No. _____

In The
Supreme Court of the United States

DARREN KOSSEN,

Petitioner,

v.

ASIA PACIFIC AIRLINES;
U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Did the ALJ, ARB and the 9th Circuit turn on its head AIR 21 law on burdens of proof by requiring a whistleblower to prove causation by a "preponderance of evidence" when it has always been only meet the prima facia burden by "any circumstantial evidence" and then the burden shifts to the employer's much higher burden of proof by "clear and convincing evidence" that the employer would have fired him anyway having nothing to do with his whistleblowing?

2. Is a federal administrative hearing ALJ bound by res judicata/law of the case/pre-emption at the trial by an unappealed state decision against an employer on the central issue between the same parties?

3. Does publication and admission of a deposition into evidence at a trial also admit into evidence exhibits numbered, provided at, and discussed during the deposition, if not specifically excluded by the judge or introducing party at the trial?

4. Should federal administrative hearings allow liberal admission of relevant evidence?

5. Does the AIR-21 lawsuit statute of limitations toll for whistleblowers passed over for promotions in favor of new, unqualified, and uncertified employees when the employer has rolling hiring/promoting anytime employer promotions, because the whistleblower is passed over every time and only the last time ends the tolling?

II. PARTIES TO THE PRECEDING

Petitioner is a single man; US Dept of Labor is a government agency; and APA is a non- governmental for profit corporation.

III. STATEMENT OF RELATED CASES

Kossen v. APA, 21-71346 9th Circuit COA Order Denying Motion for Reconsideration En Banc 9/5/2023

Kossen v. APA, 2019-AIR-00011 ARB Order Denying Reconsideration and Motions to Reopen the Record 10/28/2021

Kossen v. APA, 2019-AIR-00011 ALJ Order Denying Motion for Relief 12/2/2020

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IV. PETITION FOR A WRIT OF CERTIORARI

Darren Kossen petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

V. OPINIONS BELOW

Kossen v. APA, 2019-AIR-00011 ALJ Order Denying Motions 6/3/2020

Kossen v. APA, 2019-AIR-00011 ALJ Decision and Order Denying Complaint 11/9/2020

Kossen v. APA, 2019-AIR-00011 ALJ Order Denying Motion for Relief 12/2/2020

Kossen v. APA, 2019-AIR-00011 ARB Decision and Order 8/26/2021

Kossen v. APA, 2019-AIR-00011 ARB Order Denying Reconsideration and Motions to Reopen the Record 10/28/2021

Kossen v. APA, 21-71346 9th Circuit COA Memorandum Denying Petition for Review 4/20/2023

Kossen v.APA, 21-71346 9th Circuit COA Order Denying Extension of Time 8/1/2023

Kossen v. APA, 21-71346 9th Circuit COA Order Denying Motion for Reconsideration 8/3/2023

Kossen v. APA, 21-71346 9th Circuit COA Order Denying Motion for Reconsideration En Banc 9/5/2023

VI. JURISDICTION

The Court of Appeals entered a Memorandum Denying Petition for Review on April 20, 2023. App. 51-58. The court denied Reconsideration on August 3, 2023. App. 60. The court denied Motion for Reconsideration En Banc on September 5, 2023. App. 61. This Court has jurisdiction under 28 U.S.C. § 1254(1).

VII. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves interpretation of statutory AIR 21 law, the Administrative Procedures Act, and constitutional due process clause rights.

VIII. INTRODUCTION AND STATEMENT OF THE CASE

Darren Kossen was a pilot of a B-757 for APA and was fired on 1-11-18; when he was fired by APA, Kossen was an undisputed protected whistleblower under AIR-21. The whistleblowing centered on APA systematically hiring and operating illegal and unqualified pilots as captains and falsifying pilot hours of its other pilots to keep labor costs down and cheaper Captains. Kossen met all prima facie requirements for AIR-21 protection.

Kossen was a whistleblower to FAA for APA reporting the dangerous and illegal operations to FAA of unqualified pilots acting as Captain that violates the Congressional Safety Act of 2010 and was illegally

adversely affected by APA and constructively terminated, passed over for captain vs unqualified, uncertified candidates and then re-employed on condition he not go to his other airline offered job, fired the same day FAA interviewed pilots in the investigation and had directed APA to fire him for whistleblowing. Then APA provided false pilot records to his next employer and adversely acted against Kossen with several other employers. These actions are in violation of AIR-21 law. Kossen has clear and convincing evidence of prima facia violations and APA has no evidence (let alone required clear and convincing) that all its adverse actions were for reasons other than have to do with whistleblowing because all management at APA said his employment record was perfect.

On August 26, 2021, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") Decision and Order holding that Kossen failed to establish a prima facie case that APA discriminated against him, violating AIR-21. Kossen filed a petition for review of the Board's decision with this Court on 10-22-21, under 49 U.S.C. § 42121(b)(4)(A).

On 4-20-23, the 9th Circuit denied Kossen's Petition for Review of ARB's 8-26-19 decision. The 9th Cir panel ruled that their only role is to see if there is sufficient evidence to support the ALJ's decision, and if so, that it is the end of it regardless of what errors the ARB made. This is an error, and specifically, here, the panel did not make any findings of specific "substantial

evidence," failed to do a de novo review, and failed to follow AIR-21 law that Kossen only had to make **a prima facie case** from all the real undisputed evidence, then the burden shifts to APA to prove by clear and convincing evidence that the actions were unrelated to whistleblowing. The ALJ, ARB, and the panel were required to find that the "substantial evidence" found by them was **clear and convincing evidence** presented by APA to support their decisions. This never happened here. All three levels of decisions were riddled with errors of fact and law (the panel stated in the conclusion that it never reached conclusions of law, only conclusions of fact. ALL of which were erroneous) and APA had no evidence of any weight to support it, let alone clear and convincing evidence.

