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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| DARREN KOSSEN,<br><br>Petitioner,<br><br>v.<br><br>ASIAN PACIFIC AIRLINES; U.S. DEPARTMENT OF LABOR,<br><br>Respondents. | No. 21-71346<br><br>LABR No. 2019-AIR-00011 Department of Labor (except OSHA)<br><br>ORDER<br>(Filed Sep. 5, 2023) |

Before: PAEZ and VANDYKE, Circuit Judges, and LIBURDI,* District Judge.

Petitioner's "Motion to Chief Judge of the Ninth Circuit Court Mary H. Murgia to Overturn Court Clerk 8/1/23 Order Denying Motion for Extension of Time One Working Day and Striking Petition for En Banc Review and 8/3/23 Reconsideration Thereof and Alternatively for Order Simply Denying En Banc Review" is treated as a motion for reconsideration en banc. Treated as such, the motion is DENIED. G.O. 6.11.

No further filings will be entertained in this closed docket.

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* The Honorable Michael T. Liburdi, United States District Judge for the District of Arizona, sitting by designation.

App. 3

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| DARREN KOSSEN,<br><br>Petitioner,<br><br>v.<br><br>ASIAN PACIFIC AIRLINES; U.S. DEPARTMENT OF LABOR,<br><br>Respondents. | No. 21-71346<br><br>LABR No. 2019-AIR-00011 Department of Labor (except OSHA)<br><br>ORDER<br>(Filed AUG. 3, 2023) |

Before: PAEZ and VANDYKE, Circuit Judges, and LIBURDI,* District Judge.

Petitioner's motion for reconsideration (Docket No. 124) is DENIED.

IT IS SO ORDERED.

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* The Honorable Michael T. Liburdi, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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|---|---|
| DARREN KOSSEN,<br><br>Petitioner,<br><br>v.<br><br>ASIAN PACIFIC AIRLINES; U.S. DEPARTMENT OF LABOR,<br><br>Respondents. | No. 21-71346<br><br>LABR No. 2019-AIR-00011 Department of Labor (except OSHA)<br><br>ORDER<br>(Filed Aug. 1, 2023) |

Before: PAEZ and VANDYKE, Circuit Judges, and LIBURDI,* District Judge.

Petitioner's motion for an extension of time to file a petition for rehearing en banc on July 31, 2023 (Docket Entry No. 120) is DENIED. The petitions for rehearing en banc filed on July 29, 2023 (Docket Entry No. 121) and filed on July 31, 2023 (Docket Entry No. 122) are stricken from the record. No further petitions for rehearing shall be filed.

IT IS SO ORDERED.

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* The Honorable Michael T. Liburdi, United States District Judge for the District of Arizona, sitting by designation.

WARNING: AT LEAST ONE DOCUMENT COULD NOT BE INCLUDED!

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Please see below.

Selected docket entries for case 21−71346

| Filed | Document Description | Page | Docket Text |
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| 04/20/2023 | 108 | | FILED MEMORANDUM DISPOSITION (RICHARD A. PAEZ, LAWRENCE VANDYKE and MICHAEL T. LIBURDI) PETITION FOR REVIEW DENIED. FILED AND ENTERED JUDGMENT. [12699145] (MM) |
| | 108 Memorandum | 2 | |
| | 108 Post Judgment Form DOCUMENT COULD NOT BE RETRIEVED! | | |

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| DARREN KOSSEN,<br><br>Petitioner,<br><br>v.<br><br>ASIAN PACIFIC AIRLINES; U.S. DEPARTMENT OF LABOR,<br><br>Respondents. | No. 21-71346<br><br>LABR No. 2019-AIR-00011 Department of Labor (except OSHA)<br><br>MEMORANDUM*<br>(Filed Aug. 20, 2023) |

On Petition for Review of an Order of the Department of Labor

Argued and Submitted February 14, 2023
Seattle, Washington

Before: PAEZ and VANDYKE, Circuit Judges, and LIBURDI,** District Judge

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.*
*** The Honorable Michael T. Liburdi, United States District Judge for the District of Arizona, sitting by designation.*

Darren Kossen petitions for review of the Administrative Review Board's ("ARB") affirmance of an Administrative Law Judge's ("ALJ") denial of his complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). AIR 21 protects employees who report information to an ("AIR 21"). AIR 21 protects employees who report information to an employer or the federal government they reasonably believe relates to a violation of any order, regulation or standard of the Federal Aviation Administration. 49 U.S.C. § 42121(a)(1). Kossen alleges that his past employer, Asian Pacific Airlines ("APA"), retaliated against him for his protected whistleblowing activities by (1) refusing to promote him to captain; (2) terminating him after he rescinded his resignation; and (3) blacklisting him, which impacted his subsequent employment at TransAir, Empire Airlines ("Empire"), and Wing Spirit.

We have jurisdiction under 49 U.S.C. § 42121(b)(4)(A). We review the ARB's Final Decision and Order under the Administrative Procedure Act, 5 U.S.C. § 706(2); 49 U.S.C. § 42121(b)(4)(A). Under

Section 706, "the ARB's legal conclusions must be sustained unless they are arbitrary, capricious, an 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 Labor,* 364 F.3d 1117, 1121 (9th Cir. 2004).

We review "the decision of the ARB rather than the ALJ, but the ARB is required to consider conclusive the ALJ's factual findings if supported by substantial evidence." *Id*. at 1121–22. We deny the petition for review.

Foremost, we cannot consider many of Kossen's arguments because he failed to raise them before the ARB and thus, they are waived. *See* 29 C.F.R. § 1979.110(a). In addition, we cannot examine whether the ARB abused its discretion in denying Kossen's motions to reconsider and reopen the record because Kossen's petition does not challenge these orders. *See* 49 U.S.C. § 42121(b)(4)(A); Fed. R. of App. P. 15(a)(2). The issues properly exhausted and before this court are: (1) whether the ARB employed the wrong standard of review;(2) whether the ARB erred in finding that the ALJ did not abuse his discretion in excluding certain exhibits; (3) whether the ARB's finding that Kossen failed to prove by a preponderance of the evidence that he faced an adverse action is supported by substantial evidence; and (4) whether the ARB

legally erred in concluding that Kossen failed to prove causation by a preponderance of the evidence. We address each issue in turn.

**1.** The ARB did not employ the wrong standard of review. Contrary to Kossen's arguments, the ARB does not review the ALJ's factual findings de novo but rather for substantial evidence, which it did here. *See Calmat*, 364 F.3d 1121–22. Furthermore, the ARB properly reviewed de novo Kossen's objections to the ALJ's authority to exclude evidence and determined the ALJ did not err. Kossen's argument that the ARB's legal analysis was not sufficiently exhaustive is meritless. *See* 29 C.F.R. § 1979.110(b) (explaining that the ARB is permitted to adopt the decision of the ALJ).

**2.** The ARB correctly concluded that the ALJ did not abuse his discretion in excluding certain evidence. *See Calmat*, 364 F.3d 1122 (holding that we review evidentiary rulings for abuse of discretion and may only reverse if the error was prejudicial). Kossen argues that the ALJ erred in excluding key emails, which he contends demonstrate that he rescinded his resignation without reservation and that APA affirmatively accepted it.

Kossen, however, had many opportunities to seek admission of this evidence, but repeatedly disregarded the ALJ's pre-hearing procedural rules. Even after Kossen failed to comply with the ALJ's

Pre-Hearing Order, the ALJ afforded him the opportunity to admit evidence. Yet, he still did not include these documents in his exhibit list or present them for admission on the first day of the hearing. The ALJ acted well within his discretion in proceeding rather than continuing the hearing to allow Kossen to cure his procedural errors. The ALJ reasonably decided that a continuance would be prohibitively expensive because of the distances the participants had traveled and would unfairly burden the other parties when Kossen had ample time to prepare. *See* 29 C.F.R. § 18.102 (establishing that an ALJ should set rules to "secure fairness in administration, elimination of unjustifiable expense and delay").

The ALJ also did not abuse his discretion in refusing to admit the emails when they could not be authenticated. Kossen only attempted to enter the emails into evidence during the cross-examination of the APA Director of Operations.Despite Kossen's failure to introduce the exhibits earlier, the ALJ stated he would admit them if the witness could authenticate the documents. However, the Director of Operations stated that he did not recall the emails and was seeing them for the first time. Thus, the ALJ did not abuse his discretion in excluding the emails. *See* 29 C.F.R. § 18.901(b)(1) (permitting authentication when testimony states that "a matter is what it is claimed to be").

Finally, these emails were not part of the record simply because they were exhibits to depositions that were admitted at the hearing. *See* 29 C.F.R. § 18.82(f) (stating that parties may submit portions of documents); 29 C.F.R. § 18.55(a)(2) (establishing that "[a]ll or part of a deposition" may be used at a hearing (emphasis added)).

