the Union potentially fell within the scope of AIR21 because it could qualify as an Airline "contractor," 49 U.S.C. § 42121(e), and so as a respondent in a retaliation claim. The Union notes also that AIR21 prohibits retaliation by "contractors" only against their "employees." 49 U.S.C. § 42121(a). It follows, according to the Union, that Mawhinney's retaliation action could only proceed if he was deemed an "employee" of the Union. Yet, according to the collective bargaining agreement between the Airline and the Union, the Airline retains "sole" control over "the direction of its working force . . . and the right . . . to hire, discipline and discharge employees." Accordingly, says the Union, it could only have been engaged in an employer-employee relationship with Mawhinney if it functioned as an agent of the Airline, carrying out the Airline's "direction." *See generally* Restatement (Third) of Agency § 1.01 (2006).

[9] The Agreement defines the "Parties" as Mawhinney and the Airline, defines the "Parties Bound" as Mawhinney and the Airline, and is signed only by Mawhinney, Mawhinney's attorney, and a representative of the Airline.

The district court did not reach the question whether the Union *could* be treated as an agent of the Airline. Instead, the district court cited the maxim that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). It then compelled arbitration because the Union's legal argument for agency, and thus for an entitlement to compel arbitration, was at least colorable.

We review the district court's order de novo, *Rogers*, 547 F.3d at 1151, and reverse. Under the established meaning of the term "agent," and the statutory role of the Union under the Railway Labor Act, 45 U.S.C. §§ 151–165, 181–188, the Union simply was not the Airline's agent with regard to its role in Mawhinney's employment dispute, and so was not covered by the arbitration provision in the Agreement. Whether the Union was a "contractor" for purposes of AIR21 is a separate matter, not before us.

B

"Agency is the fiduciary relationship that arises when [a principal] manifests assent to [an agent] that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01; *Edwards v. Freeman*, 34 Cal. 2d 589, 592 (1949); *Secci v. United Indep. Taxi Drivers, Inc.*, 8 Cal. App. 5th 846, 855 (2017). To establish an agency relationship, "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control." *Edwards*, 34 Cal. 2d at 592 (citation omitted); *Secci*, 8 Cal. App. 5th at 855.

Nothing in the Union's pleadings or moving papers suggests that the Airline and the Union had agreed that the Union would act on behalf of the Airline and under its control with regard to Mawhinney's employment status. That vacuum is not surprising. Generally, a union does not act on behalf of an employer or subject to an employer's control; it acts on behalf of the represented workers, to whom it owes a duty of fair representation vis à vis the employer. *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46–47 & n.8 (1979). In that capacity, the Union's obligation is to *oppose* the employer's interests during collective bargaining and in processing grievances when its role as the workers' representative so requires, not to act on behalf of and under the control of the employer. *See Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 549 (9th Cir. 1987). Indeed, under the Railway Labor Act, which governs Mawhinney's employment with the Airline, it is illegal for the a union to operate under an employer's control. 45 U.S.C. § 152, Fourth; 45 U.S.C. § 182; *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1015–16 (9th Cir. 1990).

The Union does not really engage with the anomaly of contending that it is the agent of the employer with whom it is obligated to bargain on the employer's behalf. Instead, the Union's contention, at bottom, is that it should be treated as an agent on a counterfactual basis — not because it truly *is* an agent, but because the ARB's conclusion that the Union may have "contractor" status under AIR21 can only hold true if an agency relationship exists between the Airline and the Union.[10] We do not resolve cases based on how another

[10] It may well be that the Union is no more a "contractor" under AIR21 than it is an "agent" under the Agreement. The ARB's view, under which any party to a contract is a "contractor," is strangely literal, and

forum is approaching parallel litigation. The Union's proposition that we should do so here is particularly weak, as the ARB's decision is neither final nor certain — nor even directly about whether the Union is the Airline's "agent."

The district court did not agree with the Union's position concerning its status as the Airline's "agent." Instead, the district court invoked the familiar maxim that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25.

The preference for a broad construction of an ambiguous arbitration agreement has no application here. The federal preference for a broad construction of an arbitration agreement refers to "ambiguities as to the scope of the arbitration clause itself," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989), not the threshold question whether a person entered into or is covered by an agreement to arbitrate, *see First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Volt*, 489 U.S. at 478. Here, "[t]he question . . . is not whether a particular issue is arbitrable, but whether a particular party is bound by the arbitration agreement. Under these circumstances, the

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seems to confuse contracting *out* or *for* something with simply being a party to any contract. *Cf. Contractor*, *Webster's Third New International Dictionary* (2002) ("[O]ne that formally undertakes to do something for another . . . ; one that performs work . . . or provides supplies on a large scale . . . according to a contractual agreement . . . ."). In any event, AIR21 itself defines "contractor" narrowly, as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). There is little reason to believe the Union meets that definition — that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, "performs safety-sensitive functions" *for* the Airline.

liberal federal policy regarding the scope of arbitrable issues is inapposite." *Comer*, 436 F.3d at 1104 n.11 (emphasis omitted).

V

As the present appeals are not interlocutory, the motions to dismiss are **DENIED**.

In *American Airlines v. Mawhinney*, No. 16-56638, the Airline did not waive arbitration by waiting until after DOL's independent investigation was complete to file a motion to compel. Nor is there any inherent arbitrability problem with a private AIR21 action litigated before an ALJ following an unfavorable DOL investigation. The district court's order compelling arbitration is **AFFIRMED**.

In *Transportation Workers Union, Local 591 v. Mawhinney*, No. 16-56643, applying ordinary principles of agency law, the Union is not in a position to enforce the 2002 settlement agreement or the DOL order approving it. The district court's order compelling arbitration is **REVERSED**.

United States Court of Appeals
for the Ninth Circuit

Case: 16-56638 (CASD 3:16-cv-2270)
Title: *American Airlines, Inc., v. Mawhinney*

Date: Nov. 5, 2018

Ninth Circuit Judges: Marsha S. Berzon;
N. Randy Smith;
ORDER P. Kevin Castel.[1]

The panel has voted to deny the petition for panel rehearing.

Judge Berzon and Smith have voted to deny the petition for rehearing en banc, and Judge Castel so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing or rehearing en banc is **DENIED**.

[1] The Honorable P. Kevin Castel, United States District Judge for the Southern District of New York, sitting by designation.

United States District Court
Southern District of California

Case: 3:15-cv-0257, Doc. 45

Title: *Mawhinney v. American Airlines, Inc.*

Date: Aug. 23, 2016

U.S. District Judge: Michael M. Anello

ORDER DENYING MOTION TO ENFORCE JUDGMENT OR, IN THE ALTERNATIVE, COMPEL ARBITRATION

Respondent American Airlines ("American") has filed a motion to enforce judgment or, in the alternative, compel arbitration. Doc. No. 38. Petitioner Robert Steven Mawhinney ("Mawhinney") opposed the motion (*see* Doc. Nos. 40,42), and American replied (Doc. No. 43). The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, the Court **DENIES** American's motion.

BACKGROUND

Robert Mawhinney began working at American Airlines in 1989 as an Aviation Maintenance Technician. After Mawhinney was terminated from American in 2001, he filed an administrative whistleblower complaint with the U.S. Department of Labor ("DOL") pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21," codified at 49 U.S.C. § 42121). The parties subsequently entered into a settlement

agreement and American reinstated Mawhinney's employment. As part of the settlement agreement, the parties agreed to resolve any further disputes through binding arbitration. American terminated Mawhinney again in September 2001, and Mawhinney initiated arbitration proceedings shortly thereafter, alleging claims for, among other things, retaliation and wrongful termination. Mawhinney also filed a second AIR21 complaint with the DOL, alleging retaliation and wrongful termination.

The DOL investigated Mawhinney's claims, but dismissed his complaint because it was unable to determine that Mawhinney has been retaliated against or wrongfully terminated for reporting air safety concerns. Mawhinney was granted a hearing with an administrative law judge ("ALJ") regarding his AIR21 complaint ("ALJ Action"), but the proceeding was stayed pending American's bankruptcy proceedings.

When the ALJ Action resumed, American moved to dismiss because arbitration proceedings had already been initiated pursuant to the parties' settlement agreement. The ALJ granted the motion, but Mawhinney appealed the decision to the Administrative Review Board ("ARB").

In November, after six days of arbitration proceedings which included live testimony from nine witnesses, an arbitrator ruled in favor of American on all claims. Among other things, the arbitrator found that Mawhinney was "unable to establish that he was engaged in a protected activity," that he was "constructively terminated,"

or that "his reporting of misconduct of other employees was a motivating factor in his termination. Doc. No. 14-4 at 17.

In February 2015, Mawhinney petitioned this Court to vacate the arbitration award. American opposed vacatur, and cross-petitioned to confirm the arbitration award. The Court denied Mawhinney's petition, granted American's cross petition, and entered judgment in American's favor in August 2015. The Court denied Mawhinney's motion to alter or amend the judgment on December 9, 2015, and Mawhinney appealed the judgment on December 31, 2015.

In January 2016, the ARB reversed the ALJ's dismissal of the AIR21 complaint, finding that the ALJ did not have authority to dismiss merely based on the parties' initiation of arbitration proceedings under the settlement agreement, and remanded for further proceedings.

American filed the instant motion to enforce judgment on April 28, 2016. American argues that because the claims in the ALJ Action were already adjudicated in arbitration, and this Court confirmed the arbitration award, Mawhinney's claims in the ALJ Act are barred by res judicata and collateral estoppel. Accordingly American urges the Court to enjoin the ALJ Action from proceeding pursuant to the All Writs Act, or alternatively, to compel the parties to arbitrate the claims in the ALJ Action.

LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), a party may petition of the court for an order confirming, vacating, or modifying an arbitrator's award. 9 U.S.C. §§ 9-11. If the arbitrator's award is confirmed, "[t]he judgment so entered shall have the same force and effect, in all respects, as, and be subjected to all provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13. However, "there are fundamental differences between confirmed arbitration awards and judgments arising from a judicial proceeding." *Chiron Corp. v. Ortho Diagnostics Sys., Inc.*, 207 F.3d 1126, 1133 (9th Cir. 2000). For instance, "[a]bsent an objection on one of the narrow grounds set forth in sections 10 or 11, the Act requires the court to enter judgment upon a confirmed arbitration award, without reviewing either the merits of the award or the legal basis upon which it was reached." *Id.* Accordingly, "a judgment upon a confirmed arbitration award is qualitatively different from a judgment in a court proceeding, even though the judgment is recognized under the FAA for enforcement purposes." *Id.* At 1133-34; see also *Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25, 29 (1st Cir, 2014) ("[I]f a federal court, in enforcing an arbitration award, held that the arbitration was not fraudulent, and thus was enforceable, a subsequent arbitrator would not be able to decide to the contrary," but "if a federal court has nothing to say about the merits of the arbitration decision that is confirms (which is almost always the case), then a subsequent arbitrator does not infringe on the prerogatives of the federal court by determining the preclusive effect of that arbitration decision.").

DISCUSSION

This Court denied Mawhinney's petition to vacate the arbitrator's award because he failed to establish any of the narrow grounds for vacutur under 9 U.S.C. § 10. *See* Doc. No. 17 ("Mr. Mawhinney's disagreement with Judge Sullivan's conclusions, without more, is not a grounds for vacatur under 9 U.S.C. § 10. Mr. Mawhinney provides no evidence that Judge Sullivan acted with prejudice, engaged in misconduct, or acted with manifest disregard of the law."). The Court granted American's cross-petition to confirm the award because a court must enter an order confirming an arbitration award "unless the award is vacated, modified, or corrected" as prescribed in 9 U.S.C. §§ 10-11. 9 U.S.C. § 9. This Court did not consider the merits underlying Mawhinney's claims, and therefore enforcement of its judgment is limited to those issues it actually considered. *See* Chiron Corp. v. *Ortho Diagnostics Sys., Inc.* 207 F.3d 1126, 1133-34. American's reliance upon *Leon v. IDX Systems Corporation*, 464 F.3d 951 (9th Cir. 2006) is misplaced because Leon involved actions taken by a district court to enforce its own judgment rendered after considering the merits of the issues presented, not the more narrow judgment this Court reached when it in summarily confirmed the arbitrator's award. See Chiron 207 F.3d at 1134 (noting that "the court issuing the original decision is best equipped to determine what was considered and decided in that decision and thus what is or is not precluded by that decision," and such a policy is not served "when the

district court merely confirmed the decision issued by another entity, the arbitrator, and was not uniquely qualified to ascertain its scope and preclusive effect").