The panel is wrong on the law and this must be corrected by the En Banc hearing. " . . . The ARB does not review the ALJ's factual findings de novo . . . " Panel Decision at 3.

That is absolutely wrong. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 09-032, ALJ Nos. 2008-STA-20&21 (ARB 6-30-10):

> "In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "**all the powers [the Secretary] would have in making the initial decision**. . . ." *5 U.S.C.A. § 557(b)*

(West 1996). See also *29 C.F.R. § 1978.109(b)*. ***Therefore, <u>the Board reviews the ALJ's conclusions of</u>***

law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991)."

The ARB erred and did not do a de novo review here, and was silent on everything that had to be reviewed de novo. This requires them to review the facts and decide anew as if for the first time. This was not done here.

2. The Panel erred in Applying AIR-21 burdens of proof Putting preponderance of evidence on Kossen.

> **9th Circuit Panel at 3:** . . . whether the ARB legally erred in concluding that ***Kossen failed to prove causation by a preponderance of the evidence***."

This error mantra was repeated again at 5, 7, 8-9.

This is absolutely untrue. Under *Palmer* and all the other AIR-21 cases, the whistleblower only has to show a prima facie case only, and then the burden of proof shifts to the employer to prove by the burden of clear and convincing that the adverse action against the employee had nothing to do with him being a whistleblower. The Panel missed the entire purpose of AIR-21 to protect whistleblowers and to give them the low burden because they are fired and have no documents and witnesses who are all with the employer and typically unemployed and without counsel.

IX. REASONS FOR GRANTING THE PETITION

The issue presented in this case involves a genuine and current conflict between the 9th Circuit Court of Appeals and all other Circuits that is significant and substantially important because it will determine the application of AIR21 burdens of proof of whistleblowers and employers.

Furthermore, the Ninth Circuit opinion created a Circuit split regarding the proper standard of appellate review in such cases by the ARB, who here made no analysis and findings and conclusions of law and instead only "rubberstamped" those of the ALJ in one sentence.

The 9th Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The 9th Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, regarding their refusal to recognize and be bound by the State of Hawaii decision on these facts that the employer and whistleblower agreed to the rescission of his resignation and actually terminated him long after staying with the employer and rejected the employer's pretext allegation

that the resignation was not rescinded by agreement and that the employer could accept the resignation at any time of its choosing months later.

1. REASONS TO REVERSE 9TH CIRCUIT PANEL DECISION DENYING REVIEW OF ARB AND ALJ DECISIONS AND ORDERS.

Four reasons to accept review and reverse the 9th Circuit Panel Decision to deny Kossen's petition for review are:

> 1. ALJ, ARB, and 9th Circuit are wrong and in conflict with all other ALJ, ARB and all other Circuits in applying The AIR 21 burdens of proof placed upon the parties by statute and settled case law in ruling that whistleblower Kossen did not meet his prima facie case with all the smoking gun evidence and circumstantial evidence under said established law, placing upon APA the burden of proving by "clear and convincing" evidence that APA would have fired him for other reasons having nothing to do with whistleblowing. The 9th Circuit turns AIR 21 law burdens of proof on its head by requiring clear and convincing proof from the whistleblower and presumption of non-adverse actions for the employer. All the lower courts ignored Kossen's clear and convincing evidence and the fact that the Employer had no evidence supporting its termination of the whistleblower.
>
> 2. The ALJ abused discretion of evidentiary weight, failing to follow the liberal rules of

allowing evidence at the ALJ Hearing per Admin. Procedure Act and per AIR-21 Law; and the 9th Circuit is just plain wrong and contrary to ALL Circuits and state courts when ruling that depositions admitted into evidence automatically do not include admission of the deposition exhibits.

3. The ALJ disregarded the precedent and opinion of Hawaii State, **that Kossen rescinded his resignation**, and **was terminated by APA** (ER1308-1312CX42p163-167). In conflict with all other circuits, the 9th Circuit must recognize this Hawaii State ruling.

4. ALJ abused his discretion by giving full credibility to APA in its shifting explanations of firing, failure to promote, and blacklisting, contrary to all the evidence.

2. STANDARD OF REVIEW

The 9th Circuit Panel is wrong on the law. Panel Decision at 3. " . . . The ARB does not review the ALJ's factual findings de novo . . . " That is absolutely wrong. To do the required de novo review of prior conclusions of law [*Beatty v. Inman Trucking Management, Inc.*, ARB No. 09-032, ALJ Nos. 2008-STA-20&21 (ARB 6-30-10)], one must review factual findings from the evidence. The ARB erred and did not do a de novo review here and was silent on everything that had to be reviewed de novo.

The 9th Circuit Panel erred, stating right before the end of the decision, that the 9th Circuit Panel was

NOT reviewing the ARB Conclusions of Law and would not do a de novo review of them. That is the job.