**3.** The ARB's determination that Kossen failed to prove by a preponderance of the evidence that he faced an adverse action, whether by being (1) denied a promotion to captain, (2) blacklisted, or (3) terminated, is supported by "substantial evidence." *See Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 31 F.4th 1203, 1206 (9th Cir. 2022).

First, substantial evidence in the record supports the ARB's ruling that Kossen failed to demonstrate that APA retaliated against him by not promoting him to captain. Importantly, the ALJ correctly concluded that this claim was time- barred as Kossen learned that he would not be made captain before October 2017 and filed his AIR 21 complaint in February 2018, and thus, did not meet the requisite ninety-day filing deadline. *See* 49 U.S.C. § 42121(b)(1). Kossen also failed to substantiate his claim because he did not present any evidence before the ALJ showing that APA promoted another equally or less-qualified first officer to captain. Moreover, the record supports that Kossen needed to improve his Crew Resource

Management ("CRM") skills before being promoted to captain.

Second, substantial evidence supports the ARB's determination that Kossen failed to demonstrate that APA blacklisted him. Regarding his prospective employment at TransAir, Kossen did not present any persuasive evidence that APA provided a negative reference and the record supports that TransAir had other reasons for withdrawing its job offer. Kossen's insistence on the importance of one witness's testimony is not persuasive. The ALJ found Kossen's witness's testimony only marginally relevant as the witness could not confirm that APA communicated with TransAir. 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. Finally, in regard to Wing Spirit, Kossen failed to substantiate his claim that APA disclosed anything negative about him and the ALJ reasonably found APA's narrative more credible than Kossen's rendition of events.

Third, substantial evidence supports the ALJ's conclusion that Kossen did not demonstrate

by a preponderance of the evidence that he was terminated.

Because Kossen failed to obtain admission of the contested emails into the record, the ALJ had to rely heavily on witness testimony, taking into consideration credibility determinations, and make do with scant documentary evidence. The record supports that Kossen resigned and accepted a position at Empire and that APA hired a replacement pilot. Furthermore, it is unclear whether Kossen actually cut ties with Empire or merely postponed his start date, undermining his contention that he intended to stay with APA indefinitely. Because the ALJ did not find Kossen completely credible, the ALJ gave greater weight to APA's narrative, which reasonably explained that the company only intended for Kossen to stay on during the busy holiday season, not permanently. Without any documentary evidence that Kossen had effectively rescinded his resignation, the ALJ's conclusion that Kossen set the events in motion by resigning, rather than being terminated, is a "rational interpretation" of the evidence. *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) (citation omitted).

**4.** Because the ARB's determination that Kossen failed to prove by a preponderance of the evidence that APA subjected him to an adverse action is supported by substantial evidence, we need

not address the ARB's legal causation analysis. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

In sum, because the ARB neither erred in concluding that the ALJ did not abuse its discretion in excluding evidence or in finding that that the ALJ's determination that Kossen failed to prove an adverse action was supported by substantial evidence, we deny the petition for review.

**PETITION FOR REVIEW DENIED**.

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

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DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

| | |
|---|---|
| CASE NO.: 2019-AIR-00011<br><br>*In the Matter of :*<br><br>DARREN KOSSEN,<br><br>Complainant,<br><br>vs.<br><br>ASIAN PACIFIC AIRLINES<br><br>Respondents. | Issue Date: 02 December 2020. |

**ORDER DENYING MOTION**

On December 1, 2020, Complainant filed a Motion entitled "Complainant's Motion for Relief Under 29 C.F.R. § 18.94, FRCP 59 New Trial or Alter Judgment and FRCP 60 Relief from Judgment or Order/Reconsideration of 11/9/20 Decision and Order Denying Complaint," comprising eleven pages.

In the Motion, Complainant states he has filed a Petition for Review of my Decision and Order issued November 9, 2020 (Motion, p. 2).

Accordingly, under 29 C.F.R. section 18.94, subsection (a)(2), the Motion is DENIED.

SO ORDERED.

DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU= Administrative Law Judge,)=US
DOL Office of Administrative Law
Judges, L=San Francisco S=CA C=US
Location: San Francisco CA

**CHRISTOPHER LARSEN**

**Administrative Law Judge**

**SERVICE SHEET**

Case Name:

**KOSSEN_DARREN_v_ASIA_PACIFIC_AIRLINE**

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Case Number: **2019AIR00011**

Document Title: **ORDER DENYING MOTION**

I hereby certify that a copy of the above-referenced document was sent to the following this 2nd day of December, 2020:

DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

Digitally signed by MARYANNE B. BALLARD
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**U.S. Department of Labor**

Administrative Review Board
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DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

**In the Matter of:**

**DARREN KOSSEN,**

**COMPLAINANT,**

**v.**

**ASIA PACIFIC AIRLINES,**

**RESPONDENT.**

**ARB CASE NO. 2021-0012**

**ALJ CASE NO. 2019-AIR-00011**

**DATE: August 26, 2021**

**Appearances:**

***For the Complainant:***

**William C. Budigan, Esq.; Budigan Law Firm; Seattle, Washington**

***For the Respondent:***

**Steven P. Pixley, Esq.; Tan Holdings Corporation Legal Department; Saipan, Northern Mariana Islands**

**Before: James D. McGinley, *Chief Administrative Appeals Judge;* Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges***

## DECISION AND ORDER

PER CURIAM. Darren Kossen (Complainant) filed a complaint under the Wendell F. Ford Aviation Investment and Reform Act for the 21st Century1 (AIR 21), and its implementing regulations,[2] alleging that his former employer, Asia Pacific Airlines (Respondent), unlawfully discriminated against him under the AIR 21's whistleblower protection provisions.[3] After a hearing, an Administrative Law Judge (ALJ) found that Complainant failed to prove that Respondent had violated the AIR and denied the complaint. Complainant appealed the ALJ's decision to the Administrative Review Board (Board). We affirm.

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[2] 49 U.S.C. § 42121 (2000).
[3] 29 C.F.R. Part 1979 (2020).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[4] In AIR 21 cases, the ARB reviews questions of law presented on appeal de novo but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.[5] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[6]

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[3] To prove discrimination under AIR 21, the complainant must demonstrate, by a preponderance of the evidence, that: (1) he or she engaged in activity protected under AIR 21; (2) he or she suffered an adverse personnel action; and (3) his or her protected activity was a contributing factor in the adverse action. *Sewade v. Halo-Flight, Inc.,* ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 6 (ARB Feb. 13, 2015). If the complainant meets their burden, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. *Antonellis v.*

*Republic Airways,* ARB No. 2019-0046, ALJ No. 2018-AIR-00024, slip op. at 5 (ARB Feb. 8, 2021).

[4] 29 C.F.R. § 1979.ll0(a).

[5] *Yates v. Superior Air Charter, LLC*, ARB No. 2017-0061, ALJ No. 2015- AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

[6] *Hoffman v. NetJets Aviation, Inc.,* ARB No. 2009-0021, ALJ No. 2007-AIR- 00007, slip op. at 4 (ARB Mar. 24, 2011).

## DISCUSSION

Complainant presents two overall objections to the ALJ's decision below. First, Complainant seemingly argues that substantial evidence does not support the ALJ's findings that Complainant failed to prove by a preponderance of the evidence that Respondent committed adverse actions against him, and that an intervening event separated his protected activity from any alleged adverse action. Second, Complainant contests the ALJ's decision to exclude certain exhibits presented by Complainant, and requests that the Board reopen the record.

Upon review of the ALJ's Decision and Order Denying Complaint and the parties' briefs, we conclude that it is a well reasoned ruling based on the facts and the applicable law. The ALJ's finding that Respondent did not commit an adverse action against Complainant is supported by substantial evidence. The record and or sequence of events do not support

Complainant's assertions concerning the failure to upgrade him to captain, the alleged termination of his employment, or the alleged blacklisting from future employment. Complainant's briefings further fail to persuade the Board that the ALJ erred by excluding certain evidence presented by Complainant. Thus, we conclude that ALJ properly denied the complaint and deny Complainant's request to reopen the record.

Accordingly, we **AFFIRM, ADOPT,** and **ATTACH** the ALJ's Decision and Order Denying Complaint.

**SO ORDERED.**

**U.S. Department of Labor**

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Department of Labor
United States of America

**Issue Date: 09 November 2020**

CASE NO.: 2019-AIR-00011

*In the Matter of:*

DARREN KOSSEN,
*Complainant,*

vs.

ASIA PACIFIC AIRLINES,
*Respondent.*

APPEARANCES:

WILLIAM C. BUDIGAN, Esq.,
*For the Complainant*

STEVEN P. PIXLEY, Esq.,
*For Respondent*

Before Christopher Larsen
Administrative Law Judge

## DECISION AND ORDER DENYING COMPLAINT

The Complainant, Darren Kossen, brought this action against Asia Pacific Airlines ("Respondent" or "APA") under the whistleblower provision of the Wendell F. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"). The Act, 49 U.S.C.S. § 42121, and the regulations promulgated thereunder, 29 C.F.R. Part 1979, prohibit an air carrier from discriminating against an employee who reports air carrier safety concerns.