Because the arbitration clause in the settlement agreement[1] appears to broadly encompass all disputes arising between the parties involving Mawhinney's employment, it is likely the parties will need to seek to arbitrate the issue of whether or not the ALJ Action is precluded by the arbitrator's award. If the parties are unable to agree to arbitrate their dispute concerning the preclusive effect of the arbitrator's award, then either party may seek an order compelling arbitration of the issue by filing a petition to compel arbitration pursuant to 9 U.S.C. § r. Although American alternatively requests that this Court compel arbitration of the ALJ Action now,

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[1] The parties' settlement agreement is very broad, and provides that:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties ... involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court ..... The arbitrator shall have the authority to order any legal or equitable relief or remedy which would be available in a civil or administrative action or claim.

Doc. No. 38-1 at 3 (emphasis added).

the Court is not in the best position to determine the preclusive effect of the arbitrator's award. *See Chiron*, 207 F.3d at 1134. Furthermore, this case was closed and judgment was entered more than one year ago. The issues now giving rise to American's request to compel the arbitration are unrelated to the initial petitions to vacate or confirm the arbitration award. Accordingly, to the extent American wishes to file a petition to compel arbitration pursuant to 9 U.S.C. 4, it must file its petition as a new case, not as an alternative request in a motion to enforce judgment.

CONCLUSION

Because this Court did not consider the merits underlying Mawhinney's claims in confirming the arbitration award, it is unable to enforce the arbitrator's judgment or determine the preclusive effect of the arbitrator's judgment in the ALJ Action. Accordingly, American's motion to enforce judgment, or in the alternative, compel arbitration, is **DENIED**.

IT IS SO ORDERED

s/ Michael M. Anello

United States District Court
Southern District of California

Case 3:16-cv-2270, Doc. 20
Title: *American Airlines, Inc. v.* Mawhinney

Date: Oct. 27, 2016

U.S. District Judge: Michael M. Anello

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL ARBITRATION; AND DENYING DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, RECUSAL OF JUDGE MICHAEL M. ANELLO

Plaintiff American Airlines, Inc. ("Plaintiff"), brings a single cause of action for breach of contract and moves to compel arbitration of Defendant Robert Steven Mawhinney's ("Defendant") underlying employment discrimination claims pursuant to an arbitration clause in a settlement agreement entered into between Plaintiff and Defendant in 2002.[1] Doc. No. 5. Defendant filed an opposition to the motion, to which Plaintiff replied. Doc. No. 16, 19. On September 28, 2016, Defendant filed a motion to dismiss, or, in the alternative, requested the recusal of the undersigned. Doc. No. 14. Plaintiff filed an opposition to the motion, to which Defendant replied. Doc. Nos, 17, 18. For the reasons set forth below, the Court **GRANTS** Plaintiff's motion to compel arbitration. Moreover, the Court **DENIES** Defendant's motion to dismiss,

[1] In a related case, a different plaintiff (Transport Workers Union, Local 591) seeks to compel the same defendant, Mr. Mawhinney, to arbitrate his claims pursuant to the same settlement agreement. *See* 16cv2296-MMA (BLM)

or, in the alternative, request for the undersigned's recusal.

BACKGROUND

Defendant began working at American Airlines in 1989 as an Aviation Maintenance Technician. After American terminated Defendant's employment in 2001, Defendant filed an administrative whistleblower complaint with the U.S. Department of Labor ("DOL") challenging his termination pursuant to Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. AIR21 authorizes an "employee" of an "air carrier or contractor or subcontractor" to bring an action where the employer has retaliated against the employee for protected whistleblower activity. 49 U.S.C. § 42121(a).

In December 2002, the parties entered into a Settlement Agreement (the "2002 Agreement"), which required Plaintiff to reinstate Defendant's employment, among other relief. The 2002 Agreement included a broad arbitration clause, requiring that disputes involving compliance with the 2002 Agreement and future disputes arising out of Defendant's employment would be resolved through binding, private arbitration. The arbitration provisions of the 2002 Agreement provided, in pertinent part:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the

> Released Parties, and any [sic] their past, present or future successors, and their past, present, or future officers, directors, employees, agents, and representatives) involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court ..... The arbitrator shall have the authority to order any legal or equitable relief or remedy which would be available in a civil or administrative action or claim.
> Doc. No. 5-2 at 10.[2] The DOL issued an order approving the settlement in January 2003.

Plaintiff terminated Defendant's employment again in September 2011. Defendant initiated arbitration proceedings shortly thereafter, alleging claims for, among other things retaliation and wrongful termination. In October 2011, Defendant also filed a second AIR21 complaint with the DOL, alleging retaliation and wrongful termination.

The DOL investigated Defendant's claims in June 2012, but dismissed his complaint because it was unable to determine that Defendant had been retaliated against, or wrongfully terminated for

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[2] The Court refers to the CM/ECF pagination in Doc. No. 5-2.

reporting air safety concerns. An administrative law judge ("ALJ") granted Defendant a hearing regarding his AIR21 complaint ("ALJ Action"), but the proceeding was stayed pending Plaintiff's bankruptcy proceedings.

When the ALJ Action resumed in April 2014, Plaintiff moved to dismiss because arbitration proceedings has already been initiated pursuant to the parties' settlement agreement. On May 14, 2014, the ALJ granted the motion and dismissed the ALJ Action. Defendant appealed the decision to the Administrative Review Board ("ARB").

Defendant then proceeded to arbitrate his claims. In November 2014, after six days of arbitration proceedings which included live testimony from nine witnesses, an arbitrator ruled in favor of Plaintiff. In February 2015, Defendant petitioned this Court to vacate the arbitration award in the related case 15cv259-MMA (BLM). Plaintiff opposed vacatur, and cross-petitioned to confirm the arbitration award. The Court granted Plaintiff's cross-petition and entered judgment in American's favor in August 2015. *See* 15cv259-MMA (BLM), Doc. No. 17. Defendant appealed the judgment on December 31, 2015.

In January 2016, the ARB reversed the ALJ's dismissal of the AIR21 complaint, and remanded for further proceedings. The ARB concluded that the ALJ did not have authority to compel the matter to arbitration. The ARB explained that only a district court, and not the ALJ, could enforce Defendant's court-approved settlement and its arbitration provisions. Defendant is currently

litigating employment-related claims before the ALJ, and a two-week hearing before the ALJ is scheduled to begin on October 31, 2016.

On April 28 2016, Plaintiff filed a motion with the Court, seeking to enforce the Court's prior judgment in favor of American, or, in the alternative, to compel arbitration of Defendant's claims. *See* 15cv259-MMA (BLM),Doc. No. 38. The Court denied the motion on August 22, 2016, and instructed Plaintiff to file a new action in order to compel arbitration. On September 2, 2016, Plaintiff commenced arbitration proceedings with Defendant before the American Arbitration Association ("AAA"), and issued to Defendant a demand to compel arbitration. Defendant did not respond. Plaintiff then filed the instant case against Defendant on September 7, 2016, alleging a single cause of action for breach of the arbitration agreement. Doc. No. 1. On September 12, 2016, Plaintiff filed its motion to compel arbitration of matters arising out of Defendants' employment-related claims. Doc. No. 5.

DISCUSSION

I. Plaintiff's Motion to Compel Arbitration

A. Legal Standard

The Federal Arbitration Act ("FAA") permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a

valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

The Supreme Court has stated that the FAA espouses a general policy favoring arbitration agreements. *AT & T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Federal courts are required to rigorously enforce an agreement to arbitrate. *See id.* Courts are also directed to resolve any "ambiguities as to the scope of the arbitration clause itself ... in favor of arbitration." *Volt Info. Sys., Inc. v. Bd. Of Trs. Of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476-77 (1989).

In determining whether to compel a party to arbitration, the Court may not review the merits of the dispute; rather, the Court's role under the FAA is limited "to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (internal quotation marks and citation omitted). If the Court finds that the answers to those questions are yes, the Court must compel arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). If there is a genuine dispute of material fact as to any of these queries, a district court should apply a "standard similar to the summary judgment standard of [Federal Rule if Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004).

Agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9

U.S.C. § 2. Courts must apply ordinary state law principles in determining whether to invalidate an agreement to arbitrate. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 782 (9th Cir. 2002). As such, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. *Concepcion*, 563 U.S. at 339-41.

B. Analysis

1. Valid Agreement to Arbitrate Exists

In order to determine whether it is appropriate to compel arbitration, the Court must first determine whether a valid agreement to arbitrate exists. *See Cox*, 553 F.3d at 1119. Neither party disputes the existence of a valid agreement to arbitrate. In fact, Defendant initially requested private arbitration in September 2011 pursuant to the terms of the 2002 Agreement. Defendant participated in the arbitration, called witnesses, submitted briefs, and participated in depositions. Doc. No. 5-1 at 8. At no point did Defendant challenge the enforceability of the 2002 Agreement's arbitration provisions. *Id.* Accordingly, a valid agreement to arbitrate exists.[3]

2. The Scope of the Arbitration Clause Encompasses Defendant's Claims

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[3] Plaintiff also claims a valid agreement to arbitrate exists pursuant to 49 U.S.C. § 42121(b)(6), because the DOL previously approved the 2002 Agreement. Doc. No. 5-1 at 8. However, because neither party contests the existence of a valid agreement to arbitrate, the Court need not address this argument.

Because a valid agreement to arbitrate exists, the Court must next consider whether Plaintiff's breach of contract claim, as well as the scope of Defendant's underlying employment discrimination claims are encompassed by the arbitration provisions of the 2002 Agreement. *See Cox*, 533 F.3d at 1119. A claim is subject to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984) (*quoting United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

The 2002 Agreement requires private arbitration "[i]n the event of *any* dispute as to the compliance by either party with the terms of this Agreement." Doc. No. 5-2 at 10 (emphasis added). This broadly worded clause clearly includes a breach of the terms of the arbitration agreement itself. The arbitration provision provides for two exceptions: (1) disputes that Plaintiff chooses to grieve under the Collective Bargaining Agreement ("CBA"); and (2) disputes that may not be lawfully subject to pre-dispute arbitration agreements. *Id.* Defendant argues these additional provisions "must also be considered to understand the complete intent of the Settlement Agreement." Doc. No. 16-1 at 2 (emphasis in original). Defendant cites a decision of the ARB to support the notion that his AIR 21 claims cannot be subject to private arbitration. *Id.* at 14.

With respect to the first exception, Defendant does not claim that he chose to grieve under the

CBA, nor does Defendant offer any evidence to support this notion. Thus, the first exception is inapplicable. With respect to the second exception, Defendant cites an ARB decision, *Lucia v. American Airlines*, ARB Case Nos. 10-014, 10-015, 10-016, 2011 WL 4690625 (ARB Sept. 16, 2011), as precedent supporting the notion that AIR 21 disputes cannot be subject to a private arbitration agreement. Doc. No. 16-1 at 14. In *Lucia*, the ARB reversed an ALJ's order dismissing AIR 21 claims by airline pilots who were also pursuing arbitration under the CBA. *Lucia*, 2011 WL 4690625, at *7. The ARB found the pilots' claims in arbitration were "wholly independent" from the pilots' AIR 21 claims. *Id.* at *6. The ARB articulated that a union, in a CBA on behalf of a group of employees, could not waive the employees' individual statutory claims, like those under AIR 21. *Id.* at *7. Accordingly, the ARB found the CBA could not be interpreted to require arbitration of the pilots' AIR 21 claims. *Id.*

Here, Defendant initiated arbitration pursuant to a private agreement (the 2002 Agreement), not a CBA. Defendant agreed to submit "any" employment-related dispute to arbitration. Moreover, unlike *Lucia*, where the arbitration claims were substantively different than those in the administrative proceedings, the issues currently before the AAA are identical – claims of retaliation and wrongful termination. Accordingly, neither exception is applicable to the case at bar.

Defendant also contends he is exempt from the FAA as a "transportation worker." Doc. No. 16-1 at 10. Defendant cites 9 U.S.C. § 1 which provides,

"nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Defendant, as the party opposing arbitration, bears the burden of demonstrating that the Section 1 exemption applies. *Cilluffo v. Cent. Refrigerated Servs., Inc.*, 2012 WL 8523507, at *3 (C.D. Cal. Sept. 24, 2012) (order clarified, 2012 WL 8523474 (C.D. Cal. Nov. 8, 2012) (citing *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008)).

Here, the 2002 Agreement is not a "contract of employment," but rather a settlement agreement designed to resolve legal disputes between the parties. Defendant does not argue that the 2002 Agreement is a contract of employment. Additionally, the Supreme Court has interpreted this exemption narrowly, finding that the exemption is limited to those engaged in the movement of goods in interstate commerce, *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). Aircraft maintenance crew members, or workers engaged in aviation-related services, do not fall within this exemption. *See Jimenez v. Menzies Aviation Inc.*, 2015 WL 4914727, at *5 n.4 (N.D. Cal. Aug. 17, 2015). Because Defendant offers no evidence that the 2002 Agreement is a contract of employment, or that he engaged in interstate commerce necessary to qualify for the exemption, Defendant fails to demonstrate he is exempt from the FAA. Therefore, Defendant's claims fall within the scope of the 2002 Agreement's arbitration provisions and are subject to arbitration.