In *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) the ARB held it is so rare that whistleblower finds documentary evidence of retaliation that the burden of proof is appropriately correspondingly so low that *any* contributing factor (NOT requiring that the factor be predominant) supports ruling for the whistleblower. **On the other hand, the ARB held that an employer's burden is HIGH and must prove by clear and convincing evidence that employer's ONLY reason for taking an adverse action was for a legitimate, non-retaliatory reason having nothing to do with the whistleblowing AND that the employer would have taken the action had there been no whistleblowing.**

> In whistleblower cases. evidence is typically in the possession of the employer and direct evidence of retaliation for whistleblowing is rare. As the legislative history of the 1992 ERA amendments demonstrate, Congress unambiguously sought to benefit whistleblowers by altering the existing burdens of proof.[91] Proof by a complainant of the elements of a prima facie case of retaliation by a preponderance of the evidence, including proof of "contributing factor" causation, shifts to the employer the burden of proving by "clear and convincing evidence" not only the existence of a legitimate, non-retaliatory basis for the contested personnel action but that the employer

> would have taken the contested action on that basis *alone*[1] had the complainant not engaged in protected activity. *Id.*
>
> Ftn 91: . . . the element of "contributing factor" causation may be *inferred* by proving *knowledge* and close *temporal* proximity between the protected activity and the adverse action. These favorable presumptions benefiting the whistleblowing employee are warranted. by the compelling public policies which inform the respective substantive laws.
>
> . . . "Thus, Congress chose extraordinary measures for protecting extraordinary public policies such as averting *airliner crashes.* That extraordinary means includes *separating contributing factors from the predominant factors for decision*." . . . *Id*.

In *Palmer v. Canadian National Railway*, ARB No. 16-035 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), the ARB considered how to interpret the FRSA's burden-of-proof provision. They ruled FRSA incorporates by reference the **AIR21 standard of proof**. In *Palmer*, the Lead Opinion of the ARB held:

> . . . Importantly, if the ALJ believes that the protected activity *and* the employer's non retaliatory reasons both played a role, **the analysis is over and the employee prevails on the contributing-factor question**.

> . . . **the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's non retaliatory reasons.** ***As long as the employee's protected activity played SOME role, that is enough.*** But the evidence of the employer's non retaliatory reasons must be ***considered*** alongside the employee's evidence in making that determination; for if the employer claims that its non retaliatory reasons were the ***only*** reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. ***But, the ALJ NEVER needs to compare the employer's non retaliatory reasons [Ed. note: such as CRM or makeup allegations that a rescinded long passed resignation date of 12/6/17 means that the resignation was still open for APA to accept 1-11-18 when FAA came down hard on its falsifying credentials/hours of pilots as in this case] with the employee's protected activity to DETERMINE WHICH IS MORE IMPORTANT in the adverse action.***

The Whistleblower ONLY has a burden to make a prima facie case to prove with **circumstantial evidence** that the Employer had KNOWLEDGE of the protected activity (Kossen's FAA report of illegal captains) and **TEMPORAL PROXIMITY** for Adverse Action against Whistleblower.

Under public interest underlying AIR-21 and analogous whistleblower statutes, the **contributing factor standard** is satisfied by evidence of "any factor

which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 158 (3d Cir. 2013). To satisfy his initial burden, the Complainant need only show that protected activity contributed to the adverse personnel action. *Palmer*. Any amount of causation will satisfy this standard. *Id. All the above evidence satisfies causation.*

ALJ's irrational denial of evidence, nonacceptance of Kossen's "clear and convincing" evidence, and failure to rely on Kossen's mountains of circumstantial evidence were contrary to AIR-21. ALJ and ARB and the 9th Circuit know that direct evidence of a retaliatory motive is "rare" and circumstantial evidence meets Kossen's prima facie case burden, shifting to APA to prove by clear and convincing evidence that they would have fired him for some other reason.

The 9th Circuit failed to uphold the review of evidence in a manner prejudicial to aviation safety. The ALJ's actions harmed whistleblowers and aviation safety by not adhering to the relaxed rules of evidence and failing to allow evidence for impeachment of testimony as permitted. *Calmat*, at 1122.

ALJ, ARB, and the 9th Circuit ignored the retaliation, reasoning APA employees involved are in self-preservation mode, facing termination and FAA credential revocation.

Despite Kossen presenting evidence, he was deemed less credible than APA, who APA claimed replaced him

with two pilots hired months **BEFORE** Kossen's resignation. The ALJ's credibility rulings favored APA, showing a bias in their favor.

3. ALJ, ARB, AND 9TH CIRCUIT PANEL ERRED IN APPLYING AIR21 BURDENS OF PROOF FOR WHISTLEBLOWER'S PRIMA FACIE CIRCUMSTANTIAL EVIDENCE, BUT HERE KOSSEN'S DOCUMENTED EVIDENCE IS CERTAINLY BEYOND "SUBSTANTIAL EVIDENCE" STANDARD VERSUS APA'S MUCH HIGHER BURDEN OF PROOF OF "CLEAR AND CONVINCING" EVIDENCE THAT APA WOULD HAVE FIRED HIM ANYWAY HAVING NOTHING TO DO WITH HIS "WHISTLEBLOWING" AND THEY FAILED TO ANALYZE APA'S LACK OF DOCUMENTARY EVIDENCE.

Panel Decision at 3:

> . . . whether the ARB legally erred in concluding that ***Kossen failed to prove causation by a preponderance of the evidence***.

This error mantra was repeated again at 5, 7, 8-9.

This is absolutely untrue. Under all AIR-21 cases, the whistleblower only has to show a prima facie case, and then the burden of proof shifts to the employer to prove by the burden of "clear and convincing" that the adverse action against the employee had nothing to do with him being a whistleblower. The 9th Circuit Panel

missed the entire purpose of AIR-21 to protect whistleblowers and to give them the low proof burden because they are typically unemployed and without counsel and fired and have no documents and witnesses, who are all generally afraid to go against their employer.