## I. PROCEDURAL BACKGROUND

On February 13, 2018, Mr. Kossen filed a whistleblower complaint with theU.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"). (RX 1; RX 2.) Respondent received notice of the complaint on February 27, 2018 and submitted a written statement on March 15, 2018. (RX 1.) On February 1, 2019, OSHA dismissed the complaint. (RX 2.) Mr. Kossen timely requested a hearing on the matter. (RX 3.)[1] On August 1, 2019, Respondent submitted its Pre-Hearing Statement. I

held the hearing in this matter in Honolulu, Hawaii, on February 25-28, 2020. Mr. Kossen and his counsel, William Budigan; Respondent's counsel, Steven Pixley; Complainant's witnesses Brian Dolan, Robert Erik Herrle, Paul Y. Kobayashi, Jade Tse, and Keith Vermoy; Respondent's witnesses Richard Brown, Ralph Freeman, Joseph San Agustin, and Scott Yoder; and Respondent's President, Adam Ferguson, all appeared. I gave the parties a full and fair opportunity to present evidence and argument. I admitted Complainant's Exhibits ("CX") 1 through 23, 29, 30, 31, 33 through 36, 40 through 43, 45 through 56, 60 through 63, 65 through 67, 69, 71, 73, 74, 76 through 78, 80, and 82,[2] and Respondent's Exhibits ("RX") 1-11. After the hearing, the parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

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[1] This filing serves as Complainant's Pre-hearing Statement.

[2] The confusing sequence is discussed more fully below.

## II. ISSUES

1. Whether Mr. Kossen engaged in activity protected by AIR 21;

2. Whether Mr. Kossen suffered an adverse personnel action(s);

3. If so, whether Mr. Kossen's protected activity was a contributing factor in the adverse personnel action(s);

4. Whether Respondent would have taken the same adverse personnel action irrespective of Mr. Kossen's protected activity; and,

5. The damages, if any, to which Mr. Kossen is entitled.

## III. EVIDENCE OF RECORD

### 1. Summary of Record

AIR 21 hearings are conducted under the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, codified at 29 C.F.R. Part 18, subpart A (2015). 29 C.F.R. § 1979.107(a). Formal rules of evidence do not apply, but Administrative Law Judges (ALJs) must follow rules or principles designed to assure production of the most probative evidence. 29 C.F.R. §1979.107(d). The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. *Id.*

Additionally, the ALJ determines the credibility of witnesses, weighs evidence, draws inferences from evidence, and is not bound to accept the opinion or
theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce,* 661 F.2d 898, 900 (5th Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, and the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines,* ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). Credibility can also "involve more than demeanor. It apprehends the overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. U.S.,* 314 F.2d 718, 749 (9th Cir. 1963); *see also* I*ndiana Metal Prods. v. Nat'l Labor Relations Bd.,* 442 F.2d 46, 52 (7th Cir. 1971). I have based my credibility findings on a review of the entire record, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and "the testof plausibility," in light of the record as a whole. *Indiana Metal,* 442 F.2d at 52.

a. **Documentary Evidence**

i. Respondent's Exhibits

Respondent submitted exhibits RX 1 to 11. Complainant stipulated to their admission. (Hearing Transcript, "HT," pp. 35-37.) Respondent's Exhibits included the deposition testimony of David Seest, the Director of Flight Operations at TransAir Airlines (RX 7); and Peter Broschet, the Director of Human Resources at Empire Airlines (RX 8). Finding their testimony consistent, proffered in good faith,and pertaining to first-hand knowledge and expertise within their respective roles, I credit their testimony with full evidentiary weight.

ii. Complainant's Exhibits

I issued a Pre-Hearing Order in this case on April 15, 2019. Under the Order, the parties were obligated to serve on each other both a witness list and an exhibit index. The exhibit index was to identify each exhibit, and state what facts the serving party intended that exhibit to prove (Pre-Hearing Order, pp. 3-4). Additionally, thirty days before the hearing, the parties were to exchange copies of the exhibits they intended to introduce at the hearing (Pre-Hearing Order, p. 4). One of the reasons I issued that order was because under the Rules of Practice and Procedure, objections to authenticity of documents offered in evidence are waived unless made in writing seven days before the hearing. 29 C.F.R. section 18.82, subsection (d). Exchanging evidence before the

hearing also avoids surprise and saves hearing time. But when I called the hearing to order in Honolulu, I learned Mr. Kossen had not complied with the pre-hearing order. He had brought to the hearing a number of documents he had never disclosed to the opposing party.

At the hearing, he withdrew the exhibits he had numbered 24, 25, 26, 27, 28, 30, 32, 37, 38, 39, 44, 57, 58, 59, 64, 68, 70, 72, 75, 79, and 81. Respondent raised no objection to the remaining exhibits, so I received in evidence Claimant's Exhibits 1through 23, 29, 31, 33 through 36, 40 through 43, 45 through 56, 60 through 63, 65 through 67, 69, 71, 73, 74, 76 through 78, 80, and 82. Later in the hearing, I also received Claimant's Exhibit 30 in evidence (HT, p. 525). Though this makes for a more confusing record, the parties and their counsel had traveled to Honolulu from tremendous distances, and it would have been prohibitively expensive to continue the hearing so Mr. Kossen could re-organize and disclose his documentary evidence before the parties assembled in Honolulu a second time.

During the hearing, two additional problems with Mr. Kossen's documentary evidence arose. Both are discussed more fully below. First, Mr. Kossen asked witness Ralph Freeman to identify an email he contended Mr. Freeman had received, and Mr. Freeman testified he had not seen it before. Second, each party placed in evidence a copy of a letter Mr. Kossen had written (CX 52 and RX 4), but a relevant

date in the body of that letter was different in each copy.

Over the course of the hearing, Mr. Kossen tried to admit other documents into evidence. In some cases, he abandoned the effort, and in other cases, I excluded the proffered document because it had not been authenticated. Nonetheless, Mr. Kossen submitted many of these documents as exhibits to his "Post-Hearing Brief Regarding Adverse Actions & Declarations of Service," received March 13, 2020 (*see* fn. 14, *infra*).[3] But his continuing to file documents excluded from evidence at the hearing does not make them part of the record of the hearing. Mr. Kossen's failure to comply with the Pre-Hearing Order, and the discrepancies which appeared in some of the documents he offered, made proper authentication an issue. I did not receive unauthenticated documents in evidence at the hearing, and I do not receive them in evidence now.

---

[3] Among these documents was the purported exchange of emails on December 6 and 7, 2017, with Mr. Freeman. Mr. Freeman, who had allegedly had received one of the December 7, 2017 e-mails, at the hearing testified he had never seen it before (HT, pp. 507-08, 677-78). I declined to receive that document in evidence on the strength of that testimony (*Id*. at 509), and Mr. Kossen did not try to introduce it through any other witness.

b. **Witnesses**

i. Keith Vermoy

Keith Vermoy worked at Asia Pacific Airlines as station manager from April, 2014 until May of 2019. (HT, p. 243.) Mr. Vermoy testified to overhearing a conversation between Adam Ferguson, the President of APA, and Ralph Freeman in which they decided "they were going to honor [Mr. Kossen's] two weeks and they were going to let him go now." *Id*. at 245. Mr. Vermoy testified he did not remember when the conversation occurred, but he remembered it was "[w]hen [Mr. Kossen] was trying to leave to go to another airline." *Id*. at 246. Mr. Vermoy testified it was well-known that Mr. Kossen had given his two-week notice and was leaving APA. *Id*. at 253-54.

Mr. Vermoy also recalled a conversation with Mr. Freeman in which Mr. Freeman stated APA would not recommend Mr. Kossen to another employer. (HT, p. 247.) He does not remember when this conversation took place. *Id*. at 257. When asked if he knew of other pilots whom APA would not recommend to other potential employers, he testified, "Well, no. I was not privy to a lot of that..." *Id*. at 250. Mr. Vermoy stated that other pilots, in addition to Mr. Kossen, also complained about safety issues. *Id*. at 249.

Mr. Vermoy voluntarily resigned from APA after being informed he would bedown graded

following a "safety issue." (HT, p. 248.) He stated, "I'm not bitter about it . . . but I'd just like to know why I was the only guy . . . that got hammered over that deal. . .." *Id.* at 249. Mr. Vermoy appeared at the hearing by subpoena.*Id.* at 253.

Mr. Vermoy's testimony was consistent and credible, but because of the lack of detail, only marginally relevant.

ii. Robert Erik Herrle

Robert Erik Herrle worked as first officer at Empire Airlines from January 15, 2017 to January 26, 2019. (HT, pp. 394-95.) He did not fly with Mr. Kossen while at Empire Airlines. *Id.* at 397. He wasn't aware of Mr. Kossen having either a bad or good reputation, but he "had one employee" who did not want to fly with Mr. Kossen. *Id.* at 397-98. He does not remember the name of that employee. Id.