3. Res Judicata is an Arbitrable Issue.

Finally, Plaintiff argues that arbitration is also appropriate because Defendant's claims were previously decided in arbitration. Plaintiff notes that whether a party litigating a claim is barred by res judicata or collateral estoppel is itself an arbitrable issue to be resolved in arbitration. *See* Doc. No. 5-1 at 11. As the Ninth Circuit has indicated, the correct forum to determine the effect of the prior proceeding is in arbitration. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1132-33 (9th Cir. 2000) (holding arbitration as the appropriate forum to determine the res judicata effect of a prior arbitration award). Accordingly, arbitration is also appropriate for the separate determination of whether Defendant's claims are barred by res judicata or collateral estoppel.

C. CONCLUSION

For the reasons set forth above, the Court finds a valid arbitration agreement exists, and both Plaintiff's breach of contract claim and Defendant's underlying employment discrimination claims are encompassed by the arbitration agreement. Additionally, whether Defendant's claims are barred by res judicata or collateral estoppel is an arbitrable issue for an arbitrator to determine. Accordingly, the Court **GRANTS** Plaintiff's motion to compel arbitration.[4]

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[4] Defendant raises additional arguments in response to Plaintiff's Motion to Compel that do not bear on the disposition of the motion. For example, Defendant claims American delayed DOL and arbitration proceedings, American's motion to compel is not timely, Defendant describes events that took place more than fifteen years ago,

II. Defendant's Motion to Dismiss, or in the alternative, Request for Recusal

A. Motion to Dismiss

On September 28, 2016, Defendant filed the instant motion to dismiss based on the statute of limitations.[5] *See* Doc. No. 14. The 2002 Agreement contains a California choice of law provision that neither party contests. Doc. No. 5-2 at 6. California imposes a four-year statute of limitations on suits for a breach of written contract. *Cal. Civ. Proc. Code* § 337. The California Supreme Court has held that in the context of a contract-based action to compel arbitration, "a cause of action to compel arbitration does not accrue until one party has refused to arbitrate the controversy." *Spear v. Calif. State Auto. Ass'n*, 831 P.2d 821, 825 (Cal. 1992); *see also Wagner Constr. Co. v. Pac. Mech. Corp.* 157 P.3d 1029, 1034 (Cal. 2007) (stating "[a] petition to compel arbitration must be brought within four years after the party to be compelled has refused to arbitrate."). Thus, once the accrual

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and alleges American participated in arbitration and the AIR 21 claim without raising an objection. *See* Doc. No. 16-1. Although the Court carefully considered all of Defendant's arguments, the Court only addresses the arguments bearing on the disposition of Plaintiff's motion in this section of the Court's opinion.

[5] Defendant also argues in his motion that Plaintiff has "not been forthright with the Court" because its notice of related cases did not list a 2009 action where Plaintiff removed a PAGA representative action to federal court involving alleged wage statement violations. Doc. No. 14 at 3-4. This allegation, however, does not advance Defendant's statute of limitations or recusal arguments, and is irrelevant to Defendant's pending motion. Even if the Court were to address this argument, the Court finds the 2009 action is not "related" to the case at bar pursuant to Civil Local Rule 40.1(g).

date is determined, the applicable limitations period is the four-year period applied to breach of contract actions. *Spear*, 831 P.2d at 824.

Here, the Court finds Plaintiff timely filed its claim. Defendant asserts the alleged breach occurred in September 2011, when Defendant initiated a claim before the DOL. *See* Doc. No. 14 at 6. Thus, Defendant claims Plaintiff's complaint, filed in September 2016, exceeded the four-year limitations period. *See id.* On September 2, 2016, however, Plaintiff commenced arbitration proceedings with Defendant before the AAA and issued to him a demand to compel arbitration. Doc. No. 5-1 at 7. Defendant did not respond. *Id.* The accrual date is therefore on or around September 2, 2016. Because Plaintiff filed its Complaint and motion to compel arbitration within two weeks of Defendant's refusal to arbitrate, Plaintiff's claim is timely. Accordingly, the Court **DENIES** Defendant's motion to dismiss for exceeding the statute of limitations.

B. Request for the Undersigned's Recusal

In the alternative, Defendant requests the recusal of the undersigned. *See* Doc. No. 14. The standard for recusal under 29 U.S.C. §§ 144, 455 is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984). Importantly, "the alleged prejudice must result from an extrajudicial source; a judge's prior adverse ruling is not sufficient cause for recusal."

United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (citing *Mayes*, 729 F.2d at 607).

Defendant claims his status as a *pro se* litigant has been met with prejudice because the Court did not consider the merits underlying Defendant's claims in his motion to vacate the arbitration award in the related, previous case. Doc. No. 14 at 7-8; *see* 15cv259-MMA (BLM), Doc. No. 45 ("This Court did not consider the merits underlying Mawhinney's claims, and therefore enforcement of its judgment is limited to those issues it actually considered."). However, a judge's prior adverse ruling is not a sufficient cause for recusal. *Studley*, 783 F.2d at 939. Furthermore, the Court has at all times carefully considered Defendant's arguments. When the Court declined to consider the merits of Defendant's petition to vacate the arbitration award in the previous, related case, it was because the Court lacked jurisdiction to do so. Accordingly, because Defendant fails to state an appropriate ground for recusal, the Court **DENIES** Defendant's request for the undersigned's recusal.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Plaintiff's motion to compel arbitration. The Court **DISMISSES THIS ACTION WITHOUT PREJUDICE** and **ORDERS** the parties to proceed to arbitration in accordance with the terms of the arbitration agreement. Furthermore, the Court **DENIES** Defendant's motion to dismiss, or, in the alternative, request for recusal of the undersigned. The Clerk of Court is instructed to enter judgment accordingly and terminate this case.

IT IS SO ORDERED. s/ Michael M. Anello

United States District Court
Southern District of California

Case 3:16-cv-2296, Doc. 23
Title: *TWU, L-591 v. Mawhinney*

Date: Oct. 27, 2016

U.S. District Judge: Michael M. Anello

ORDER GRANRING PLAINTIFF'S MOTION TO COMPEL ARBITRATION; AND DENYING DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, RECUSAL OF JUDGE MICHAEL M. ANELLO

Plaintiff Transport Workers Union, Local 591 ("Plaintiff" or "Local 591"), brings a single cause of action for breach of contract and moves to compel arbitration of Defendant Robert Steven Mawhinney's ("Defendant") underlying employment discrimination claims pursuant to an arbitration clause in a settlement agreement entered into between American Airlines ("American") and Defendant.[1] Doc. No. 12. Defendant filed an opposition to the motion, to which Plaintiff replied. Doc. No. 20, 21. On September 28, 2016, Defendant filed a motion to dismiss, or, in the alternative, requested the recusal of the undersigned. Doc. No. 17. Plaintiff filed an opposition to the motion, to which Defendant replied. Doc. Nos, 19, 22. For the reasons set forth below, the Court **GRANTS**

[1] In a related case, a different plaintiff (American Airlines) seeks to compel the same defendant, Mr. Mawhinney, to arbitrate his claims pursuant to the same settlement agreement. *See* 16cv2270-MMA (BLM)

Plaintiff's motion to compel arbitration. Moreover, the Court **DENIES** Defendant's motion to dismiss, or, in the alternative, request for the undersigned's recusal.

BACKGROUND

Defendant began working at American in 1989 as an Aviation Maintenance Technician. During the tenure of his employment with American, Defendant was a member of Transport Workers Union, Local 564 ("Local 564"), the members of which were absorbed by Local 591 after Local 564's dissolution in 2013.

After American terminated Defendant's employment in 2001, Defendant filed an administrative whistleblower complaint with the U.S. Department of Labor ("DOL") challenging his termination pursuant to Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. AIR21 authorizes an "employee" of an "air carrier or contractor or subcontractor" to bring an action where the employer has retaliated against the employee for protected whistleblower activity. 49 U.S.C. § 42121(a).

In December 2002, Defendant and American entered into a Settlement Agreement (the "2002 Agreement"), which required Plaintiff to reinstate Defendant's employment, among other relief. The 2002 Agreement included a broad arbitration clause, requiring that disputes involving compliance with the 2002 Agreement, and future disputes arising out of Plaintiff's employment would be resolved through binding, private

arbitration. The arbitration provisions of the 2002 Agreement provided, in pertinent part:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the Released Parties, and any [sic] their past, present or future successors, and their past, present, or future officers, directors, *employees, agents, and representatives*) involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court ..... The arbitrator shall have the authority to order any legal or equitable relief or remedy which would be available in a civil or administrative action or claim.

Doc. No. 12-3 at 6 (emphasis added).[2] Plaintiff asserts it is covered by the 2002 Agreement because Defendant's claims are based on Plaintiff's alleged status as an agent of American. The DOL issued an order approving the settlement in January 2003.

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[2] The Court refers to the CM/ECF pagination in Doc. No. 12-3.

American terminated Defendant's employment again in September 2011. Defendant initiated arbitration proceedings shortly thereafter, alleging claims for, among other things retaliation and wrongful termination. Defendant also filed a second AIR21 complaint with the DOL against American, Local 564 (later absorbed by Local 591), and other American employees, alleging retaliation and wrongful termination. Defendant claims Local 591 succeeds to any liability of Local 564 in the event that Local 564 is found to have operated as a contractor or subcontractor of American, as defined by the AIR 21 statute.

On July 19, 2012, the Administrative Law Judge ("ALJ") issued an order severing Defendant's second AIR 21 complaint with the DOL against Local 564 (ALJ Action No. 2012-AIR-014), from the complaint against American (ALJ Action No. 2012-AIR-017). On August 23, 2012, The ALJ dismissed Action No. 2012-AIR-014 against Local 564, based on a finding that the union was not a company; thus, it could not be considered a contractor or subcontractor as defined by the AIR 21 statute. If Local 564 could not be considered a contractor or subcontractor, Local 564 was not subject to liability pursuant to AIR21, Defendant appealed the order to the Administrative Review Board ("ARB").

Meanwhile, American requested the ALJ compel arbitration and dismiss the action with regards to the ALJ Action No. 2012-AIR-017. On May 14, 2014, the ALJ granted American's request and dismissed the ALJ Action No. 2012-AIR-017. Defendant also appealed this decision to the ARB.

On September 18, 2014, the ARB vacated and remanded the ALJ's order of dismissal against Local 564 in ALJ Action No. 2012-AIR-014. The ARB remanded to the ALJ the issue of whether Local 564 could be considered a contractor or subcontractor of American pursuant to AIR 21 for the purpose of assessing joint liability.

In November 2014, American and Defendant proceeded to arbitration in the dismissed ALJ Action No. 2012-AIR-017. After six days of arbitration proceedings, which included live testimony from nine witnesses, an arbitrator ruled in favor of American. American petitioned this Court to confirm the arbitration award, which the Court granted on August 13, 2015, *See* 15cv259-MMA (BLM), Doc. No. 17. Defendant appealed the judgment on December 31, 2015.

In January 2016, the ARB reversed the ALJ's prior order compelling arbitration and dismissing ALJ Action No. 2012-AIR-017. The ARB concluded that the ALJ did not have authority to compel the matter to arbitration. The ARB explained that only a district court, and not the ALJ, could enforce Defendant's court-approved settlement and its arbitration provisions. Defendant is currently litigating employment-related claims before the ALJ, and a two-week hearing before the ALJ is scheduled to begin on October 31, 2016.

On September 2, 2016, American commenced arbitration proceedings with Defendant before the American Arbitration Association ("AAA"), and issued to Defendant a demand to compel arbitration. Defendant did not respond. On

September 7, 2016, Plaintiff filed a parallel arbitration demand with the AAA to compel arbitration and served the same demand on Defendant. Defendant did not respond. Plaintiff then filed the instant case against Defendant on September 12, 2016, alleging a single casue of action for breach of the arbitration agreement. Doc. No. 1. On September 23, 2016, Plaintiff filed its motion to compel arbitration of matters arising out of Defendants' employment-related claims. Doc. No. 12.

DISCUSSION

I. Plaintiff's Motion to Compel Arbitration

A. Legal Standard

The Federal Arbitration Act ("FAA") permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

The Supreme Court has stated that the FAA espouses a general policy favoring arbitration agreements. *AT & T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Federal courts are required to rigorously enforce an agreement to arbitrate. *See id.* Courts are also directed to resolve any "ambiguities as to the scope of the arbitration clause itself ... in favor of arbitration." *Volt Info.*

Sys., Inc. v. Bd. Of Trs. Of Leland Stanford Jr. Univ., 489 U.S. 468, 476-77 (1989).