In *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) the ARB held it is so rare that a whistleblower finds documentary evidence of retaliation that the burden of proof is appropriately correspondingly so low that ***any contributing factor*** (NOT requiring that the factor be predominant) supports ruling for the whistleblower. **On the other hand, the ARB held that an employer's burden is HIGH and must prove by "*clear and convincing*" evidence that employer's *ONLY reason for taking an adverse action was for a legitimate, non-retaliatory reason having nothing to do with the whistleblowing AND that the employer would have taken the action had there been no whistleblowing*.**

APA's burden was to prove with clear and convincing evidence they would have fired him for some reason not in any way having to do with his whistleblowing – a very tall order for APA to meet because APA admitted that Kossen had absolutely nothing bad in his employment record **(FreemanER2584-HT691; FergusonER2536-HT643; BrownER2642-HT748; YoderER2420-HT528; KossenER2034-HT151)** and he had flown more hours than anyone else in the prior year.

In Palmer v. Canadian National Railway, ARB No. 16-035 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), the ARB considered the **AIR21 standard of proof**. In *Palmer*, the Lead Opinion held:

> . . . Importantly, if the ALJ believes that the protected activity *and* the employer's non retaliatory reasons both played a role, **the analysis is over and the employee prevails on the contributing-factor question.**
>
> . . . **the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's non retaliatory reasons.** ***As long as the employee's protected activity played SOME role, that is enough.***

The Whistleblower ONLY has a burden to make a prima facie case to prove with **circumstantial evidence** that the Employer had **KNOWLEDGE** of the protected activity (Kossen's FAA report of illegal captains, undisputed here and found by the ALJ), **TEMPORAL PROXIMITY, PRETEXT, SHIFTING EXPLANATIONS FOR THE ADVERSE ACTION, etc** for there to be found an adverse action against Whistleblower.

4. THE COURTS FAILED TO APPLY THE "ANY CONTRIBUTING FACTOR" LAW OF AIR 21, HERE.

The ALJ overlooked the significance of the **any contributing factor** standard of evidence, which Kossen fulfilled by demonstrating ***any*** factor that impacts the decision's outcome **alone** or in conjunction with other factors. *See Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 158 (3d Cir. 2013).

A. CIRCUMSTANTIAL EVIDENCE OF *ANY* CONTRIBUTING FACTOR: TEMPORAL PROXIMITY

Temporal proximity typically fulfills burden of establishing prima facie knowledge and causation. 29 C.F.R. § 1979.104(b)(2). Temporal proximity's probative impact remains applicable despite protected activities occurring several months before adverse actions. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 12-13. Kossen's extended employment at APA long after the effective resignation date implies an agreement to stay. ALJ, ARB, and the 9th Circuit Court failed to shift the burden of proof to APA, as Kossen's termination by APA within hours of the 1-11-18 FAA grilling of APA pilots for false hours met his prima facie burden and to prove by clear and convincing evidence that it would have fired him for reason other than whistleblowing. It gave none.

B. CIRCUMSTANTIAL EVIDENCE OF *ANY* CONTRIBUTING FACTOR: PRETEXT

APA's reliance on circumstances surrounding Kossen's termination, after the FAA investigation and well after his rescinded resignation meets the ***pretext reason for a prima facie case***. The FAA grilling of pilots on the termination day provides substantial **evidence of pretext**. *See*, *e.g.*, *NLRB v. Howard Baer*, 1996 U.S. App. 42533, *17-18 (6th Cir. 6-26-96). APA made up the whacky reason for firing Kossen in its termination letter that his resignation many weeks before staying with APA was simply **pretext** to cover their real desire to simply fire him because of all the problems he brought down on them with the FAA. The other reasons, without factual basis, of having already hired pilots after his withdrawn resignation (wrong) and that he was leaving for Empire anyway (wrong) simply are false **pretexts**.

C. CIRCUMSTANTIAL EVIDENCE OF *ANY* CONTRIBUTING FACTOR: APA'S SHIFTING EXPLANATIONS

"Circumstantial evidence may include . . . **shifting explanations for its action** . . . the falsity of an employer's explanation for the [unfavorable personnel] action taken, and **a change in the employer's attitude toward the complainant after [engaging] in protected activity.**" *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 at 7 (ARB Feb. 29, 2012).

APA's ***shifting FALSE explanations for firing Kossen confirm that the firing was based on pretext: He was going to leave 12-31-17 – NO: he was on work schedules into 2-2018*** (ER1436-1438CX65p330-332); APA hired too many other unqualified pilots AFTER Kossen resigned – NO: the two pilots were hired and did their FAA checkride flights before Kossen's resignation (see below); Kossen was actually going to Empire 1-2018 – NO: that job as Captain was given up when Kossen accepted APA's offer to stay indefinitely (see below).

Despite Kossen presenting document evidence, he was deemed less credible than APA. ***APA's credibility was under far greater pressure at the ALJ Hearing to justify Kossen's firing because it acted against him when APA was facing a total shutdown by FAA because of Kossen's whistleblowing coming to a head in the peak flight freight season of Christmas 2017*** and APA had been warned about this problem of false hours for nearly a year.

5. ALJ ABUSED HIS DISCRETION AND FAILED TO FOLLOW STATUTES AND RULES DUTIES TO LIBERALLY ALLOW ALL RELEVANT EVIDENCE AND ARB AND 9th CIRCUIT PANEL ERRED IN NOT CORRECTING THIS.

Formal Rules of Evidence do not apply in hearings under the APA. *Huckman v. US Airways*, 1-16-20ARBDOP9:

> Furthermore, formal rules of evidence are expressly rejected under the AIR 21 regulations. (here 29 C.F.R §1979.107(d) ("Formal rules of evidence shall not apply . . . "). The applicable regulations instead provide that ALJs shall apply "rules or principles designed to assure production of the most probative evidence."