Mr. Herrle testified Empire Airlines had "[a] lot of maintenance issues that were unresolved." (HT, p. 399.) Mr. Herrle defined "stick shaker" and "stick pusher." *Id.* at 401-04. He confirmed the occurrence of either in flight would be a very serious safety event. *Id.* at 413-14. Mr. Herrle was asked to speak about Respondent's exhibit, RX 12, in which Mr. Kossen is described as having experienced a "stick shaker" and "stick pusher" while acting as a captain for a flight with passengers. *Id.* at 401-407. He testified he had never heard of the incident reported in RX 12 before the hearing. *Id.* at 412.

With regard to Mr. Herrle's testimony pertaining to his own first-hand experience and knowledge, I find him credible. But for the most part, his testimony was of little relevance.

### iii. Paul Y. Kobayashi

Mr. Kossen hired Paul Kobayashi to testify as an expert witness regardingpotential damages. (HT, p. 424.) In voir dire with Respondent's counsel, Mr. Kobayashi stated he had never testified as an expert witness before.[4] *Id*. at 423. Mr. Kobayashi testified to the report, "An Earning Capacity Loss Evaluation," which he co-drafted at the request of Mr. Kossen. The report, (CX 50), assessesdamages by determining the estimated lifetime earnings Mr. Kossen would accumulate as a pilot. Because I ultimately decide Mr. Kossen is not entitled torelief under AIR 21, Mr. Kobayashi's testimony is moot.

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[4] At the hearing, Respondent objected to Mr. Kobayashi's inclusion as an expert witness both as to his qualifications and Mr. Kossen's non-compliance with the timely disclosure requirements under the April 15, 2019, Pre-Hearing Order. Respondent raised similar objections in its post-hearing notice requesting to present expert testimony regarding damages and related issues. ("Memorandum in Support of Motion to Present Post-Hearing Testimony from an Expert Witness" (March 12, 2020).)

> On March 16, 2020, Mr. Kossen filed a Response waiving objection to Respondent's request. On March 25, 2020, I granted Respondent's request to retain a damages expert and present testimony regarding damages. On July 7, 2020, Respondent submitted the expert report of Dr. Jack P. Suyderhoud, who found issue with much of Mr. Kobayashi's testimony. I carefully read and considered Dr. Suyderhoud's report. But because I deny this Complaint, I need not weigh the conflicting testimony regarding damages.

iv. Ralph Freeman

Ralph Freeman is the Director of Operations at APA. He has worked at APA for five and a half years. (HT, pp. 452-454.) Throughout his career, he has supervised over 300 pilots. *Id.* at 454. Mr. Freeman testified at length about his interactions with Mr. Kossen while at APA; his involvement in the personnel decision relating to Mr. Kossen's separation with APA; and his views of Mr. Kossen's pilot skills while at APA. The hearing transcript spanned nearly 800 pages. For clarity and efficiency, I discuss the relevant portions of Mr. Freeman's testimony in greater detail within the appropriate sections below within headings numbered 2 to 5.

Mr. Freeman's testimony was consistent, proffered in good faith, and pertaining to his first-hand knowledge and expertise within his role as

Director of Operations at APA. Accordingly, I credit his testimony full evidentiary weight.

v. Scott Yoder

Scott Yoder worked at APA from 2006 until 2017. He was a chief pilot with APA for two years. He currently serves as first officer at Hawaiian Airlines. (HT, p. 523-24.)

Mr. Yoder testified he spoke with Mr. Freeman to discuss whether Mr. Kossen should be promoted to captain. *Id*. at 529. Mr. Yoder also testified at length about the qualifications APA considers when promoting to captain; his opinion of Mr. Kossen's pilot skills while at APA; and an investigation conducted by the Federal Aviation Administration (FAA) into several APA pilots' logbooks. Mr. Yoder also testified he "never contacted any company regarding Darren Kossen." *Id*. at 532. Mr. Yoder's testimony is discussed in further detail within the applicable sections below.

Mr. Yoder's testimony was consistent, proffered in good faith, and pertaining to first-hand knowledge and expertise within his role as chief pilot at APA. Accordingly, I credit his testimony full evidentiary weight.

vi. Joseph San Agustin

Joseph San Agustin is a captain at APA. (HT, p. 537.) Before working atAPA, Mr. San Agustin was

a Marine Corps and naval aviator. *Id.* at 539. He testified at length about the qualifications necessary for being an effective captain; what a "stick shaker" and a 'stick pusher" are, and the effect either in flight would have on a career; and his personal interactions with Mr. Kossen. All applicable parts of his testimony are discussed in greater detail within the corresponding sections below.

I found Mr. San Agustin's demeanor forthright and candid, and his testimony consistent and pertaining to his own first-hand knowledge and expertise within his role at APA. I find Mr. San Agustin credible and ascribe his testimony full evidentiary weight.

vii. Adam Ferguson

Adam Ferguson is the President of Asia Pacific Airlines. He has been in this position for three-and-a-half years. (HT, p. 589.) Before working at APA, Mr. Ferguson was the Director of Cargo for Asia at Continental Airlines (now United Airlines). *Id.* at 590. During 2017, Mr. Ferguson was "transform[ing] [APA's] fleet," and, as a result, traveled extensively for work. *Id.* at 591. He testified at length about APA's relationship with the FAA; his interactions with Mr. Kossen while at APA; the process he utilizes when considering whether to upgrade a pilot to captain; APA's interactions with the State of Hawaii regarding Mr. Kossen's application forunemployment benefits; and his understanding of how Mr. Kossen came to no

longer work at APA. All relevant parts of his testimony are discussed in greater detail within the corresponding sections below.

I found Mr. Ferguson's testimony consistent and credible. Accordingly, I afford it full evidentiary weight.

viii. Brian Dolan

Brian Dolan testified by telephone from Guam under subpoena from Mr. Kossen. (HT, p. 663.) Mr. Dolan flies for a "small commuter" airline. *Id*. at 653-654. He previously worked at APA as a captain and a "check airman, FAA check airman." *Id*. at 655. He worked at APA for 14 years until the summer of 2017. *Id*. Mr. Dolan has a pending AIR 21 claim with APA, in which he contends APA discriminated against him because he is Marshallese. *Id*. at 664. Mr. Dolan testified to his experience as a person who is undergoing AIR 21 litigation. Specifically, he stated it has been financially and emotionally difficult for him, and he believes it is difficult for him to find a job because he brought his AIR 21 case. Mr. Kossen was a witness in Mr. Dolan's suit against APA. *Id*. at 664.

While I found Mr. Dolan candid and credible, his testimony is not relevant to the case at hand. First, in this case Mr. Kossen is not seeking damages arising from his choice to pursue an AIR 21 claim, but rather damages, if any, from APA's alleged retaliation against him for his protected activity. Second, Mr.

Dolan's recounting of his personal experience is not relevant to Mr. Kossen's experience, much less of any damages Mr. Kossen has experienced as a result of his protected activity.

ix. Jade Tse

Jade Tse rented two rooms within her home to Mr. Kossen and his children. (HT, p. 696.) She does not remember exactly when she rented to him, but she thinks a year and a half before the hearing. *Id.* Ms. Tse spoke to Mr. Kossen's character, including a change in his personality, resulting in her "kick[ing] him out." *Id.* at 699. Ms. Tse testified Mr. Kossen paid her $5,000 to care for his two children for two months while he attended training for a new job out-of-state. She could not remember the date for when she provided him childcare but recalled it was after he was "fired" from his job. *Id.* at 702.

Ms. Tse did not remember well the timeline or details of her interactions with Mr. Kossen. She does not have direct personal knowledge of the circumstances of Mr. Kossen's employment, either at APA or elsewhere. As to her verification of the amount paid to her for childcare, I fully credit her testimony. But her testimony is of very little relevance to this issues in this case.

x. Richard Brown

Richard Brown is the Assistant Director of Operations at APA. (HT, p. 715.) He has worked at APA since 2000. *Id*. at 716. At the time Mr. Kossen was employed by APA, Mr. Brown was the Director of Safety there. *Id*. at 731. Mr. Brown testified at length about his interactions with Mr. Kossen; the safety issue reporting procedure at APA; APA's interactions with the FAA; and the significance of either astick shaker or a stick pusher occurring in flight. All applicable parts of his testimony are discussed in more detail within the corresponding sections below.

I found Mr. Brown's testimony consistent and credible, and I afford it full evidentiary weight.

xi. Darren Kossen

Darren Kossen testified by deposition, RX 11, and in person at the hearing.His deposition spans 156 pages, and the transcript to his testimony over the threeday hearing is nearly twice that. I have carefully read and considered the entirety of the record, and for ease of understanding and efficiency, I discuss Mr. Kossen's applicable testimony in detail within the corresponding sections below.