In determining whether to compel a party to arbitration, the Court may not review the merits of the dispute; rather, the Court's role under the FAA is limited "to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (internal quotation marks and citation omitted). If the Court finds that the answers to those questions are yes, the Court must compel arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). If there is a genuine dispute of material fact as to any of these queries, a district court should apply a "standard similar to the summary judgment standard of [Federal Rule if Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004).

Agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. Courts must apply ordinary state law principles in determining whether to invalidate an agreement to arbitrate. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 782 (9th Cir. 2002). As such, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. *Concepcion*, 563 U.S. at 339-41.

B. Analysis

1. Valid Agreement to Arbitrate Exists

In order to determine whether it is appropriate to compel arbitration, the Court must first determine whether a valid agreement to arbitrate exists. *See Cox*, 553 F.3d at 1119. The 2002 Agreement provides for arbitration of all employment-related claims asserted by Defendant against American, or American's "officers, directors, employees, agents and representatives," Doc. No. 12-3 at 6. Thus, Plaintiff argues a valid agreement exists because Defendant's claims are based on Local 591's alleged status as an agent of American. *See* Doc. No. 12-1 at 10.

Neither party disputes the existence of a valid agreement to arbitrate. In fact, Defendant requested private arbitration in September 2011 pursuant to the terms of the 2002 Agreement. *See id.* at 11. Defendant participated in the arbitration, called witnesses, submitted briefs, and participated in depositions. *Id.* at 10. At no point did Defendant challenge the enforceability of the 2002 Agreement's arbitration provisions. *Id.* Accordingly, a valid agreement to arbitrate exists.[3]

2. The Scope of the Arbitration Clause Encompasses Defendant's Claims

Because a valid agreement to arbitrate exists, the Court must next consider whether Plaintiff's

[3] Plaintiff also claims a valid agreement to arbitrate exists pursuant to 49 U.S.C. § 42121(b)(6), because the DOL previously approved the 2002 Agreement. Doc. No. 5-1 at 8. However, because neither party contests the existence of a valid agreement to arbitrate, the Court need not address this argument.

breach of contract claim, as well as the scope of Defendant's underlying employment-related claims are encompassed by the arbitration provisions of the 2002 Agreement. *See Cox*, 533 F.3d at 1119. A claim is subject to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984) (*quoting United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

The 2002 Agreement requires private arbitration for "*any* dispute arising at any time in the future between the Parties (including but not limited to ... their ... officers, directors, *agents*, and representatives) involving [Mawhinney's] employment...." Doc. No. 12-3 at 6 (emphasis added). This broadly worded clause certainly includes a breach of the arbitration agreement itself. The arbitration provision provides for two exceptions: (1) disputes that Plaintiff chooses to grieve under the Collective Bargaining Agreement ("CBA"); and (2) disputes that may not be lawfully subject to pre-dispute arbitration agreements. *Id.* Defendant argues these additional provisions "must also be considered to understand the complete intent of the Settlement Agreement." Doc. No. 20-1 at 2 (emphasis in original). Defendant cites a decision of the ARB to support the notion that his AIR 21 claims cannot be subject to private arbitration. *Id.* at 14.

With respect to the first exception, Defendant admitted that he chose not to file any grievance

pursuant to the CBA in his September 2016 deposition. *See* Doc. No. 21-2 at 2.[4] Moreover, Defendant does not offer any evidence that he chose to grieve under the CBA. Thus, the first exception is inapplicable. With respect to the second exception, Defendant cites an ARB decision, *Lucia v. American Airlines*, ARB Case Nos. 10-014, 10-015, 10-016, 2011 WL 4690625 (ARB Sept. 16, 2011), as precedent supporting the notion that AIR 21 disputes cannot be subject to a private arbitration agreement. Doc. No. 20-1 at 14. In *Lucia*, the ARB reversed an ALJ's order dismissing AIR 21 claims by airline pilots who were also pursuing arbitration under their CBA. *Lucia*, 2011 WL 4690625, at *7. The ARB found the pilot's claims in arbitration were "wholly independent" from the pilots' AIR 21 claims. *Id.* at *6. The ARB articulated that a union, in a CBA on behalf of a group of employees, could not waive the employees' individual statutory claims, like those under AIR 21. *Id.* at *7. Accordingly, the ARB found the CBA could not be interpreted to require arbitration of the pilots' AIR 21 claims. *Id.*

Here, Defendant initiated arbitration pursuant to a private agreement (the 2002 Agreement), not a CBA. Defendant agreed to submit "any" employment-related dispute to arbitration. Moreover, unlike *Lucia*, where the arbitration claims were substantively different than those in the administrative proceedings, the issues currently before the AAA are identical – claims of retaliation and wrongful termination. Accordingly, neither exception is applicable to the case at bar.

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[4] The Court refers to the CM/ECF pagination in Doc. No. 21-2.

Therefore, Defendant's claims fall within the scope of the 2002 Agreement's arbitration provision and are subject to arbitration.

The Court is aware that Plaintiff was not a party to the 2002 Agreement. However, the language of the arbitration provision covers disputes between the parties, and their agents. *See* Doc. No. 12-3 at 6. Additionally, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, arbitration is appropriate.

3. Res Judicata is an Arbitrable Issue.

Finally, Plaintiff argues that arbitration is also appropriate because Defendant's claims were previously decided in arbitration. Plaintiff notes that whether a party litigating a claim is barred by res judicata or collateral estoppel is itself an arbitrable issue to be resolved in arbitration. See Doc. No. 12-1 at 14. As the Ninth Circuit has indicated, the correct forum to determine the effect of the prior proceeding is in arbitration. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1132-33 (9th Cir. 2000) (holding arbitration as the appropriate forum to determine the res judicata effect of a prior arbitration award). Accordingly, arbitration is also appropriate for the separate determination of whether Defendant's claims are barred by res judicata or collateral estoppel.

C. CONCLUSION

For the reasons set forth above, the Court finds a valid arbitration agreement exists, and that

Plaintiff's breach of contract claim, as well as Defendant's employment-related claims are encompassed by the arbitration agreement. Additionally, whether Defendant's claims are barred by res judicata or collateral estoppel is an arbitrable issue for an arbitrator to determine. Accordingly, the Court **GRANTS** Plaintiff's motion to compel arbitration.[5]

II. Defendant's Motion to Dismiss, or in the alternative, Request for Recusal[6]

On September 28, 2016, Defendant filed the instant motion to dismiss based on the statute of limitations.[7] *See* Doc. No. 17. The 2002 Agreement

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[5] Defendant raises additional arguments in response to Plaintiff's Motion to Compel that do not bear on the disposition of the motion. For example, Defendant claims American delayed DOL and arbitration proceedings, American's motion to compel is not timely, Defendant describes events that took place more than fifteen years ago, and alleges American participated in arbitration and the AIR 21 claim without raising an objection. *See* Doc. No. 20-1 at 11-12. Although the Court carefully considered all of Defendant's arguments, the Court only addresses the arguments bearing on the disposition of Plaintiff's motion in this section of the Court's opinion.

[6] Although titled as a motion requesting the recusal of the undersigned in the alternative, Defendant does not address this argument in the body of his motion. *See* Doc. No. 17, Accordingly, the Court construes Defendant's motion as solely requesting dismissal base on the statute of limitations.

[7] Defendant also argues in his motion that Plaintiff has "not been forthright with the Court" because its notice of related cases did not list a 2009 action where Plaintiff removed a PAGA representative action to federal court involving alleged wage statement violations. Doc. No. 17 at 3-4. This allegation, however, does not advance Defendant's statute of limitations or recusal arguments, and is irrelevant to Defendant's

contains a California choice of law provision that neither party contests. Doc. No. 12-2 at 6. California imposes a four-year statute of limitations on suits for a breach of written contract. *Cal. Civ. Proc. Code* § 337. The California Supreme Court has held that in the context of a contract-based action to compel arbitration, "a cause of action to compel arbitration does not accrue until one party has refused to arbitrate the controversy." *Spear v. Calif. State Auto. Ass'n*, 831 P.2d 821, 825 (Cal. 1992); *see also Wagner Constr. Co. v. Pac. Mech. Corp.* 157 P.3d 1029, 1034 (Cal. 2007) (stating "[a] petition to compel arbitration must be brought within four years after the party to be compelled has refused to arbitrate."). Thus, once the accrual date is determined, the applicable limitations period is the four-year period applied to breach of contract actions. *Spear*, 831 P.2d at 824.

Here, Plaintiff's claim is timely. Plaintiff asserts Defendant refused to arbitrate on or about September 8, 2016; thus, the applicable limitations period has not yet expired. *See* Doc. No. 19 at 5. Defendant fails to argue for any accrual date for Local 591's cause of action. In fact, Defendant summarily states Plaintiff exceeded the statute of limitation by filing its Complaint on September 12, 2016. Doc. No. 17 at 4. Because Plaintiff filed its Complaint, and motion to compel arbitration, within two weeks of Defendant's refusal to arbitrate, Plaintiff's claim is timely. Accordingly,

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pending motion. Even if the Court were to address this argument, the Court finds the 2009 action is not "related" to the case at bar pursuant to Civil Local Rule 40.1(g).

the Court **DENIES** Defendant's motion to dismiss for exceeding the statute of limitations.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Plaintiff's motion to compel arbitration. The Court **DISMISSES THIS ACTION WITHOUT PREJUDICE** and **ORDERS** the parties to proceed to arbitration in accordance with the terms of the arbitration agreement. Furthermore, the Court **DENIES** Defendant's motion to dismiss, or, in the alternative, request for recusal of the undersigned.

The Clerk of Court is instructed to enter judgment accordingly and terminate this case.

IT IS SO ORDERED. s/ Michael M. Anello

U.S. Department of Labor,
Administrative Review Board
Case: 2014-0060/2012-AIR-017
Title: *Mawhinney v. American Airlines, Inc.*

Date: Jan. 21, 2016

Appeals Judges: Joanne Royce, AAJ;
Luis A. Corchado, AAJ;
Paul M. Igasaki, Chief AAJ.

DECISION AND ORDER VACATING AND REMANDING

Robert Mawhinney filed a complaint against American Airlines (American) ; the Transportation workers Union (TWU); and the following named members of the union: Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznaric, Larry Costanza, and Ken Mactiernan; and Jose Montes, an American Airlines employee, under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act) and its implementing regulations.[1] He alleged that a "concerted effort" to remove him from employment was "orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564.[2] On July 19, 2012, the Administrative Law Judge (ALJ) issued an order severing this case from Case No. 2012-AIR-014, and this case was placed in abeyance pending American Airline's bankruptcy proceedings. On

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007); 29 C.F.R. Part 1979 (2015).
[2] Mawhinney Complaint filed October 5, 2011 (2011 Complaint).

April 8, 2014, Respondent filed a Motion to Compel Arbitration and to Dismiss Action. Finding that Complainant agreed to arbitrate all claims arising from his employment relationship with Respondent, the ALJ granted Respondent's motion to compel arbitration and dismissed Mawhinney's AIE 21 claim.[3] Mawhinney appealed the dismissal of his AIR 21 complaint to the Administrative Review Board. (ARB).

Background

As there has not been a hearing on the merits, the following background is based on the complaint filed in October 2011, the pleading of the parties, and the decision in a previous AIR 21 action Mawhinney filed. American Airlines first employed Mawhinney in 1989. Respondent terminated his employment in 2001, and he subsequently filed a complaint under the ACT, as well as a civil action against Respondent. The complaint and the civil action were resolved, and Mawhinney and Respondent signed a settlement agreement in December 2002. Pursuant to the agreement, Respondent reinstated Mawhinney to his former employment as Aircraft Maintenance Technician. The settlement agreement also contained the following provision:

> In the event of any dispute ... arising at any time in the future between the parties ... involving [Complainant}'s employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his

[3] *Mawhinney v. American Airlines*, No. 2012-AIR-017 (May 14, 2014) (O.D.C.).

> employment, [Complainant and Respondent] agree to submit such dispute to final binding arbitration ("Private Arbitration") for resolution. Private arbitration shall be the exclusive means for resolving any such dispute and no other action will be brought in any other forum or court ....