The 9th Circuit Panel and ARB findings that it was proper ALJ discretion to exclude the emails proving APA agreed to Kossen's rescission of resignation (because the ALJ in error thought they were late disclosed by Kossen when they were actually late disclosed by APA – see below), and in clear conflict with, are contrary to AIR 21 and its case law. This is the opposite of the law allowing for liberal admittance of evidence to get to justice and the merits. First, the emails were not late disclosed by Kossen, but the parties themselves allowed APA to bring these APA long-before produced emails with APA Bates numbers into both parties their ALJ Hearing exhibits because this is because the emails were in Kossen's deposition APA took and introduced as Exhibit late. And just before the ALJ Hearing, APA counsel Pixley emailed Budigan for permission to add all the Kossen deposition Exs to the RX11 deposition or in RX12 because APA just erred and forgot to give them earlier in trial Exhibits. Of course, Budigan agreed to all APA Exhibits. After all, they were known for years and are central to the case. ER2843:

Pixley wrote:

Bill:

For unknown reasons, **the Deposition Exhibits introduced during the deposition of Darren Kossen on July 10, 2020,** which were provided to you by email prior to the deposition, were not annexed to the transcript of his testimony. I am attaching these Exhibits. I intend to use them as **Exhibit RX-12**.

Steve

Budigan responded:

Steve:

Thanks for the exhibits.

I assume we have agreement on admissibility of all my exhibits and all yours.

Bill

A. THE ALJ, ARB AND 9TH CIRCUIT PANEL ERRED IN EXCLUDING THE 12-6-17 EMAILS AS NOT AUTHENTICATED.

Kossen was a party to the emails and authenticated them.

APA's Freeman denying having seen his own email, with Freeman's own ICON on the email and denying it when it had APA's own Bates stamp (APA provided it in discovery) is simply NOT a reasonable basis for the ALJ abusing his discretion excluding them. ALJ saying ruling that APA Freeman could not

authenticate his own emails because Freeman claimed he had never seen his emails (ER-26DO14) is an abuse of reasonable discretion – these emails were produced by APA in discovery and just because a witness does not review with his attorney one of five documents in the entire case that determines the outcome of the case, does not mean he has never seen it. The ALJ was absolutely wrong to exclude the emails from Freeman because he did not remember them in the face of APA providing them and allegedly never showing Freeman his email that was the crux of the Kossen deposition. Everything about them had indicia of authenticity and the source was fully known. (ER-339-341Appendix4p14-16, ER-279-284CX109p68-72 and quoted in ER-1310CX42p167, ER-2858-2860RX11sub-EX8, RX-12 APA Bates639 and documented every instance in Kossen's 9th Circuit Brief section "D, 1-8" pages 25-36).

Kossen was party to all the emails and authenticated them as written by him or received by him in clear response to an email written by him. No one alleged they were inauthentic in any way.

They also included APA management as "CCs" on several APA email addresses, proving APA did not make these up and produced them over and over again in the 1500 pages of discovery from multiple employee's files. APA took the Kossen deposition and never questioned the authenticity of the emails APA introduced itself at the deposition. **Nothing supports the ALJ's, ARB or 9th Circuit 9th Circuit Panel's explanation for upholding rejection of**

this evidence – let alone "substantial evidence" supporting ALJ discretionary decision to exclude the emails. There was none.

B. THE 9TH CIRCUIT RULING THAT ALL EXHIBITS TO A DEPOSITION THAT WAS ADMITTED INTO EVIDENCE AT TRIAL ARE PRESUMED NOT ADMITTED AT TRIAL IS IN CONFLICT WITH ALL CIRCUITS AND ALL COURTS.

Despite ALJ's best efforts to exclude the "smoking gun" 12/17 emails of APA agreement with Kossen that his resignation that was rescinded and he was staying at APA and therefore there was no termination when months later APA attempted to say they were not firing Kossen and only accepting his resignation and the best efforts of ARB and 9th Circuit just "rubber stamping" approving the ALJ decisions without any analysis of the findings or evidence, the fact remains.

The emails are Exhibits to the admitted evidence deposition of Kossen. 9th Circuit Panel is absolutely incorrect when, for the first time by any courts or administrative bodies, it ruled that " . . . these emails were not part of the record simply because they were exhibits to depositions that were admitted at the hearing." (Panel Decision at 5). The 9th Circuit Panel ruling that exhibits to depositions admitted into evidence are not part of the Record is unsupported by any law, court rule or case law. This is not the law. Depositions always include their exhibits unless specifically excluded by

stipulation of parties or by court order. A deposition discussing exhibits without having the exhibits cannot make sufficient sense to the trier of fact. To exclude any exhibits from a published deposition offered by agreement of the parties and admitted by the court cannot be done without agreement of parties or ruling of Court specifically excluding some or all exhibits and **that never happened here. The exhibits were quoted and read into the Record at the ALJ Hearing because they were central to the case and Kossen testified at length about them.** Kossen authenticated the email exhibits.

C. ALJ, ARB & 9TH CIRCUIT PANEL ERRED IN REFUSING TO ALLOW NEWLY DISCOVERED EVIDENCE, CONTRARY TO AIR 21 STATUTE ALLOWING FOR LIBERAL ADMISSION OF ALL RELEVANT EVIDENCE IN ADMINISTRATIVE HEARINGS.

9th Circuit Panel Decision at 2:

> "In addition, we cannot examine whether ARB abused its discretion in denying Kossen's motions to reconsider and reopen the record **because Kossen's petition does not challenge these orders**."