At hearing, Mr. Kossen was not forthright. At times, he became visibly upset (*see*, e.g., HT, p. 264), and on several occasions he would not directly answer the question being asked (*see*, e.g., *id.* at 294). Much of Mr. Kossen's testimony was tangential, run-on, off-topic, or unrelated. In addition, his testimony was

often inconsistent within itself, both at the hearing and when considering his earlier deposition (discussed in detail within later sections, infra). I found Mr. Kossen'stestimony not only vague and unhelpful, but also at times cagey and evasive. Not only was he unable to pin down important dates or describe a coherent timeline, it was also difficult to stay on topic. Several times, he cited injustices he allegedly experienced that were irrelevant to his complaint, attributing them to APA. For these reasons, I find his credibility impaired, and afford his testimony less evidentiary weight, especially when contradicted by the testimony of more credible witnesses.

**2. Employment at Asia Pacific Airlines**

Asia Pacific Airlines ("APA") is an "all-cargo" airline headquartered in the Territory of Guam. (Respondent's Brief, "RB," p. 3.) APA also operates a base in Honolulu, Hawaii. *Id*. It transports cargo "throughout the vast Pacific Region" and, in 2016-2017, employed approximately 20 pilots. *Id*.

Mr. Kossen was hired as a First Officer by APA on or about October 10, 2016.[5] (HT, pp. 51, 456.) Mr. Kossen testified he hoped to stay at APA "for as long as possible, as long as I had a medical and as long as I was under 65" (*id*. at 51), but also expected to progress in his role at APA by July of 2017:

> Mr. Kossen: I wanted to stay at Asia Pacific and also I wanted to fly – there's

always a need to fly a bigger plane. Always a need. Bigger plane, more money.

Mr. Budigan: Okay. So, tell us about your career progression at APA?

Mr. Kossen: My career progression was I was flying as first officer. There's a lot of movement in the company. I was expecting to be upgraded to captain, as tradition there, and I stayed as a first officer.

Mr. Budigan: Over what period of time do you think you should have been a captain?

Mr. Kossen: Between May and July of 2017, they needed to upgrade, they needed captains to fly around and I was qualified around that time.

Mr. Budigan: But they didn't make you captain?

Mr. Kossen: No.

*Id.* at 52.

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[5] Mr. Kossen's "Statement of Complaint" to OSHA lists his first day of employment at APA as October 9, 2016. (RX 1.)

Adam Ferguson, the President of APA, testified Mr. Kossen sent him an email before October, 2017, "formally . . . asking to be put into a captain's seat." (HT, p. 596.) Mr. Ferguson testified a recommendation to promote a first officer to captain would normally follow from a formal process, often stemming from the Chief Pilot. Mr. Ferguson found the email request "arrogan[t]" because Mr. Kossen had "just ... one year of service with us." *Id.* He explained, "For someone to come out and ask the president of the company – hey, I want to upgrade when I go to recurrent [training] – I thought was very bold." *Id.*

Mr. Kossen testified he emailed Mr. Ferguson just before October, 2017, and learned he would not be upgraded to captain soon after. (HT, pp. 281-82.) He learned he would not be upgraded before he attended the annual training in October, 2017. *Id.* at 304.

a. Crew Resource Management

Mr. Kossen believes APA should have upgraded him to captain by July 2017 and that he was "qualified" to be a captain, having reached 1,000 flight time hours. (HT, p. 52.)

When considering whether to promote a pilot from first officer to captain,[6] Mr. Ferguson testified he considers "tangible skills," such as the "1000-hour rule"[7] pertaining to flight hours, as well as "the intangibles in terms of personality and traits," which fall under the concept of Crew Resource Management, or "CRM."[8] (HT, p. 596.)

Ralph Freeman, the Director of Operations at APA, testified it is common for pilots to have thousands of flight hours and still not qualify for captain, potentially waiting "four or five, six years" for an upgrade. (HT, p. 461.) Mr. Freemanemphasized the importance of "attitude," having "a mentoring personality," and the ability to communicate well with others in the cockpit when considering candidates for promotion to captain.[9] He described CRM as "one of the most important things we look for" when evaluating a potential upgrade.[10] *Id.* at 461-462.

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[6] Mr. Ferguson testified he is "solely" responsible for decisions regarding personnel hiring but he also relies on monthly "operational calls" with Mr. Yoder and Mr. Freeman to inform his personnel decisions. (HT, pp. 613, 610-11.)

[7] To qualify as captain, a pilot must, among other things, have acquired 1,000 hours of flight time. This "1000-hour rule" formed the basis of Mr. Kossen's

complaint to the FAA and is discussed in more detail within that section.

[8] Crew Resource Management, or "CRM," as defined by Joseph San Agustin (HT, pp. 546-47):

> Mr. San Agustin: Crew Resource Management, CRM in short, a requirement for any type of manning, whether it's a three-man crew or a two-man crew, CRM is applied in all facets of the flight to include proper rest for crew members, rest/breaks, on an eight-hour flight or more. A captain has to be relieved of his duties for a bit, to make sure he doesn't exceed the eight hours. And we, as a crew, in general, crews in general need to be aware of that and be cognizant for the issue of safety and CFR adherence. So, the crew has to generally look at

each other, they have to say, okay, who is going to get out of the seat and who is going to get in the seat, and who is going to take a break, and it varies and it changes, but that's how it's practiced out there.

Mr. Pixley: So, is it important that the crew members get along and communicate with each other, so that they can talk to the captain about problems that might happen or just work together as a team?

Mr. San Agustin: That is critical. That is critical in our business, that communication be open, is professional and accurate and clear.

[9] "So, you're in the cockpit – you really need to get along, you need to get along. And this is where the CRM, this Crew Resource Management, comes into play." (HT, p. 463.)

> [10] Mr. Freeman, as the Director of Operations at APA, provides Mr. Ferguson with performance reviews of pilots during regular "operational calls." These calls inform Mr. Ferguson's personnel decisions. *See* footnote 6, supra.

Additionally, Joseph San Agustin, a Captain and Check Airman at APA, evaluates the flying abilities and capabilities of its pilots. He testified to the importance of CRM when considering a potential upgrade. Mr. San Agustin has been a pilot at APA since May, 1999. (HT, p. 542.) At the hearing, he testified:

> And then there's a recommendation. There's a recommendation from a hoard of people who are involved in the upgrade or step-up upgrade. You get recommendations of other captains, recommendation from a check airman, recommendations from the Director of Operations, and most specifically the chief pilot. You really can't – you can't walk in the door and say – hey, I'm going to be a captain, you have to gothrough that like anything else.

*Id*. at 544. He also testified it was common for pilots to meet the requirement of 1,000 hours of flight time but not yet be upgraded to captain:

> As a matter of fact, I remember when I was 10 years into my active duty time I heard that there were first officers at Delta Airlines with 17,000 hours, and weren't even in the upgrade syllabus yet. And I was like – what? But that's the truth, that's the norm.

*Id*. Lastly, Mr. San Agustin affirmed the importance of a pilot's CRM skills when considering upgrades, describing CRM as "critical." *Id.* at 547.

Additionally, Scott Yoder, former Chief Pilot of APA, emphasized the importance of seniority and CRM when considering promotions—"CRM is one of the key things that we try to look at and keep coordinated." (HT, p. 525.)

Lastly, Mr. Kossen agreed an airline may consider other criteria, in addition to flight time hours, such as seniority and CRM, when evaluating the qualifications for a potential promotion to captain. (HT, pp. 290, 298.) But Mr. Kossen contends CRM does not include whether pilots get along within the cockpit:

> The getting along doesn't matter. It's the crew working as a team. Aslong as they're being professional and doing their job, and utilizing each other, that's Crew Resource Management. If they get

> along, fine. But you're there to do a job, it's a job.

Mr. Kossen testified he had "good CRM" skills while at APA. (HT, p. 301.) In his post-hearing brief, he argues, "Everybody loved Darren Kossen and he would be employed for a *[sic]* as long as he wanted and captain if he did not report safety. Darren Kossen was a model employee, had zero sick calls and flew the most amount of company flight hours for the year of 2017." (Complainant's Brief, "CB," p. 62.)