In September 2011, American Airlines again terminated Mawhinney's employment. He filed an AIR 21 complaint with OSHA in October 2011. He alleged that Respondent retaliated against him by terminating his employment because he made safety complaints against Respondent.[4] Given the 2002 settlement agreement's language, the ALJ found that "the only issue meriting discussion is whether [Mawhinney's] complaint under AIR21 may lawfully be the subject of a pre-dispute arbitration agreement. O.D.C. at 2. The ALJ found that Congress did not invalidate any agreements to arbitrate claims arising under AIR 21. He also

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[4] In its decision in *Mawhinney v. Transportation Workers' Union*, ARB No. 12-108, ALJ No. 2012-AIR-014 (Sept. 18, 2014), the Board vacated the ALJ's finding that the TWU is not a "company," and thus it cannot by definition be a contractor or subcontractor subject to liability under the Act. Rather, the Board held that the common legal definition of "contractor" manifestly includes labor unions, and that the proper inquiry is whether the Collective Bargaining Agreement (CBA), or any other contract, between the TWU and American, which was in effect during Mawhinney's employment with American, provides for the performance of safety-sensitive functions by the TWU or its members. Therefore, the Board remanded this issue to the AJ to determine initially whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.

found that the agreement to arbitrate is a "condition of employment" that allows for arbitration under related Title VII cases.[5] After rejecting Complainant's remaining contentions, and noting that Mawhinney himself invoked the arbitration clause, the ALJ concluded that Mawhinney's AIR 21 claim falls within the scope of the agreement to arbitrate, and that he must pursue his claim in arbitration.[6] The ALJ compelled arbitration of the dispute and dismissed Complainant's AIR 21 complaint.

Discussion

Before the ALJ, Respondent filed a Motion to Compel Arbitration and to Dismiss Action pursuant to the terms of a settlement agreement signed in December 2002. The agreement to arbitrate was a provision of this settlement, and it is this provision that Respondent seeks to enforce. In adjudicating an AIR 21 whistleblower complaint, the ALJ and Board have only the authority expressly or implicitly provided by law.[7] The Act requires the Secretary to (1) investigate and AIR 21 whistleblower complaint and issue findings; (2) permit parties to object to the Secretary's findings

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[5] 42 U.S.C.A. § 2000 et seq. (Thomson Reuters 2012).

[6] The arbitration was conducted on September 3-5 and 9-11, 2014. The arbitrator issued her decision on November 24, 2014. Details of the proceedings were not provided.

[7] *See. E.g., Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules).

and participate in a hearing before an ALJ; and (3) issue a final order, including relief for the Complainant if the Secretary believes that an AIR 21 violation occurred. See 49 U.S.C.A. § 42121(b)(2), (3). Pursuant to 49 U.S.C.A. § 42121(b)(3)(A), a pending whistleblower "proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation."

Initially we hold that the Secretary's approval of the December 2002 settlement agreement does not mean that Complainant was precluded from pursuing a whistleblower claim with OSHA and DOL against American without clearer indication from the Secretary that this preclusion was intended. Moreover, the parties simultaneously participated in the arbitration process and the AIR 21 whistleblower claim without raising an objection.

Whenever any person has failed to comply with an order issued under the Act, including orders approving settlement agreements, the person on whose behalf the order was issued may commence a civil action to require compliance with such order.[8] The Act provides that the appropriate United States district court shall have jurisdiction to enforce such order.[9] Thus, the issue of whether a settlement agreement has been breached is not a matter for the Board to determine. "A settlement is

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[8] 49 U.S.C.A. §42121(b)(6)(A); *see also* 29 C.F.R. §1979.113.
[9] *Id.*

a contract. Its construction and enforcement are dictated by principles of contract law.[10] As the AIR 21 whistleblower section provides for enforcement of settlement agreements in the appropriate United States district court, the federal district courts, not the ALJ, nor this Board, have jurisdiction to consider actions based on alleged settlement breaches. Therefore, we hold that the ALJ erred in compelling arbitration and dismissing the claim, and remand the claim to the ALJ for further consideration.[11]

Further, our review of the case is impeded by our ability to determine the positions taken by the parties. For example, Respondent appears to have filled a motion to compel arbitration after the date Complainant had invoked arbitration.[12] In

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[10] *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 8 (ARB Nov. 10, 1997).

[11] Moreover, in an intervening case, the Board acknowledged in *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 14-050, ALJ No. 2014-AIR-010 (Mar. 18, 2015), that the Federal Arbitration Act (FAA) manifests a federal policy favoring arbitration agreements. However, the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirements of the FAA. Without explicitly holding that the FAA applies to AIR21 claims, the Board concluded that this exemption applies to interstate air transportation of passengers and thus the complainant, a flight attendant, was entitled to pursue her AIR21 retaliation claim before the DOL. The FAA arbitration exclusion for "transportation workers" might similarly apply to Mawhinney who was employed by American Airlines as an Aircraft Maintenance Technician.

[12] We are cognizant of the fact that Mawhinney can, and did, invoke arbitration. The record indicates that arbitration of Mawhinney's claims was conducted last year and was

addition, as noted earlier, the parties simultaneously participated in arbitration and the claim under AIR 21. Therefore, on remand, the ALJ is instructed to clarify the positions taken by the parties, consider the contentions raised, and provide a full explanation for resolution of the contested issues. Though his pleadings are unclear, we assume Mawhinney appealed the ALJ's ruling compelling arbitration only to the extent that it disallowed a concurrent determination of his AIR 21 claim before the Department of Labor. In *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 015, 016; ALJ No. 209-AIR-017, 016, 015 (Sept. 16, 2011),[13] the Board held that the contractual arbitration proceeding and the retaliation proceeding then pending before the Secretary can both proceed, as the causes of action are different and wholly independent. The Board further noted that any judicial relief ordered can be equitably structured such that it is offset by any arbitration award ordered for the same relief to avoid duplicate recovery.

Consequently, we hold that the ALJ erred in dismissing Mawhinney's AIR 21 case as he did not have jurisdiction to enforce the terms of the settlement agreement. We vacate the ALJ's order

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followed by a decision issued on November 24, 2014. This information is provided by Respondent. *See* American Airlines, Inc.'s Status Update for Pending Petition For Review (Jan. 20, 2015).

[13] Mawhinney appears to have cited this case before the ALJ, but the ALJ directed the discussion to another case, *Alexander v. Gardner*, 415 U.S. 36 (1974), which he found was not analogous.

dismissing the complaint and remand for proceedings consistent with this decision.

Conclusion

The ALJ's Order Dismissing the Complaint is **VACATED**, and the case is **REMANDED** for further consideration consistent with this opinion.

SO ORDERED,

s/ Joanne Royce, Administrative Appeals Judge;
s/ Paul M. Igasaki, Chief AAJ

Judge Corchado, concurring:

I agree with the majority that this matter should be remanded; however, without more analysis and facts, I cannot agree at this time with all of the majority's reasons. To be clear, like the majority, I found no provision in the whistleblower statutes or regulations that expressly authorizes the OALJ or the Board to grant a "motion to compel" to enforce an arbitration clause in a settlement agreement. As the majority opinion indicates, the OALJ and ARB may exercise only the authority they are explicitly or inherently granted. Congress has explicitly authorized the Secretary of Labor to adjudicate whistleblower claims arising in various safety-sensitive industries (planes, trains, trucking, nuclear plants, etc.).

In my view, American Airlines pointed to insufficient legal authority to support its motion to compel and allow the Department of Labor to opt out of fulfilling the Congressional mandate to adjudicate AIR 21 whistleblower claims by

subjecting the claim to exclusive arbitration. Congress wanted to ensure the public learned about safety concerns in industries where many people can die or be seriously injured if a plane or train or 80,000 pound semi-trailer crashes, a nuclear plant threatens to melt down, or the drinking water of a town has toxic poisons. Whistleblower laws also aim to protect us from experiencing another world financial crisis caused by Enron-like scandals. Burying these safety disclosures in the world of arbitration would defeat this Congressional purpose for whistleblower laws. Also, like the majority, I think the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have the delegated authority to adjudicate a whistleblower claim.

In the interest of moving this case forward, I will simply list the reasons for my concurrence and wait for another day to address these issues more fully. To begin with, there is no question that the ALJ faced an area of unsettled whistleblower law and confusing conduct by the parties. Recently in *Willbanks*, the Board discussed the Federal Arbitration Act and arguably suggests that it applies unless the employee is exempt under the Federal Arbitration Act's exemption provisions. The Board needs to clarify whether the Act applies, in the first place, to whistleblower cases and resolve the tension between the congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act. If the Federal Arbitration

Act applies to the Board, then the Board must ensure it complies with the mandatory language of that arbitration act and, in my view, more thoroughly analyze the applicability of the arbitration act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C.A. § 1. Neither party in this case provided the ALJ or the Board with sufficient argument on this point.

Because of the ambiguity in Board decisions like *Willbanks*, whistleblowers who disclose nuclear safety and environmental safety concerns might be treated differently from airline and railroad employees. But the Federal Arbitration Act was passed in 1925 without the slightest notion of the devastating power and real threat of nuclear meltdowns like those that occurred at Chernobyl (1986) and Fukashima (2011) and the feared meltdown of Pennsylvania's Three Mile Island (1979). Lastly, American Airlines filed a motion to compel only one month after asking the ALJ to schedule the AIR 21 hearing to occur prior to the arbitration hearing. The significance and impact of this request is unclear to me on the record before us, and I reserve judgment on this point for another day. For the sake of the public and the Administrative Law Judges that must adjudicate the whistleblower claims, I hope the Board soon directly addresses the big question of the Federal Arbitration Act coverage. s/ **Luis A. Corchado**

U.S. Department of Labor,
Administrative Review Board
Case: 2012-0108/2012-AIR-014
Title: *Mawhinney v. TWU, Local 591*

Date: Sept. 18, 2014

Appeals Judge: s/ Joanne Royce, AAJ;
s/ Lisa W. Edwards, AAJ;
s/ Paul M. Igasaki, Chief AAJ.

DECISION AND ORDER VACATING AND REMANDING

Robert Mawhinney filed a complaint against American Airlines; the Transportation Workers Union (TWU); the following named members of the union: Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznaric, Larry Costanza, and Ken Mactiernan; and Jose Montes, an American Airlines employee, under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act) and its implementing regulations.[1] He alleged that a "concerted effort" to remove him from employment was "orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564.[2] On July 19, 2012, the Administrative Law Judge (ALJ) issued an order severing this case from

[1] 49 U.S.C.A. § 42121 (Thompson/West 2013); 29 C.F.R. Part 1979 (2013).
[2] Mawhinney Complaint filed October 5, 2011 ("2011 Complaint").

Case No. 2012-AIR-017[3] and ordered the parties to show cause why the case should not be dismissed against the named Respondents. After the parties submitted responses, the ALJ dismissed the complaint. Mawhinney appealed to the Administrative Review Board. (ARB).

BACKGROUND

As there has not been a hearing on the merits, the following background is based on the complaint filed in October 2011, the pleadings of the parties, and the decision in a previous AIR 21 action filed by Mawhinney. Mawhinney was an employee of American Airlines (American) when he filed his first complaint under the Act, which was resolved by settlement on January 23, 2003.[4] According to the terms of the agreement. Mawhinney returned to his position at American. However, he alleges that when he returned to work he was subjected to a hostile work environment. Mawhinney filed another complaint in October 2011, alleging that he had been "threatened, ignored, abandoned, and subjected to a hostile work environment" and ultimately terminated on September 23, 2011, by American acting in concert with the TWU.[5] Specifically, he contends that the TWU and the individual named respondents conspired with American to retaliate against him for continuing to

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[3] Mawhinney's complaint against American Airlines, ALJ No. 2012-AIR-017, was placed in abeyance pending American Airlines bankruptcy proceedings.

[4] *Mawhinney v. American Airlines*, ALJ No, 2002-AIR-013 (Jan. 24, 2003).

[5] 2011 Complaint

report safety violations to management and federal authorities.

On July 19, 2012, the ALJ severed this case from Mawhinney's complaint against American. At the same time, the ALJ issued an order to the parties to show cause why the Respondents in this case should not be dismissed.[6] After review of the responses, the ALJ found that neither the named individuals nor the TWU are "air carriers" for the purpose of the Act; that neither the TWU nor its members can be held liable as a contractor or subcontractor and that AIR 21 does not provide for individual liability. Accordingly, the ALJ dismissed the claims against the named Respondents. We vacate and remand.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in AIR 21 cases.[7] In this case, the ALJ issued an Order to show cause, sua sponte, and then dismissed Mawhinney's complaint on several legal grounds. Therefore, we review the ALJ's conclusions de novo and limit our review to the legal grounds Mawhinney raised.[8]

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[6] This included all of the Respondent's in the two claims, with the exception of American Airlines.

[7] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 68,378 (Nov. 16, 2012); 29 C.F.R. § 1979.109(a).

[8] *See Saporito v. Publix*, ARB No. 10-073, ALJ No. 2010-CPS-001, slip op. at 4 (ARB Mar. 28, 2012).