This is absolutely untrue and error of the 9th Circuit Panel to find so. In Kossen's Petition to 9th Circuit he stated at 37-41 a long section about the fantastic newly discovered evidence hidden by APA. He

explained that APA withheld newly discovered **FAA reports** on 1-10-18 and on 1-12-18 APA that failed to provide it in discovery, ever. They show his firing at that same time was related to FAA coming down hard on APA.

Kossen had recently at the time of the Petition to the 9th Circuit received over 100-pages of new evidence from FAA of emails from APA employees with FAA and these certainly should have been produced by APA before the ALJ Hearing because all APA-FAA communications about pilot hours were specially requested in discovery. **IMPORTANTLY, it includes an FAA letter dated 1-10-18 (day before Kossen firing–talk about "smoking gun", temporal proximity, pretext, impetus for shifting explanation prima facie adverse action case) to Freeman for compliance action being taken against APA. ALJ, ARB, and the 9th Circuit in error denied any new evidence after the ALJ Hearing. Again, AIR21 law and case law requires liberally admitting of all evidence (Citation above).**

6. COMPARISON OF EVIDENCE OF ADVERSE ACTION: TERMINATION

ALJ ruled in error that anyone who resigns from a horrible job for which they had filed a whistleblower complaint must then have caused their own "supervening" event, precluding arguing adverse actions of constructive or actual termination thereafter are against AIR 21. This is error and totally contrary to AIR 21

protections. Furthermore, ALJ found, without any evidence other than two APA witnesses' word, that the APA agreed he could rescind his 11-22-17 resignation and APA agreed for him to stay only through 12-31-17 and not indefinitely. While Kossen appreciates that ALJ found that there was actually was agreement on the day of resignation was to take effect 12-6-17 (and this is supported by APA Freeman's own testimony that he advised Kossen to stay for his career advancement), the ALJ thinks it was only through 12-31-17 contrary to the parties' arguments (Kossen: staying indefinitely; and APA: ridiculously saying Kossen staying unknown length of time but pending under an open concept that he has resigned, not rescinded his resignation, and APA could accept this resignation at any time it wants. Therefore the firing on 1/11/18 was really just an acceptance of resignation). The ALJ erred and missed the actual contradictory exhibits and evidence of the pilots' schedules having Kossen flying for APA February 2018. No one disputes he was terminated two weeks after 12-31-17, ending that theory of agreement only through 12-17. Hawaii State looked at all these claims and testimony by APA and decided Kossen rescinded resignation, performed and APA terminated him and this is binding here (See below).

Kossen was outed as a whistleblower by Baumler, the FAA inspector who investigated APA and instructed APA to fire Kossen. *(ER1503-CX73)*. (CX73) Email from APA Brown to Freeman dated 12-18-17: "He [FAA Baumler] is trying to wrap up Kossen's complaint tomorrow, not

really to Kossen's benefit. He pretty much came up to 6 the same conclusion as we have regarding Darren. He feels that we should definitely not hang on to him and let him part ways asap." When your FAA inspector, with power over your employees and airline, says fire the whistleblower Kossen, you find a way. APA fired Kossen 1-11-2018, three weeks from this date of email. The above email from FAA was sent in violation of FAA law that any disclosure about Kossen had to be authorized by Kossen: 2150.3B – FAA Compliance and Enforcement Program . . . Document Information. . . . (2) The Privacy Act prohibits FAA investigative personnel [Baumler] from disclosing information contained in an EIR [enforcement investigation report] about an individual [Kossen] to third parties [Brown] without PRIOR WRITTEN AUTHORIZATION from that individual [Kossen]. . . . https://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentid/17213.

TALK ABOUT A SMOKING GUN FOR KOSSEN clearly meeting his prima facie burden of AIR 21 violation.

On the other hand, APA needed to prove by clear and convincing evidence that APA has other reasons to fire Kossen and APA never provided such proof or even argument.

A. ALJ ABUSE OF DISCRETION REGARDING FULL CREDIBILITY TO APA WITNESSES REGARDING: HIRING OF NEW PILOTS AFTER KOSSEN'S RESIGNATION AND REGARDING ULTIMATE TERMINATION OF KOSSEN.

APA had no evidence whatsoever of a reason to fire Kossen or do any of the other adverse actions herein– except for some unsupported oral testimony of some APA employees. APA outright lied to the ALJ about Kossen could not stay at APA after mid-1-18 because APA had hired too many pilots AFTER his 11-22-17 resignation to replace him and therefore did not have a job for him to stay with AOPA as a First Officer or Captain after Mid January 2018 and they had to accept his still open offer of resignation. Lie. The new pilots were already hired **before** his resignation (hired 10-2017 and APA check-rides done 11-16-17; only APA employees can take APA FAA Boeing 757 simulator certification). According to testimony estimates, "the training is around $50,000 to $60,000" (ER1942) for APA B-757 Airline Transport License costs that normally take 2-3 months to complete (ER1452CX65p346 showing Kossen had completed) and yet the ending checkrides for these pilots was on 11-16-17, this is proven by public government knowledge by searching the FAA database of pilots found on public government website (request for judicial notice of this) by putting the first and last name (Sergey Rybakov and Max Griffin) into the Search function and their issues dates will be 11-16-17, before 11-21-17 Kossen resignation.

Yet the ALJ deemed APA credible on this point over Kossen.