In contrast, APA contends Mr. Kossen's "behavior created CRM issues" and "he was not competent to be a captain. He lacked skill and he had a bad attitude." (RB, pp. 44, 43.) Mr. Yoder testified, "I did not believe that he held those characteristics to be a captain." [11] (HT, p. 527.) And, "[b]y the hours, he was fine, but by ability, no, he was not ready to be a captain." *Id.* at 529. Additionally, Mr. Freeman, who was in charge of scheduling, testified several pilots requested not to be assigned to fly with Mr. Kossen, including a captain who felt it would be "unsafe" if Mr. Kossen were in his cockpit and that Mr. Kossen was "stalking" him. *Id.* At 470, 472. Lastly, Mr. Ferguson, the President of APA, when asked if he would allow Mr. Kossen to return to APA as a first officer pilot, testified, "The only concern I would have is the CRM aspect of it and how he would be able to get along with everybody knowing his circumstance." *Id.* at 642.

b. Departure from APA

Mr. Kossen learned he would not be upgraded to captain before October, 2017. (HT, p. 304.) He testified he "was happy with [APA], but also wanted to be a captain," and applied to Empire Airlines on October 3, 2017. *Id.* at 305. Mr. Kossen accepted a job offer from Empire Airlines on October 12, 2017. (HT, p. 306; RX 4; CX 52.) The position at Empire Airlines was Captain, to begin on either December 9, 2017, (RX 4), or January, 13, 2018, (CX 52).[12]

In October, 2017, APA gave Mr. Kossen a pay raise on the anniversary of his hiring (HT, p. 219). Mr. Freeman testified Mr. Kossen asked for a leave of absence in December, before Mr. Freeman received Mr. Kossen's letter of resignation. (HT, p. 475.) Mr. Freeman denied this request, because December is APA's "heavy" season and APA policy is to not accommodate leave of absences during December except for emergencies. *Id.*

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[11] Mr. Yoder: "... in order to be captain you have to have certain traits. And pilot judgment is one of the big ones, flying ability is another big one, and just decision making process and maturity." (HT, p. 527.)

[12] Oddly, CX 52 and RX 4 are identical in every respect except one: they show different start

dates with Empire Airlines. No witness attempted to explain why the dates in different copies of the same documents did not match.

On November 22, 2017, Mr. Kossen gave APA written two-week notice. (HT, pp. 474-75; RX 5.) In his resignation letter, he reports he has "been offered a Captain position"; says he leaves with "a heavy heart"; will "miss APA"; and "would like to thank everyone at [APA] for creating a fun and professional work environment." (RX 5.) He gives his last day at APA as December 8, 2017. *Id.*

After receiving Mr. Kossen's November 22, 2017 resignation, APA took action to replace him and Mr. Yoder, hiring two new pilots. (RB, p. 44; HT, p. 609-610.)

On or about December 4, 2017, Mr. Kossen spoke with Mr. Freeman, who Mr. Kossen contends talked him into rescinding his resignation. (HT, pp. 327-28, 343.) Mr. Freeman testified he met with Mr. Kossen, but only to discuss Mr. Kossen's staying on through December to support APA's busy season. *Id.* at 476.

Mr. Kossen contends he e-mailed Mr. Freeman and Peter Nutting, the "[D]irector of [O]perations and [C]hief [P]ilot" at APA, respectively, on December 6, 2017, rescinding his resignation. (CB, pp. 11-12, 37-38; HT, p. 330-31.) But when he showed what he claimed was a copy of that e-mail to Mr. Freeman, to

whom the alleged e-mail was addressed,[13] Mr. Freeman testified he had never seen it before:

| | |
|---|---|
| Judge Larsen: | Okay. Did you receive this e-mail from Mr. Kossen? |
| Mr. Freeman: | I just read it. I don't recall the e-mail, sir. |
| Judge Larsen: | Have you ever seen it before today? |
| Mr. Freeman: | I would have to say I'm seeing this for the first time. |

(HT, pp. 507-08; *see* also *id*. at 677-78.) Mr. Kossen also argues Mr. Nutting and Mr. Freeman responded to this alleged e-mail, constituting acceptance of his rescission, on December 7, 2017. (CB, pp. 37-38.) But the record does not support this claim.[14]

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[13] The alleged e-mail was also addressed to Mr. Nutting, the Chief Pilot of APA at the time. Mr. Nutting, who died before this matter came to hearing, did not testify. (RB, p. 1.)

[14] Complainant's Brief cites CX 16 and CX 35, neither of which contain either the purported December 6 e-mailed rescission letter or the alleged December 7 e-mailed replies. Mr. Kossen also cites CX 42, which is a letter from the State of Hawaii awarding unemployment benefits. But CX 42 also lacks the alleged December 6 and 7 e-mails. Additionally, Mr. Kossen tried unsuccessfully to admitthe alleged e-mails into evidence through the testimony of Ralph Freeman, and attached purported copies of them, although never received in evidence, to his "Post-Hearing Brief Regarding Adverse Actions & Declarations of Service," received March 13, 2020. But because he never authenticated them at the hearing, and did not disclose them to Respondent before the hearing, I did not receive them in evidence.

On January 11, 2018, Mr. Kossen testified he received an e-mail from APA "that said that [his] resignation had been accepted and January 12th was [his] last day." (HT, p. 136.)

Mr. Kossen argues he did not resign from APA, having he e-mailed his rescission on December 6, 2017. Mr. Nutting and Mr. Freeman allegedly accepted this rescission via e-mail on December 7, 2017, yet APA terminated him on January 11, 2017. APA stipulates, "It is uncontradicted that Darren Kossen agreed to work through the month of December," but maintains "there was no agreement

beyond December." (RB, pp. 1-2.) APA argues Mr. Kossen resigned rather than having been terminated, and contends events after Mr. Kossen's resignation became "somewhat muddied." (RB, p. 1.)

Mr. Ferguson testified it was "solely" his decision to accept Mr. Kossen's
resignation. (HT, p. 613.) Mr. Free an confirmed Mr. Ferguson, as President of APA, makes decisions regarding personnel hiring and firing. *Id*. at 515. Mr. Ferguson testified he relies on monthly "operational calls" with Mr. Yoder and Mr. Freeman to inform his personnel decisions.15 Mr. Ferguson decided to send the January 11, 2018 separation letter to Mr. Kossen after an operational call during which he learned Mr. Kossen was on leave around January 1 for training at Empire Airlines. *Id*. at 613. At that time, Mr. Ferguson did not know Mr. Kossen had filed a safety complaint with the FAA about APA. *Id*. at 615. APA argues Mr. Kossen's November 22, 2017 resignation caused it to "lose confidence" in him. (RB, p. 43.) APA argues this "loss of confidence was exacerbated" upon learning Mr. Kossen had accepted a position at Empire Airlines on October 12, 2017. *Id*.

Mr. Kossen maintains he withdrew his application at Empire Airlines on December 21, 2017 after he wrote APA requesting to rescind his resignation. He testified he "told them that my dad had an accident and I couldn't work there, I need to not accept the job." (HT, p. 134; CB, p. 58.) APA, on

the other hand, contends Mr. Kossen did not withdraw his application at Empire Airlines. (RB, pp. 1, 39; HT, pp. 345-49.) In a December 9, 2017 email to Empire Airlines, Mr. Kossen wrote, "I have an emergency with my father that happened Friday night. I will advise when I understand and know more information. I cannot work effectively at this time and need to postpone . . . I will need to postpone hiring until further notice." (RX 4.) [15] "So, of course I'll query, you know, my team and ask them. You know, we have weekly, you know,operations calls, where I can ask those questions or I can just pick up the phone and call them. We have monthly staff meetings where we can address personnel issues." (HT, pp. 610-11.)

In February 2018, Mr. Kossen applied for unemployment benefits from the State of Hawaii. (HT, p. 150.) On March 2, 2018, his application was denied "on the basis that claimant voluntarily left employment without good cause." (CX 42.) On March 19, 2018, Mr. Kossen appealed the decision. *Id.* APA did not participate in the appeal. Mr. Ferguson testified, "I appreciated the effort, he stayed and worked through December for us. So, if he wanted to appeal and get, you know, unemployment for a month, god bless him." (HT, p. 602.) The decision was reversed, finding Mr. Kossen was "discharged for reasons other than misconduct connected with work" and qualified for unemployment benefits. (CX 42.) APA also paid Mr. Kossen $5,000 in severance. (HT, p. 150.)

[15] "So, of course I'll query, you know, my team and ask them. You know, we have weekly, you know, operations calls, where I can ask those questions or I can just pick up the phone and call them. We have monthly staff meetings where we can address personnel issues." (HT, pp. 610-11.)

3. **Employment History Following Asia Pacific Airlines**

a. TransAir

In January 2018, Mr. Kossen applied for a position at TransAir and was interviewed. (HT, pp. 151-52.) On February 3, 2018, he received an offer letter. (CX 17, 74.) Mr. Kossen contends he had a two-year employment contract with TransAir and was terminated from that position on February 8, 2017. (RX 1.) TransAir contends it never hired Mr. Kossen, (RX 7, p. 24), contending it did not sign the contract and "decided not to go ahead with hiring him." *Id*. at 23. Mr. Kossen maintains he was offered a captain position. (RX 1.) TransAir contends he likely would have begun as a first officer; "we've hardly hired people as captain." (RX 7, p. 36.)