DISCUSSION

Air 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsect (a):

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee ... provided or is about to provide ... to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

The implementing regulations provide that an "[a]ir carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide transportation." 29 C.F.R. § 1979.101. the term "contractor" under Section 42121 is define at (e) as "a company that performs safety-sensitive functions by contract for an air carrier."

1. Complainant did not adequately raise the issue of individual liability under AIR21

Mawhinney alleged in his administrative complaint that AA and the TWU contrived to terminate his employment, and he listed a number of employees of American Airlines and Union members who threatened him. See OSHA Complaint dated October 5, 2011. The ALJ dismissed the complaint, in part, based on a

determination that these employees could not be individually liable under the AIR 21. Order of Dismissal (O.D.) at 2. We vacate this finding.

In dismissing Mawhinney's OSHA complaint on the ground that AIR 21 does not permit individual liability, the ALJ answered the wrong question. The OSHA complaint Mawhinney filed on October 5, 2011, does not appear to seek to hold the named individuals personally liable for the purported violations alleged. Rather, the complaint seeks to hold American Airlines and the Union liable for the acts of its employees and members in the course of their duties at AA. Mawhinney named in his complaint nine persons acting in the context of their official roles as agents of, or on behalf of, the company and/or the Union. See Mawhinney OSHA Complaint at 1 (dated Oct. 5, 2011) ("The concerted effort to remove me from employment at American Airlines was orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564.") Mawhinney did not thereby seek to pursue personal liability against the named individuals. Although Mawhinney may name individuals as respondents in their official capacities, individual respondents are unnecessary since Mawhinney also sued American and the Union. In any case, Mawhinney failed to adequately raise, much less brief, the issue of personal liability under AIR 21 and we decline to address it.[9] Consequently, we vacate the ALJ's

[9] Complaints and briefs filed by pro se litigants should be construed "liberally in deference to their lack of training in the law." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op, at 7 (ARB Apr. 30, 2010). However, "[w]e recognize that while adjudicators must accord

determination that AIR 21 does not permit individual liability.

2. The TWU may be considered a "contractor under AIR 21

The ALJ also ruled that because the TWU is not a "company," it cannot by definition be a contractor or subcontractor subject to liability under the Act. We agree with the ALJ that an individual union member cannot be a "company" but we reject his conclusory assertion that "the [TWU] is not a company." O.D. at 3. Neither the Act nor the implanting regulations specifically address the liability of a labor union. However, as we noted earlier, the definition of a "person" under the regulations includes the broad category of "any group of persons," as well as "association." Additionally, the definition of "company" as follows: "a corporation – or, less commonly, an association, partnership, or union – that carries on a commercial or industrial enterprise."[10] Especially in light of our obligation to interpret AIR broadly to facilitate the critical air safety policies behind AIR 21, we discern no common sense reason for treating the TWU in this case differently from a contractor.

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a pro se complainant 'fair and equal treatment, [such a complaint] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forego expert assistance.' *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n. 7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194)D.C. Cir. 1983)." *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2, n.2 (ARB Apr. 26, 2005).

[10] BLACK'S LAW DICTIONARY at 318 (9th ed. 2009).

Indeed, the common legal definition of "contractor" manifestly includes labor unions. According to Mawhinney, a collective bargaining agreement (CBA) between the TWU and American Airlines management addresses the terms of employment of the TWU's members. A "collective-bargaining agreement" is defined as "a contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances."[11] And since the definition of "contractor" is "a party to a contract,"[12] TWU may be considered a "contractor." However, only a contractor that "performs safety-sensitive functions by contract for an air carrier" is subject to suit under AIR 21. Therefore, the proper inquiry is whether the CBA (or any other contract) between the TWU and American (in effect during Mawhinney's employment with American_ provide for the performance of safety-sensitive functions by the TWU or its members.

Under the terms of the CBA, the TWU appears to play a role in ensuring that air carrier safety rules and regulations are followed at American Airlines. Citing the CBA, the TWU acknowledges its role in airlines safety:"[t]he Agreement between TWU and AA sets out in its Preamble that the parties enter in the Agreement 'in the mutual interests of the employees and of the Company to promote the safety and continuity of air transportation.' ... The Crew Chiefs have an obligation to bring to the attention of management any hazardous conditions, unsafe practices, or

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[11] *Id.* at 299.
[12] *Id.* at 375.

improperly functioning equipment and tools. Some of these obligations are repeated in the Aviation Safety Action Partnership ("ASAP") between the Union, AA and the Federal Aviation Administration."[13] However, we remand this issue to the ALJ to determine in the first instance whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.

If, on remand, the ALJ finds that any of the union Respondents may be deemed "air carriers" or "contractors" for purposes of the Act, the ALJ must consider the appropriate remedy given the role of each Respondent with regard to the Complainant's employment.[14]

CONCLUSION

Without expressing any view on the merits of Mawhinney's complaint, we **VACATE** the ALJ's Order of Dismissal, hold that the issue of personal liability under AIR 21 was not adequately raised and **REMAND** for further consideration consistent with this opinion.

SO ORDERED.

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[13] Response of Respondents to Order to Show Cause at 3 (citations to Exhibits omitted)(dated August 7, 2012).

[14] For example, if Mawhinney's employment is dependent on his being a member in good standing of the TWU, his recourse against the union, if prohibited retaliation has occurred, should include reinstatement as a member in the union; see also *Parson v. Kaiser Aluminum*, 583 F.2d 132, 134 (5th Cir. 1978)(appointment of liability and relief between employer and union should proceed on a "flexible basis with regard to the comparative equities").

U.S. Department of Labor, Occupational Health and Safety Administration (OSHA)

Case: 1083989

Title: "Preliminary Order"
Mawhinney v. American Airlines, Inc.

Date: Feb. 4, 2002

Dear Mr. Mawhinney:

This is to notify you of the results of the investigation in the above referenced case, in which you alleged violation of 49 U.S.C. 42121, the whistleblower protection provision of the Aviation Investment and Reform Act for the 21st Century (AIRA). As a result of its investigation, OSHA has reasonable cause to believe that the following violation of 49 U.S.C. 42121(a)(1) has occurred: beginning on January 18, 2001 a series of suspensions, disciplinary letters issued, and medical examinations that you were required to undergo, culminated in a constructive discharge on October 30, 2001. These actions were taken by the Respondent in retaliation for the ASAP report you filed on December 7, 2000.

The Respondent has been notified that they are required to remedy the violation. The remedy is described in the *Preliminary Order* on page 6 of the enclosed letter to Respondent.

Section 42121(b)(2)(A) permits both American Airlines and you to file objections to the Secretary's Findings and to request a hearing on the record. If no objections are filed within thirty (30) days of receipt of this letter, the Findings and Order will become final and not subject to judicial review.

Objections must be filed with:
Chief Administrative Law Judge,
U.S. Department of Labor,
800 K Street, N.W., Suite 400 North,
Washington D.C. 20001-8000.

If you decide to request a hearing, it will be necessary for you to send copies of the request to American Airlines and to the office at the address noted in the above letter head. If you have any questions, please do not hesitate to call Mr. Nicholas Sebastian at 415-975-4872.

Sincerely, s/ Christopher Lee,
Deputy Regional Administrator

Dear Mr. Harmon American:

This is to advise you that we have completed our investigation of the above referenced complaint filed by Mr. Robert Steven Mawhinney on March 5, 2001, under the employee protection provisions of 49 U.S.C., Section 42121 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (short name, AIR Act).

Mr. Mawhinney claims that American Airlines imposed a series of adverse actions that culminated in his 'constructive discharge", in retaliation for communicating safety and maintenance complaints to the Federal Aviation Administration.

Event alleged to have been discriminatory, include: 1) Being placed in a non-duty, then non-pay status, subject to medical review, on February 21, 2001, despite having been medically cleared to return to full-duty, full pay just three days

previously; 2) Being placed in non-duty status twice in January, upon unproven and unsubstantiated charges by co-workers that they feared he would commit violent acts in the workplace and that his actions, attitude and statements created a hostile and unprofessional work environment.

Finally, after receiving medical clearance to return to full-duty, full-pay status, in September, 2001, and having been previously informed that this was the only issue that had to be resolved to return to that status, American Airlines revived its earlier investigation into the charges that he created a hostile workplace environment; in the course of the inquiry determined that he answered a series of questions in a misleading and non-credible manner, and used these determinations to accomplish what it had tried to effect since January, 2001, i.e., termination of his employment, under the guise of voluntary resignation.

American Airlines, through its legal, management and Human Resources representatives does not deny that it placed the Complainant in n0n-duty and non-pay status in January and February, 2001. It contends, however, that these decisions were made for legitimate business reasons, including a fear that he might commit violent acts in the workplace, and that is performance as a mechanic had deteriorated to a point that he could not complete his duties in a professional manner and the company feared that his inability to do so may have been related to an underlying and/or debilitating medical or psychological condition.

Following an investigation of this matter, by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Health and Safety Administration, Region IX, pursuant 49 U.S.C., Section 42121, and a Secretary's Order, finds there is reasonable cause to believe that American Airlines violated 49 U.S.C., Section 42121 (a).

Jurisdiction:

The Complainant in this matter, and Respondent, American Airlines, are both covered under the provisions of the Air Act. Respondent is an air carrier that flies commercial aircraft on domestic and international routes. Mr. Mawhinney was employed by the Respondent as a mechanic and was assigned maintenance duties on Respondent's aircraft.

Timeliness:

Mr. Mawhinney was notified by Respondent Supervisor, Mr. Harmon, on March 2, 2001, that as a result of a medical evaluation, he was placed in a non-duty/medical status, until such time as the medical issues were resolved.

49 U.S.C., Section 42121 of the Air Act) permits complaints to file a claim, petition for relief, within 90 days of the alleged discriminatory act. Mr. Mawhinney filed his discrimination complaint with this Office on March 5, 2001, and thus his complaint is deemed to have been filed in a timely manner.

Findings:

The Act prohibits discharging or otherwise discriminating against an employee if the employee "provide...to the employer...information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States..." 49 U.S.C., Section 42121 (a)(1).

Mr. Mawhinney satisfied the four basic elements to make a prima facie case. i.e.,

1) He made safety/regulatory complaints to the Federal Aviation Administration, via the company's ASAP protocol, on December 7, 2000.

2) American Airlines became aware of his protected activities, safety/regulatory complaints when the Federal Aviation Administration initiated an investigation of his complaints;

3) Mr. Mawhinney was first placed in a non-duty status on January 18, 2001;

4) The nexus between the above three elements is found in the contemporaneous actions, i.e., complaints, company knowledge, and adverse actions.

The issues to be resolved in this matter, then are: 1) Whether or not American Airlines has taken any adverse action against Mr. Mawhinney; 2) If so, has it articulated non-discriminatory reasons for doing so; 3) Whether the company can provide by

clear and convincing testimony and documentation that it would have taken its actions even in the absence of Mr. Mawhinney's protected activity, i.e., that the protected activity was not the deciding factor in discipline imposed and creation of a hostile work environment.

The company initially meets its burden, above, by stating that the actions it took were predicated upon its belief that Mr. Mawhinney may have been prone to commit violent acts in the workplace due to his ownership of a personal weapon, allegations from co-workers that he threatened "to bring the station (workplace) down", and that placing him on a medically disabled status pending evaluation was not an adverse action.

To meet its second burden, i.e., provide clear and convincing testimony that its proffered reasons for its actions were not pretextual, the company produced testimony by the Complainant's supervisor, hearsay and direct, that the Complainant was not completing his duties in a satisfactory and professional manner, which triggered two medical evaluations – one direct – that led to a conclusion that the Complainant was not medically disqualified from employment, and a second one – several days later, that he was medically disqualified from employment at that time, February 28, 2001.

When finally cleared by the American Airlines medical staff, to return to full-duty, full-pay status, in September, 2001, American Airlines management and Human Resources specialists determined that the Complainant had created a

hostile working environment in January, 2001, and that his inconsistent answers to a series of questions during that Board of Inquiry evinced misrepresentation of facts. Determining that these violations were serious, it countermanded its just issued determination to return Complainant to full-time status, and instead imposed discipline in the form of a "Career Decision Day", on October 30, 2001.

When Mr. Mawhinney declined to return to work under a set of conditions designed by American Airlines, it determined that he had voluntarily resigned and thus considered his employment with the company terminated.

However, for the reasons listed below, it is determined that the company has ultimately failed to meet either burden, i.e., to provide clear and convincing evidence that the protected activity, safety complaints, was not the deciding factor in the adverse action, or that its proffered reasons were not pretextual.