Giving full credibility to the APA witnesses was an abuse of discretion. The absence of physical evidence for the agreement to work through a specific date was overlooked. Moreover, the timing of Kossen's termination, coinciding with the FAA investigation on 1-11-18 and complaint, was not properly addressed – of course APA was incredible on this. **Even the ALJ found APA Pres. Ferguson incredible that he did not know that the FAA grilled its pilots before firing Kossen that day 1-11-18 (DO at 24-ER35).** The few examples that the ALJ gave for Kossen incredulity are minor and irrelevant. There is NO APA evidence or testimony of clear and convincing reasons for firing him, especially in the face of mountains of evidence supporting Kossen, more than meeting his prima facie burden and shifting to APA to prove by clear and convincing evidence (none) that APA would have fired him for a reason unrelated to his whistleblowing.

B. NO PROOF BY APA THAT KOSSEN SECRETLY KEPT EMPIRE JOB (SUCH THAT HE HAD NOT AGREED WITH APA TO STAY INDEFINITELY IN HIS RESCISSION OF RESIGNATION).

APA's claim of Kossen leaving for another job at Empire in 1-2018 and therefore he had never rescinded his 11-22-17 resignation, so it could still be accepted by APA in firing him on 1-11-18, even though the effective

date of resignation on 12-6-17 was passed (a totally illogical and FALSE argument by APA and not based on clear and convincing evidence and completely refuted by Empire email evidence at ALJ Hearing), lacked any evidence support. **Of course, he did not keep and hide the Empire job so he could work three weeks more in 12-17 for APA for no reason.**

ALJ, ARB, and 9th Circuit disregarded Kossen's well-documented evidence that reasonably supported that when he agreed to stay with APA, Empire pulled his job offer and insisted he would have to reapply. He gave up his captain's Empire job and Empire took the job opportunity away from Kossen once and for all on 12-21-17. Empire's Alberts made this clear in an email of **12-20-17**: Accept the job by TOMORROW 12-21-17 or it is gone and you must reapply all over again. ER1247-1545at1373CX55p228ER2511HT-618.

In Empire's Broschet Deposition, he agreed there was no contact with Kossen in their employing folder (with written on cover that Kossen "pulled" [rejected] their offer 12-10-17 ER277) between 12-9-17 and when Kossen finally did reapply 2-15-18 after APA fired him on 1-2018. ER1713RX-8-page-21-inset-page-78-lines-2-21. Simply nothing supports the ALJ's made-up thought that Kossen secretly kept the Empire job as an option and was staying at APA under an open resignation APA could accept anytime and terminate this whistleblower without firing him.

7. ALJ, ARB, AND 9TH CIRCUIT PANEL ERRED IN NOT APPLYING HAWAII DECISION BINDING ON EACH REGARDING APA'S TERMINATION OF KOSSEN AFTER AGREED RESCISSION OF RESIGNATION.

Kossen argued in great detail and case law in several briefs at ALJ, ARB and the 9th Circuit about the binding Hawaii State decision here, but the 9th Circuit Panel did not even mention it. The ALJ, ARB, and 9th Circuit Panel overlooked the reasonable ruling provided by the Hawaii State decision regarding Kossen's termination after APA accepted rescission of resignation. This law of the case, unappealed by APA is binding here. The 9th Circuit Panel also failed to follow precedent, ignoring documented evidence in the record (*See* Richardson *v. Perales*, 402 U.S. 389, 401 (1971); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010); *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011(9th Cir. 2003). The 9th Circuit must recognize this Hawaii decision.

8. COMPARISON OF EVIDENCE OF ADVERSE ACTION: FAILURE TO PROMOTE KOSSEN TO CAPTAIN, PASSED OVER FOR UNQUALIFIED PILOTS AND ALJ, ARB, AND 9TH CIRCUIT PANEL ALL ERRED ON STATUTE OF LIMITATIONS FOR AIR21 SUIT FOR ADVERSE ACTION FAILURE TO PROMOTE.

9th Circuit Panel, ALJ, and ARB threw out Kossen's claim of adverse action for failure to promote

him from First Officer to Captain when APA made unqualified, new hires Captain instead of him because they erred about it being barred by the short 90-day statute of limitations by the time Kossen filed suit 2-13-18. This was factual and legal error.

First, 90-days prior is adverse actions **going back to 11-15-17 and covers many instances that APA failed to promote Kossen** after that date.

Second, **equitable tolling** applies due to APA's assurances regarding Kossen's promotion, [APA's Freeman admitted that Kossen was promised to be promoted to next captain (ER2368HT480)] and the promised planned downgrading of the brand new pilots coming in as Captains, with no experience with B757s to handle the Christmas rush because APA was so short of Captains. (ER1150-CXp10). EACH DAY APA went without captains (such as Yoder quitting about 11-22-17) and as APA hired pilots that were all unqualified and hired as Captains ahead of Kossen. APA continued to hire pilots without certification AFTER 11-15-17 and was adverse action against this protected whistleblower. Each of these days right up until the firing of Kossen on 1-11-18 were within the 90-day window of 2-13-18 filing and were adverse action NOT barred but the 90 day statute of limitations.

A. NO APA PROOF OF KOSSEN "BAD CRM" AS A REASON NOT TO PROMOTE HIM.

APA's failure to meet the burden of proof was evident in their lack of documentation and non-compliance with FAA requirements regarding APA's long-after-the firing allegation of bad CRM as a trumped up pretext for firing him. **CRM means Crew Resource Management, but APA argued for the first time at the ALJ Hearing that Kossen had "bad" CRM because he was all business when flying and not joking, telling stories, and frankly inappropriate things, etc. in the cockpit like "one of the boys". It is true Kossen is the consummate professional in the cockpit and several other pilots' opinion of him changed when he whistleblew them to the FAA to get APA to self-correct their practice of false reporting of pilots qualifying hours. Whistleblowers shutting down an employer for lack of unsuspected pilots in a very small airline face these types of adverse actions, as Kossen definitely did here.** (APA must document negative/poor performance, APA failure to do so is violation of FAA AC 120-68G section 4.5, FAR119.65A&121.9, but all APA management agreed at ALJ Hearing there was nothing bad in Kossen's employment record **(FreemanER2584-HT691; FergusonER2536-HT643; BrownER2642-HT748; YoderER2420-HT528; KossenER2034-HT151). APA used bogus bad CRM as an excuse for not promoting him, and NOT for firing him and**

certainly there was "no clear and convincing" evidence of this to meet APA's burden.