Mr. Kossen believes Mr. Freeman dissuaded TransAir from hiring him, effectively blacklisting him. (CB, p. 50.) David Seest, the Director of Operations and Flight Operations at TransAir,

testified he called Mr. Freeman as a "past employer" to "see what kind of employee" Mr. Kossen was. (RX 7, p. 29.) Mr. Freeman testified he described Mr. Kossen as "a good stick." (HT, pp. 484-485; RX 1.) Mr. Freeman did not tell Mr. Seest Mr. Kossen was a "whistleblower." *Id.* Mr. Seest described Mr. Freeman's response as "the standard HR answer, you know. Typically, when you call a place, they'd say, yeah, he worked here, or he didn't work here. And that's pretty much all they give you, so unfortunately, that's all I got from Mr. Freeman. Yes." (RX 7, p. 30.) When asked if he believed Mr. Freeman was blacklisting Mr. Kossen, Mr. Seest replied, "No. No." *Id.* TransAir decided to ultimately not hire Mr. Kossen due to "little red flags" related to Mr. Kossen's inability to follow the hiring instructions TransAir requested and because Mr. Kossen was "pushy and with an attitude." *Id.* at 45, 31.

b. Empire Airlines

Mr. Kossen began employment as a captain at Empire Airlines on March 3, 2018.[16] (RX 10.) Of his time at Empire Airlines, Mr. Kossen testified,

> I was going good at Empire. I applied for chief pilot, did an interview for a chief pilot, and then after that it seemed like there was somethingworking against me at that company.

(HT, p. 178.) In addition to applying for the position of chief pilot, he also applied for safety officer and "other stuff" but did not receive these promotions. [17] *Id*. At 180.

In August of 2018, Mr. Kossen was demoted from captain to first officer for ten days or approximately one month.[18] Mr. Kossen contends the downgrade occurred "because first officers had complained about [him]". (HT, p. 179.) Empire Airlines contends the downgrade occurred due to poor CRM skills, specifically, the improper briefing of a first officer during takeoff. (RX 8, p. 57.)[19]

On February 26, 2019, Mr. Kossen, in command of an aircraft with forty-two passengers aboard, experienced a "stick shaker" during an unsuccessful landing attempt in inclement weather. [20] (HT, pp. 183, 369, 787; RX 8, p. 31.) He was suspended the next day and terminated on March 7, 2019. (HT, p. 181; RX 10.) In a

termination letter dated March 7, 2019, Empire Airlines lists the reason for Mr. Kossen's termination as "Unsatisfactory Performance":

> 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.

(RX 8, Exhibit 3 to the deposition.) A "stick shaker" (HT, pp. 414, 554) and a "stick pusher" (*Id.* at 554) are both serious safety situations.

Mr. Kossen filed a whistleblower complaint with OSHA against Empire Airlines. (HT, p. 193-194.)

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[16] There is conflicting testimony about whether Mr. Kossen commenced the position offered to him in October of 2017 or if he withdrew that application and reapplied. Mr. Kossen contends he withdrew his application in December, and in February, 2018, reapplied and received a new offer at Empire Airlines. (HT, p. 170.) APA, in contrast, argues Mr. Kossen accepted the position Empire had offered him in October of 2017. (RB, p. 39.) The Director of Human Resources for Empire Airlines, Peter Broschet, in his deposition, testified Mr. Kossen did not withdraw his application with Empire Airlines in December (RX 8, pp. 40-41), but rather asked for a later start date due to a "family emergency." *Id.* at 18-19. According to Mr. Broschet, Empire Airlines granted Mr. Kossen a new start date of March 3, 2018. *Id.*

[17] Mr. Kossen contends Mr. Yoder told Empire Airlines in July of 2018 that Mr. Kossen "was a whistleblower," after which Empire did not offer Mr. Kossen the chief pilot position. (CB, p. 54.) Mr. Kossen advances this as evidence of APA blacklisting him. But Mr. Yoder left APA on November 17, 2017, after eleven years of employment, and testified he never contacted any company about Mr. Kossen. (HT, p. 532.)

[18] Mr. Kossen testified the demotion occurred for ten days. (HT, p. 179.) Mr. Broschet stated the demotion lasted "approximately a month." (RX 8, p. 57.)

[19] Mr. Broschet during his deposition:

> On August 19, 2018 we had an informal downgrade of Mr. Kossen from captain to first officer. This downgrade was related to a takeoff briefing he had. During the briefing he described his intention to violate FAA approved procedure for engine failure during takeoff... (RX 8, p. 57.)

[20] A "stick shaker" is an automatic alert which causes the aircraft's controls to shake in the pilot's hands when the aircraft is approaching a stall. A stall typically results in a sudden uncontrolled drop in altitude. A "stick pusher"

> is a more serious warning of an impending stall, in which the aircraft's nose drops automatically just before the stall. A stall during a landing, when the aircraft is necessarily at low altitude, is potentially catastrophic. *See*, e.g., HT, pp. 414, 554.

c. Wing Spirit

Mr. Kossen worked as an executive assistant for Wing Spirit from July 28, 2019 until February 6, 2020. (HT, p. 186-87.) Wing Spirit told Mr. Kossen he had "a bad attitude". *Id*. at 189. Wing Spirit also told him it believed he had "started rumors about the company over the weekend" before his termination. *Id*.

Mr. Freeman met with Wing Spirit while Mr. Kossen was employed there. (HT, pp. 682-683.) Mr. Freeman went to discuss potential job opportunities with Wing Spirit. *Id*. While there, Mr. Freeman disclosed Mr. Kossen "has litigation" involving Mr. Freeman, and "it could be a conflict of interest." *Id*. Wing Spirit asked no follow up questions. *Id*.

On December 24, 2019, Mr. Kossen contends he met with the Vice President of Wing Spirit, who mentioned a lawsuit with APA. (HT, pp. 192-195.) Mr. Kossen believes Wing Spirit fired him because of Mr. Freeman's reference to "litigation," that is, this AIR 21 claim. (CB, pp. 54-55.)

**4. Complaint to the FAA**

Before he worked at APA, Mr. Kossen flew as a first officer at Mesa Airlines. (HT, p. 202.) While at Mesa, he became aware of Regulation 121.436, which requires a pilot to accrue at least 1,000 hours of flight time before qualifying as captain – the "1000-hour rule." 14 § C.F.R. 121.436(b); *see* also HT, p. 68. In August of 2017, he told the FAA a pilot at Mesa, who had been promoted from first officer to captain, had in fact not satisfied the 1000-hour rule and should not have been upgraded. (CX 61, pp. 317-321.) The FAA found no safety violation. *Id*. At 318.

While at APA, Mr. Kossen became aware of an issue with pilots misreporting their flight times within the logbooks. (HT, pp. 71-74.) On June 13, 2017, Mr. Kossen emailed the Director of Safety at APA, Richard Brown, asking, "Who is in charge of calculating upgrade time and verifying the 1000hrs for upgrade?" Mr. Brown replied, "That's my job." (CX 6.)

On July 26, 2017, Mr. Kossen emailed Mr. Brown regarding his concern:

> I believe that there is a typo in our manual that will lead/has apa to upgrade people before meeting a captain qualification of 1000 hrs as a first officer under far 121.436a and has possibly been misunderstood by apa...

(CX 11.)

Sometime in the summer or fall of 2017, Mr. Kossen met with Mr. Brown. (HT, p. 718.) Mr. Brown testified Mr. Kossen had a question about flight time. *Id.* Mr. Brown did not consider the conversation to involve a safety complaint. *Id.* APA uses the "Baldwin" system, which allows people to file safety reports anonymously. *Id.* at 719. APA has utilized the Baldwin reporting system since 2014. *Id.* at 720. APA pays $2,000 per month for this system. *Id.* at 721. Mr. Kossen received training on this system. *Id.* at 719. Mr. Kossen did not file a Baldwin safety report in the summer or fall of 2017. Mr. Brown testified he received no anonymous Baldwin reports during the year 2017 regarding safety issues. *Id.* at 720.

Sometime in July of 2017, Mr. Kossen met with Mr. Freeman regarding his concern with misreporting of flight time hours. (HT, pp. 122-123, 490-492.) Afterward, Mr. Freeman spoke with Mr. Nutting and they "went back to the resumes" to confirm flight time hours were met. *Id.* at 492.

In October and November of 2017, Mr. Kossen e-mailed Mr. San Agustin several times regarding this concern. (CX 7, 10.)