1) It has failed to produce, though requested, reports, documents, or persuasive, corroborated testimony to support its allegation that the Complainant was withheld from service, initially in January, 2001, for a legitimate business reason, i.e., that it feared he would commit violent acts in the workplace.

2) It has failed to produce, though requested, reports, documents, e.g., to substantiate or support its contention that his removal from service, a second time, in February, 2001, was for a

legitimate business reason, that by his actions, the Complainant created a hostile work environment.

3) It has failed to provide persuasive testimony to counter Complainant's contention that when he was cleared for duty on February 19, 2001, all investigations were completed.

4) It has failed to provide persuasive testimony or maintenance/performance reports but rather only statements of company officials, and a consequent medical report, based upon this hearsay, rather than personal re-examination, that the complainant was withheld from service from February until October, 2001, for a legitimate business reason - failure to perform duties in a professional manner. Nor could it adequately explain the lengthy process involved in providing medical documents to the Complainant's physician and attorney such that the ultimate determination of fitness for duty could have been made in a more timely fashion.

5) It has failed to provide a convincing rationale, in light of the above, for continuing an investigation into Complainant's fitness for duty, in October, 2001, despite its repeated contentions that all issues were resolved in February, but for the medical for fitness issue. Though requested, it has failed to provide any documentation to show that it has treated similarly situated individuals in a similar manner, i.e., held disciplinary actions in abeyance, without informing an employee, pending medical clearance, then instituting a "Career Decision Day" disciplinary process, upon receipt of medical clearance. This final act is considered by

the Department of Labor to be particularly egregious, in light of the fact that the Department was conducting an investigation into the merits of the retaliation claim when the Career Decision Day, and subsequent termination (see below) was imposed.

6) The company failed to provide, though requested, documents, reports, testimony, to conclude that Complainant, at the Board of Inquiry meeting, October 29, 2001, answered a series of questions in an inconsistent manner, thus triggering the charge that he violated a company policy, misrepresenting facts or falsification of records.

7) The chief Respondent witness, Mr. Harmon, who initially and ultimately, with the concurrence of American Airlines Human Resources Department, imposed all disciplinary adverse actions upon Complainant, could not adequately explain why his communication to the Complainant, i.e., his admonition to the Complainant that he should resolve all future safety issues at the local (station) level, rather than with outside agencies, should not lead to the inference that Complainant's failure to do so, and failure to be a team player, in the past and future, did and would lead to the imposition of disciplinary action.

8) The inference above is further buttressed by a signed statement taken from a witness, who will testify, if called, that Mr. Harmon told Mr. Mawhinney, in the October 29, 2001, meeting, that "allegations he had made placed undue burden on

himself and the station during the investigations by the various Federal agencies..."

Three conclusions are drawn from the above:

1) The supervisor, Mr. Harmon, felt enormous pressure, from nearly all of the Complainant's co-workers, to terminate the Complainant because they feared that Mr. Mawhinney's scrutiny of their work could and would lead to investigations by outside agencies such as the FAA, with the possible consequence of loss of employment.

2) On the other hand, Mr. Harmon was aware that Federal statutes as well as the company's own ASAP program provided the means to do just that – voice safety concerns to outside agencies, without fear of reprisal or retaliation for such protected activities.

3) Faced with this dilemma, it is determined that the Respondent and its management officials, under the twin pretexts of medical and professional unsuitability, repeatedly placed the Complainant in a non-duty, and eventually non-pay status (on March 2, 2001 through October 1, 2001; before eventually imposing its "Career Decision Day", a final adverse action, in such egregious manner that when the Complainant said, in effect, "I quit"; in actuality, he had been "constructively discharged". An employer is considered to have discharged an employee when "the employer's conduct effectively forces an employee to resign. Although the employee may say "I quit", the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. This

form of termination of the employment relationship is commonly known as 'constructive discharge' and it is "legally regarded as a firing rather than a resignation.' (Thompson v. Tracor Flight Systems, Inc. (2001) 86 Cal. App. 4th 1136, 1166, quoting Turner v. Anheuser-Busch, Inc., (1994) 7 Cal. 4th 1238, 1244-1245.)

On the basis of the above, it is determined that the Respondent company, American Airlines, did not sufficiently meet its burden to provide clear and convincing evidence, testimony that its proffered reasons for taking adverse actions against the Complainant were not pretextual, and that his protected activities were not the deciding factors in the adverse actions.

Based on the foregoing, it is determined that American Airlines, Respondent in this matter, has violated 49 U.S.C., Section 42121(a)(1).

Preliminary Order

1. American Airlines shall immediately return Mr. Mawhinney to his previous position and restore all employment rights and personnel benefits, including but not limited to retirement and pension benefits and vacation, holiday and sick leave he would have accrued from March 2, 2001, but for his constructive discharge.

2. American Airlines shall withdraw all documentation of disciplinary complaints and actions, and expunge all negative/adverse references from Mr. Mawhinney's employment record, personnel file, since December, 2000.

3. American Airlines shall pay Mr. Mawhinney for all lost wages from March 2, 2001, until American Airlines makes Mr. Mawhinney a bona fide offer of reinstatement. The exact sum to be paid will be calculated by applying the following wage rates to the total number of hours lost:
Regular Compensation, $34.88/hr.
Holiday Compensation, $83.85/hr.
Overtime Compensation, $51.00/hr.
Sick Day Compensation, $34.88/her.

In addition, American Airlines shall pay Mr. Mawhinney $3,994.15, for medical expenses and $4,636.91, for legal expenses incurred during this period.

4. American Airlines shall post, in conspicuous venues, the enclosed Notice to Employees, to all its employees, acknowledging its obligations under the AIR Act.

Appeal Notification:

American Airlines and Mr. Mawhinney have 30 days from receipt of these Findings to file objections and request a hearing on the record, or they will become final and not subject to court review. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor 800 K Street, N.W., Suite 400, North, Washington, D.C., 20001....

The Complainant must be notified of any objections you file.

Sincerely, s/ Frank Strasheim
Regional Administrator

SETTLEMENT AGREEMENT AND RELEASE

This Release and Settlement Agreement "Agreement") entered into by Plaintiff Robert Steven Mawhinney ("Plaintiff"), and Defendants American Airlines, Inc. ("American Airlines" or "Defendant") (collectively, the "Parties"), is a binding Contract, the terms of which are delineated below.

1. **The Lawsuits and the Administrative Proceedings**. Plaintiff currently has an action pending in the Superior Court of California, County of San Diego, styled *Robert Steven Mawhinney v. American Airlines, Inc., a Corporation; Ken Harmon, an individual and DOES 1-50 inclusive*, Docket No. GIC 782632 ("the Lawsuit"). In addition, Plaintiff currently has an action pending against American Airlines with the U.S. Department of Labor, Office of Administrative Law Judges, styled *Robert Steven Mawhinney, Complainant v. American Airlines, Inc., Respondent*, Case No. 2002-AIR-013 ("the Administrative Proceeding"). Plaintiff retained David P. Strauss, Esq., and filed the above-referenced Lawsuit to recover Plaintiff's alleged damages and also retained David P. Strauss, Esq., to represent him in the Administrative Proceeding to recover alleged damages and for other relief.

2. **Denial of Liability**. American Airlines and its officers, agents, representatives, and employees (including but not limited to Ken Harmon) have denied and continue to deny each of the allegations made by Plaintiff. The Parties recognize, however, that the continued litigation and administrative

proceedings of these disputes will be costly, disruptive, and time-consuming. Accordingly, to avoid the time, expense and uncertainties of litigation, the Parties now desire to dismiss, settle and compromise all claims, proceeding and matters between them on the following terms and conditions.

3. **Full Settlement**. The Parties do hereby fully and finally settle all disputes, claims, and causes of action that have been, were or could have been asserted in any court of law, administrative tribunal, or other forum, as a claim or counterclaim by Plaintiff against American Airlines, or its employees (including but not limited to Ken Harmon), officers, agents and representatives. The parties shall immediately take all steps and actions needed to obtain Dismissals with Prejudice of both the Lawsuit and the Administrative Proceeding. Plaintiff hereby agrees that he hereby waives all rights under Section 1542 of the Civil Code of the State of California. Section1542 provides as follows:

> A general release does not extend to claims under which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

4. **Release**. Notwithstanding the provisions of Section 1542 of the Civil Code of the State of California, Plaintiff hereby releases and forever discharges American Airline, its parent, subsidiaries, affiliates, successors, and their present or former officers, directors, employees, agents and representatives, including but not

limited to Ken Harmon (collectively, the "Released Parties"), or any of them, from all charges, claims, complaints, demands and causes of action for damages or any other relief, obligations, promises, judgments, liabilities, expenses including attorney's fees and costs, express or implied contracts or executions of any nature, whether or not now known, in law or in equity, that Plaintiff now has or may have ever have had against the Released Parties, including, without limitations, all claims that were raised or could have been raised in the Lawsuit or the Administrative Proceeding and any and all claims arising from Plaintiff's employment with American Airlines up through and including the date on which he physically returns to work.

5. **Consideration**. (A) **Monetary Consideration**. i) After execution of this Agreement and ten business days after the Parties receive Dismissals with Prejudice of both the Lawsuit and the Administrative Proceeding, and ten business days after expiration of all time periods set forth in Paragraph 8 hereof, and further provided that Plaintiff has not exercised any right of revocation of this Agreement, American Airlines will issue one or more check(s) as described hereafter. Any such check(s) shall be made payable to the Strauss & Asher Client Trust Account on behalf of Robert Steven Mawhinney in the total amount of (redacted). In addition, American shall restore to Mawhinney's retiree medical benefits premium fund the amount of (redacted). The Parties recognize for purposes of entering into this Agreement and settling all claims between them, that Mawhinney's claim in the Lawsuit for Wrongful Termination in Violation of Public Policy

is preempted by 49 (*sic*) U.S.C. § 42121 ("AIR21"), and that the claims remaining in the Lawsuit for Defamation, Intentional Infliction of Emotional Distress, and Public Disclosure of Private Facts seek only damages for emotional distress and similar tort-type damages, and not for lost wages. In view of that recognition, the Parties agree that the amount being paid Plaintiff does not constitute wages and American Airlines will not withhold any sums from this amount and will not issue a W-2 Form. American Airlines will issue a Form 1099 as required by the Internal Revenue Service and comply with all reporting requirements. If, at any later date, it is claimed or determined by the Internal Revenue Service or other taxing authority that any sum should have been withheld or that any taxes, interest or penalties thereby determined to be due shall be his sole responsibility and he agrees to indemnify American Airlines, and hold it harmless from and against the assessment of any such taxes, interest, or penalties. ii) Plaintiff agrees that any check(s) described above will be transmitted to his attorney David P. Strauss and that the Released Parties shall have no further obligations with respect to the payment, delivery or disbursal of any consideration due to Plaintiff hereunder. iii) Plaintiff represents that his social security number is (redacted); and David Strauss represents that his law firm's taxpayer identification number is (redacted). The Parties agree that any and all amounts owing as and for Plaintiff's attorney's fees and costs are to be paid solely by Plaintiff and that neither he nor his attorney shall seek nor be entitled to any further amounts as and for attorney fees or costs.