9. COMPARISON OF EVIDENCE OF ADVERSE ACTION: BLACKLISTING

A. TRANSAIR

The PRIA at TransAir proves Kossen was hired at TransAir (PRIA background check is required by 49 USC 44703 for employment) until APA blacklisted Kossen to TransAir, witnessed by independent witness Bermoy (BermoyHTER2133-2134HT246-247 and Kossen 1-13-23 Response Brief in 9th Circuit at 35 and FreemanER2574-2576HT681-683).

ALJ disregarded the testimony of eyewitness Bermoy who clearly overheard APA's Freeman blacklisting Kossen to TransAir. Bermoy confronted Freeman after the call with TransAir and Freeman and asked why Freeman ruined Kossen's career:

(ER2134-HT247):

> "**Hey, Mr. Freeman, why don't you just let him go?** I mean you know he's leaving anyway, so let him go and do what you got to do." And Mr. Freeman said: **"Well, he wasn't going to get a recommendation from us."**

This is another "Smoking Gun" that 9th Circuit Panel, ARB and ALJ erred and ignored.

For the 9th Circuit Panel to change 9th Circuit evidence law and rule that one eye

witness (here Bermoy) to anything means it is NOT enough evidence and should be given no weight (Panel Decision at 6: "one witness' testimony is not persuasive"), it is simply ERROR and absolutely contrary to rules of evidence and too great a burden for any party to call multiple eyewitnesses before one can be believed. This is another "Smoking Gun" that 9th Circuit Panel, ARB and ALJ erred and ignored.

B. EMPIRE

Panel Decision at 6:

> With respect to Kossen's employment at **Empire**, Kossen did not offer any evidence that APA ever contacted Empire regarding Kossen and thus, failed to demonstrate that APA interfered with his employment. Furthermore, the record is replete with evidence that Kossen was denied positions, demoted, and ultimately **terminated on account of a safety incident, his flying credentials, and his poor CRM skills**.

ALJ knows that this is simply not true and this 9th Circuit Panel is in error. The ALJ took this back and found the opposite, in the subsequent *Kossen v. Empire* AIR 21 case, the ALJ in error refused to disqualify himself from the Hearing due to his already in error finding of Kossen as "incredible" in *Kossen v. APA* and for all the other ALJ errors and bias alleged against ALJ Larson in the previous case. This goes far beyond the appearance of impropriety and on any

remand ALJ Larson must be disqualified. In its termination letter dated 3-7-19 (ER1839&ALJ&ER38-DOp18-***RX8-EX3***), Empire Airlines listed the reasons for Kossen's termination as:

> "During the review of the **stick shaker/ pusher incident** that happened on February 26, 2019, flight 602, and **your previous training records (PRIA/FAA Blue Ribbon)** has led us to believe that you display substandard performance for a part 121 Airline Captain."

ALJ Larsen ruled that Kossen's expert in the Empire AIR 21 case did NOT have to testify because there was no dispute that no bad flying happened on Flight 602 and that it was a faulty part and false stick shaker warning and Thank God Kossen had the experience to not react according to the manual for a stick shaker recovery, which would have been disastrous, and instead flew perfect, saving the passengers' lives. The ALJ ruling in subsequent *Kossen v. Empire* refuted his ruling in earlier *Kossen v. APA* that Kossen did not lose his job at Empire for bad flying skills, but ALJ erred and did not correct the record in the APA case and vacate the dismissal.

As for the PRIA file on Kossen, that came from APA and Kossen's experts support that APA sent it to Empire after APA made training statements indicating that Kossen needed extra sessions in training to pass. This was error and simply are not true. APA has no contrary evidence about their false PRIA and

Kossen's evidence is clear and convincing, though that is APA's burden of proof under AIR 21.

Between 2019 and 2013 FAA recalled Empire' planes of the same model Kossen flew for false stick shaker warning equipment. FAA received five false stick shake/pusher warning complaints by Empire pilots within the year after he was fired. FAA determined that APA and Empire violated PRIA regarding Kossen and regarding APA's contact with Trans Air.

C. WINGSPIRIT

Years later, to retaliate further against Kossen, APA's Freeman stalked Kossen and found out Kossen had a job with WingSpirit. APA's Freeman then applied for a job there (a fledgling startup airline, for approximately half Freeman's then-current pay at APA). At the ALJ Hearing, APA Freeman testified he disclosed, in the interview, Kossen's AIR21 lawsuit (a major violation of AIR 21 law : strictly forbidden) and made clear that Freeman would not work for Windspirit if Kosen were there, meaning him or me. Kossen was fired right after that. It is beyond incredible for the ALJ, ARB, and 9th Circuit Panel not to see this adverse action.

X. CONCLUSION

The US Supreme Court should reverse the decisions of the 9th Circuit, the ARB and ALJ Final

Decisions and Orders and remand for a new ALJ Hearing with a different ALJ and OALJ district.

Originally filed: November 1, 2023
Re-filed: January 15, 2024

Respectfully submitted,

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