(B) **Reinstatement, Other Consideration and**

Dispute Resolution Mechanism.
i) **Reinstatement**. After execution of this Agreement and after the Parties receive Dismissals with Prejudice of both the Lawsuit and the Administrative Proceeding, and after expiration of all time periods set forth in Paragraph 8 hereof, and further provided the Plaintiff has not exercised any right of revocation of this Agreement, American shall, no sooner than January 6, 2003, reinstate Claimant to his previous position of Aviation Maintenance Technician at its operation in San Diego, California, subject to a favorable result as to legally required fingerprinting and background checks. In the event such results are not favorable, this matter shall still be conclusively resolved and considered settled, and the Agreement shall remain in full force and effect, with the exception that Plaintiff shall have no right of reinstatement. As part of Plaintiff's reinstatement, his union, the Transport Workers Union, has agreed that Plaintiff's American Airlines, occupational, and classification seniority dates shall be deemed to have been uninterrupted for purposes of seniority since July 31, 1989. As part of Plaintiff's reinstatement, American shall restore to Plaintiff his pension seniority date, vacation, holiday and sick leave he would have accrued from March 2, 2001. These amounts are as follows: (1) · Vacation: 35 days through December 31, 2002; (2) Sick: 75 days through December 31, 2002.
ii) **Expungement of Negative Records**. American Airlines shall withdraw all documentation of disciplinary complaints and actions, and expunge all negative or adverse references from Plaintiff's personnel file since December 2000.

iii) **Rights, Privileges and Obligations of Employment**. Except as specifically set forth in Subparagraph 5(B)(iv) of this Agreement, and upon his reinstatement to employment at American Airlines, Plaintiff shall enjoy and be entitled to all the normal rights and privileges of an American Airlines employee, including those afforded to him under any Collective Bargaining Agreement which may govern his employment. Similarly, and except as specifically set forth in Subparagraph 5(B)(iv) of this Agreement, Plaintiff shall be subject to and governed by all American Airlines obligations, rules, policies and procedures applicable generally to American Airlines employees, including those contained in or promulgated pursuant to any Collective Bargaining Agreement which may govern his employment.

iv) **Dispute Resolution Mechanism.** a) Grievance Under Collective Bargaining Agreement. In the event of any dispute between the Parties which may be the subject of a grievance under any Collective Bargaining Agreement governing Plaintiff's employment, Plaintiff and his bargaining unit representative may utilize the grievance and System Board of Adjustment mechanism set forth therein.

b) **Private Arbitration**. (i) In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the Released Parties, and their past, present or future officers, directors, employees, agents and representatives) involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses

not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court. The arbitration process shall commence by a Party to the Agreement submitting to the other Party a written request for arbitration within the time limits that would otherwise be applicable to the claim being asserted, The arbitrator shall be empowered to determine whether any such demand is timely. If the parties are unable to agree on a neutral arbitrator, they shall obtain a list of arbitrators from the American Arbitration Association, and select an arbitrator from said list. The arbitrator shall be bound by the arbitration procedures set forth in the Model Employment Arbitration Procedures of the American Arbitration Association, including the requirement for a written decision. Each party shall bear his or its own attorney's fees and costs except that American shall bear the cost of the arbitrator and any other costs unique to arbitration as opposed to litigation. The arbitrator shall have the authority to order any legal and or equitable relief or remedy which would be available in a civil or administrative action on the claim. ii) American Agrees that, in any such Private Arbitration, it will not assert as a defense thereto an argument that the claim should have been brought before a System Board of Adjustment pursuant to the Railway Labor Act 45 U.S.C. § 151 et seq., and is thereby preempted. iii) Pursuant to the provisions of California law, nothing in this Agreement shall

affect California Labor Commissioner Claims, workers compensation benefits claim, or the ability of either party to seek appropriate interim injunctive relief pursuant to the California Code of Civil Procedure before or while arbitration proceedings are pending. If any court of competent jurisdiction declares that any part of this Dispute Resolution Mechanism subparagraph is illegal, invalid, or unenforceable, such declaration will not affect the legality, validity, or enforceability of the remaining parts of this Agreement, and illegal, invalid, or unenforceable parts will no longer be part of this Agreement.

6. **Dismissal of Lawsuit and Administrative Proceeding**. Within five (5) business days following the execution of this Agreement, the Parties shall file with the Court a Request for Dismissal with Prejudice, a copy of which is attached as Exhibit A. In addition, the Parties will move to dismiss Plaintiff's Administrative Proceeding with Prejudice within five business days following execution of this Agreement. Until and unless both the Lawsuit and the Administrative Proceeding are Dismissed with Prejudice, neither American Airlines nor any of the Released Parties shall be obligated to provide any of the consideration called for under this Agreement. If both the Lawsuit and the Administrative Proceeding are not Dismissed with Prejudice, this Agreement shall be null and void.

7. **No Assignment of Claims**. Plaintiff represents that, except for his attorneys' fee agreement with David P. Strauss, he has not made, and will not make, any assignment of any claim, cause or right

of action, or any right of any kind whatsoever, embodied in any of the claims and obligations that are released herein, and that no other person or entity of any kind, other than Plaintiff, had or has an interest in any claims that are released herein. Plaintiff agrees to indemnify and hold harmless each and every one of the Released Parties from any and all claims, demands, expenses, costs, attorneys' fees, and causes of action asserted by any person or entity due to a violation of this non-assignment provision.

8. **Specific Waiver and Release of ADEA Claims**. This Agreement extends to all claims of whatsoever type or nature, including but not limited to any possible claim under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-635, as amended by the Older Worker's Benefit Protection Act ("OWBPA")(Pub. Law, 101-433, 104 Stat. 978), which among other things, establishes minimum standards for validity of waivers of claims under the ADEA. With respect to the waiver of any ADEA claim, Plaintiff states: (A) This waiver is knowing and voluntary on his part; (B) This Agreement is clear and understandable to him and he needs not further time to considerate; (C) He understands that this waiver applies only to right or claims arising on or before the date he signs this waiver (set forth below); (D) In return for this waiver and all others set forth herein, he is receiving and will receive consideration as set forth herein; (E) He has been advised in writing to consult an attorney before signing this waiver; (F) He has been given a period of at least 21 days to consider this waiver; and (G) He understands that he may revoke his waiver of

any claim under the under the ADEA at any time within a period of 7 days after execution of this Agreement, and that his waiver of any claim under the ADEA is not enforceable until such revocation period has passed. The Plaintiff represents and warrants that he has not assigned any such claim or authorized any other person or entity to assert any such claim on his behalf. Further, the Plaintiff agrees that by the Release, he waives any claim for damages incurred at any time after the date of this Release because of any possible continuing effects or any alleged or unalleged acts or omissions involving the released parties that occurred on or before the date of this Agreement, and any right to sue acts or omissions that occurred before the date of this Agreement.

9. **Confidentiality**. Plaintiff and his undersigned attorney represent and warrant that they have not disclosed the existence of, or any details regarding this Agreement, including the amount of the cash payment, to any person or entity with the sole exception of Plaintiff's immediate family, his attorney, and/or his accountant and that they will not do so at any time in the future unless compelled by law or court order. Plaintiff further agrees that the Released Parties would be irreparably harmed by any actual or threatened violation of this paragraph and that the Released Parties shall be entitled to an injunction prohibiting Plaintiff from committing any such violation. The Parties further agree, in view of the difficulty of measuring the damages suffered by American in the event of a breach by Mawhinney of this provision, to liquidate damages in the (redacted). Alternatively, American may in such a proceeding seek (redacted), but it

may not seek both liquidated damages and attorneys' fees and costs. In the event American initiates an arbitration proceeding to enforce this confidentiality provisions but is unsuccessful, it shall pay Mawhinney's reasonable attorney's fees and costs. If Plaintiff is asked about the Lawsuit, he may answer, "I prefer not to talk about it." This paragraph extends to and includes the existence of the terms of this Agreement, and to any consideration exchanged in this Agreement, and to any consideration exchanged thereunder.

10. **Consideration Acknowledged**. The Parties hereby acknowledge that the covenants in this Agreement provide good and sufficient consideration for every promise, duty, release, obligation and right contained in this Agreement.

11. **Entirety of Agreement**. Plaintiff affirms that this Agreement constitutes the entire agreement between the Parties; that no other promise or agreement of any kind has been made to or with him by any person or entity to cause him to execute this instrument.

12. **Consultation with Attorney**. Plaintiff represents and acknowledges that, not only is he fully aware of his right to discuss any and all aspects of this Agreement with his attorney David P. Strauss, but that he has, in fact, discussed the terms of this Agreement with said attorney, including its final and binding effect. Plaintiff further represents and acknowledges that he has carefully read and fully understands each any every terms of this Agreement, that he does not rely and has not relied upon any statement made

by any of the Released Parties or their agents, representatives or attorneys with regard to any aspect of this Agreement, including its effect, and that he is voluntarily entering into this Agreement.

13. **Reasonable Time to Review**. Plaintiff further represents and acknowledges that he has been given a reasonable and sufficient time within which to review and consider this Agreement.

14. **Waiver of Attorney Fees**. The parties agree that each party shall bear his or its own costs and attorneys' fees.

15. **Severability**. The provisions of this Agreement and Release are severable, and if any part of it is found to be unenforceable, the other provisions shall remain fully valid and enforceable.

16. **Law Governing**. This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed by and under the laws of the State of California.

17. **Venue**. The Parties agree that venue in any action to enforce any provision of this Agreement or for breach of this Agreement shall be in San Diego, California. 18. Parties Bound. This Agreement shall be bind upon and inure to the benefit of the Parties, their respective heirs, successors and assigns.

Dated this 17 day of December, 2002

s/ Robert Steven Mawhinney, For (Petitioner)
s/ David P. Strauss, For (Strauss & Asher)

s/ Enza Ricciadone, For (American Airlines. Inc,)

U.S. Department of Labor, Office of
Whistleblower Protection Program
Case : OSHA 9-3290-12-001 (2002-AIR-013)
Title: *Mawhinney v. American Airlines, Inc.*
Letter from Director of the OWPP
to RSMawhinney

Date: Apr. 11, 2012

Dear Mr. Mawhinney:

Thank You for your correspondence dated March 30, 2012, to Secretary of Labor Hilda L. Solis, in which you requested a status update concerning the whistleblower complaint you filed with the Occupational Safety and Health Administration (OSHA). Your letter was referred to the Office of Whistleblower Protection Program for response.

Our records indicate that on October 5, 2011, you filed a whistleblower complaint against American Airlines under AIR21 with OSHA San Francisco Regional Office. We understand that OSHA's investigation of your complaint was delayed due to voluntary arbitration of your claim with your former employer ... Nonetheless, OSHA's investigation of your case has resumed, and the investigator assigned to your case, Mr. Wu, has been in contact with you, most recently via email on April 2, 2012.

We have forwarded your correspondence to San Francisco Regional Office. If you have any additional concerns or questions, please contact that office directly at:

Ms. Gail Hudspeth, Acting Regional Administrator,
USDOL – OSHA....

We appreciate the opportunity to be of service to you.

Sincerely,

s/ Sandra Dillon, Director
Office of Whistleblower Protection Program

U.S. Department of Labor, Occupational
Health and Safety Administration (OSHA)
Case : 9-3290-12-001 (2012-AIR-017)
Title: *Mawhinney v. American Airlines, Inc.*
Letter from American Airlines, Inc.
to DOL OSHA Investigator, Mr. Blake Wu

Date: May 11, 2012

Summary

American, by its very nature, is a safety-related business. American knows that what it does means nothing if its passengers do not arrive at their destination safely. Therefore, it both encourages and expects its employees to raise any safety-related concerns they may have so that such concerns may be investigated and resolved without fear of reprisal or retaliation. And Mr. Mawhinney knows this.

As important as planes are to what American does, however, nothing is more important to its mission of safe travel than the people who make what it does possible. Planes don not fly themselves, nor do they fix themselves. People do. And so maintain a work environment in which people can do there jobs, and do them well, is itself important to American's mission of providing safe travel.

In airplane maintenance, the Crew Chief position is critical and acts as a hub of activity. That person is

a central nexus through which mechanics, operations, and management all connect. Although not management themselves, Crew Chiefs are leaders and tone-setters. They drive the maintenance operations on any given shift....

s/ Robert J. Hendricks, Esq.,
American Airlines, Inc.,

U.S. Department of Labor, Office of Administrative Law Judges

Case: 2012-AIR-017

Title: *Mawhinney v. American Airlines, Inc.*

Letter from American Airlines, Inc. to ALJ Paul C. Johnson, Jr.

Date: March 10, 2014

Dear Judge Johnson,

This office represents American Airlines in the above referenced matter. This is American's response to the recently issued Order to Meet and Confer to further the scheduling of the proceedings in this matter....

Given the anticipated nature of Mr. Mawhinney's claims in the pending arbitration, American Airlines respectfully submits that the hearing on Mr. Mawhinney's AIR21 claims should proceed first in order to avoid duplication and potentially conflicting resolution of duplicate claims. Accordingly, American Airlines submits the following requested information.

Proposed hearing date: June 23, 2014.

Location: ....

Respectfully submitted,

s/ Robert Jon Hendricks, Esq.,

American Airlines, Inc.

STATUTES and CONSTITUTIONAL PROVISION

5 U.S.C. § 554 provides, in pertinent part:

"Adjudications -

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing ...."

9 U.S.C. § 1 provides, in pertinent part: ("FAA"),

"'Maritime transactions' and 'commerce' defined; exceptions to operation of title -

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of

workers engaged in foreign or interstate commerce."

28 U.S.C. § 1361 provides, in pertinent part:

"Action to compel an officer of the United States to perform his duty -

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

49 U.S.C. § 42121 provides, in pertinent part:[1]

"Protection of employees providing air safety information -

(a) Discrimination against airline employees. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1)Provided, cause to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal

---

[1] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR21").

Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(2)Has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(3)Testified or is about to testify in such a proceeding; or

(4)Assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.

(1)Filing and Notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint,

of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2)Investigation; preliminary order.

(A) In general. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such

hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review....

(c) Mandamus – Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code...."

Article III – U.S. Constitution, in pertinent part:

"Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States ... to all cases of admiralty and maritime Jurisdiction ... to Controversies to which the United States shall be a party ....

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make ...."