In August of 2017, Mr. Kossen contacted the FAA seeking "FAA legal interpretation of international flight times." (CX 61.) In the same e-mail chain, Mr. Kossen identified a pilot from Mesa

Airlines whom Mr. Kossen felt did not qualify under the "1000-hour rule". *Id.* at 317. Mr. Kossen did not identify APA nor any APA pilots by name within this e-mail chain.[21] *Id.*

Sometime in November[22] or December of 2017, the FAA began an investigation at APA, asking to see pilots' logbooks. (HT, p. 497; *see also* CX 31, text message, dated December 15, 2017, from Mr. San Agustin to Mr. Kossen: "Dash The Feds are looking into your concerns about 121 flight time...".) Mr. Freeman testified it is common for an official from the FAA to stop by or be in communication with APA. *Id.* at 498-499. Mr. Freeman was "sure" this investigation was because "Darren had brought this issue up." *Id.* at 498. But he did not consider Mr. Kossen a "whistleblower" – "I was not thinking anything about whistleblower. Am I aware that the investigation on log books was because of Mr. Kossen, okay. But as far as whistleblower, that was not in my thought process." *Id.* at 511. APA experiencedno repercussions following the completion of the FAA investigation. *Id.* at 489. The FAA asked APA to consider ways to improve its pilot-hiring process. *Id.*

At the time of separation, Mr. Ferguson testified he was unaware Mr. Kossen filed a safety complaint with the FAA regarding APA. (HT, p. 615.)

On October 30, 2018, the FAA closed an investigation initiated by a complaint from Mr.

Kossen. The investigation was closed due to Mr. Kossen's noncompliance. (CX 8, p. 45.)

On December 12, 2018, the FAA completed its investigation into Mr. Kossen's "air carrier safety allegations," finding a safety violation occurred. (CX 8, p. 44.) Similarly, on November 2, 2018, the FAA completed an investigation into a "safety allegation" filed by Mr. Kossen, finding a violation occurred and APA "may have pilots who have falsified their flight hours." (CX 9, p. 57.)

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[21] In his post-hearing brief, Mr. Kossen references various "FAA Hotline Report[s]" allegedly made during July of 2017, including one that identified pilots Francis Lessett, Dennis Nutting, and Loveman Calero by name. (CB, p. 17.) But CX 61 shows no helpful identifying information. Pages 322 to 326 appear to be screen shots of submission screens to the FAA Hotline Reporting Form. There are no corresponding dates, except for one, June 10, 2018 – a date that falls well after Mr. Kossen's separation from APA in January, 2018. (CX 61, p. 325.)

[22] Mr. Kossen writes, "On November 24, 2017, I became aware that the FAA was investigating the safety concerns I brought up to management." (RX 1.)

[23] The record lacks the specific filing which triggered this investigation. Therefore, the exact date and contents of the relevant FAA complaint(s) and the precise date of the ensuing FAA investigation do not appear in the record.

**5. OSHA Complaint**

On February 13, 2018, Mr. Kossen filed a whistleblower complaint with OSHA. (RX 2.) He alleged he "was terminated and blacklisted in retaliation for bringing up FAA safety violations to company management and for filing a workers compensation claim." *Id.* The complaint alleged the adverse action occurred on or about February 8, 2018. *Id*. On February 1, 2019, the Secretary of Labor found a violation could not be sustained because Mr. Kossen failed to cooperate in the investigation. *Id.*

Mr. Kossen seeks reinstatement or, in the alternative, damages. (CB, p. 63.)

## IV. ANALYSIS

The Legal Standard and Burdens of Proof

It is a violation of AIR 21 "for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate

against any employee" because the employee has engaged in protected activity. 29 C.F.R. § 1979.102(b)

Under the Act a complainant engages in protected activity if he:

> 1) provided, caused 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 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 this 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.

49 U.S.C. § 42121(a).

A two-pronged burden-shifting framework applies in whistleblower claims under AIR 21. 42 U.S.C § 42121(b). The complainant has the initial burden of satisfying the first prong of the two-part test. *Id*.

To satisfy the first prong, the complainant must demonstrate, by a preponderance of the evidence, that: (1) he or she engaged in protected activity; (2) the employer knew of the protected activity; (3) he or she suffered an adverse personnel action; and (4) his or her protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B); *Clemmons v. Ameristar Airways, Inc.,* ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007). If the complainant cannot demonstrate each of the four elements, then his or her case is unsuccessful, and the employer prevails.

If the complainant demonstrates all four elements, the burden shifts to the employer to show, by clear and convincing evidence, that it would have taken the same adverse personnel action notwithstanding the protected activity. *Cain v. BNSF Railway Co.,* ARB No. 13-006, ALJ No. 2012-

FRS-019, slip op. at 3 (ARB Sep. 18, 2014).

**a. Complainant's Prima Facie Case**

**1. Protected Activities**

Protected activities under the Act include providing the employer or (with knowledge of the employer) the Federal Government with "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 . . . " 49 U.S.C.A. § 42121(a)(1); *see* also 29 C.F.R. § 1979.102. The complaints may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. *See Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-00021 (ARB Mar. 14, 2008); but *see Occhione v. PSA Airlines, Inc.,* ARB No. 15-090, ALJ No. 2011-AIR-12 (ARB July 26, 2017). Though the complainant need not prove an actual violation, the complainant's belief that a violation occurred must be objectively reasonable. *See Douglas v. Skywest Airlines, Inc.,* ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014 (ARB Sept. 30, 2009). A reasonable belief has both objective and subjective components. *Hukman v. U.S. Airways, Inc.,* ARB No. 15-054, ALJ No. 2015-AIR-3 (ARB July 13, 2017). To prove subjective belief, a complainant must prove he or she actually "believed that the conduct he or she complained of constituted a violation of relevant law." *Id*. at 4-5. To determine

whether a subjective belief is objectively reasonable, the ALJ assesses a complainant's belief, taking into account "the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.*

Here, no one disputes Mr. Kossen engaged in protected activity. Sometime between June and December of 2017, he filed at least one complaint with the FAA relating to safety concerns at APA. (CB, p. 17.) While the evidence of record includes August 2017 communications with the FAA regarding legal interpretations of the "1000-hour rule," these communications identify Mesa Airlines and name a specific pilot at Mesa Airlines, both for alleged violations of the "1000-hour rule." (CX 61.) But these communications do not identify APA nor any APA pilots by name. *Id.* Moreover, the included FAA Hotline submission forms do not reveal any content or dates of these complaints, other than one date – June 10, 2018 – which falls nearly six months after Mr. Kossen's separation with APA. (CX 61, p. 325.) Thus, the evidence of record does not include Mr. Kossen's actual complaint naming APA during this time.

But the evidence suggests it is very likely Mr. Kossen made a complaint that resulted in an investigation of APA sometime in November or December of 2017. Several APA employees acknowledged an investigation pertaining to the "1000-hour rule." (HT, p. 497; *see also* CX 31.) In

addition, at least two APA employees testified the investigation was directly linked to the very concerns Mr. Kossen had raised with them. Mr. Freeman, the Director of Operations at APA at the time of the investigation, was "sure" the ensuing investigation was because Mr. Kossen "had brought this issue up." (HT, p. 498.) Similarly, in December of 2017, Mr. San Agustin wrote Mr. Kossen, within a text message, " The Feds are looking into your concerns..." (CX 31.) Lastly, the record shows the FAA, in December of 2018, completed an investigation pertaining to "air carrier safety allegations" raised by Mr. Kossen and concluded APA "may have pilots who have falsified their flight hours." (CX 9, p. 57.) While it is unclear when the complaint which triggered this investigation was filed, the record demonstrates Mr. Kossen filed an FAA complaint specifically naming APA.

Given the documented history of engagement with the FAA, the documented exchanges with APA officials regarding the safety issue, and the occurrence of an investigation into the very same issue Mr. Kossen raised, I find Mr. Kossen engaged in protected activity sometime between June and December of 2017 through the filing of a complaint with the FAA relating to safety concerns at APA.

**2. Knowledge**

To prevail under the Act, a complainant must demonstrate by a preponderance of the evidence that the employer knew of his protected activity. 49 U.S.C.

§ 42121(b)(2)(B); see Clemmons, slip op. at 9. "Preponderance of evidence" means the greater weight of evidence; moreover, superior evidentiary weight, though maybe "not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-Air-8, slip op. at 13 (ARB Jan. 31, 2006). Lastly, knowledge of a protected activity may be shown by circumstantial evidence. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 4 (ARB Sept. 30, 2003).

In general, it is not enough for a complainant to show the employer, as an entity, knew of his protected activity. Rather, the complainant must show the decision makers who subjected him to the alleged adverse actions knew of his protected activity. *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028 (ARB: Jan. 30, 2004), slip op. at 11. Even where the complainant cannot show the decision maker who ultimately took the adverse action knew of the protected activity, he or she may establish knowledge by showing another person who had "substantial input" into the alleged adverse action knew of the protected activity. Kester, slip op. at 4 (finding knowledge where an employee who had "substantial input into the decision to fire" the complainant had knowledge of the protected activity). Thus, an employer can not evade a finding of knowledge where a decision may have been substantially influenced by an individual who knew of

the activity but the ultimate decision maker remained unaware.

The record demonstrates by a preponderance of the evidence that Respondent knew of Mr. Kossen's protected activity of filing a complaint with the FAA. Mr. Ferguson testified he was unaware of Mr. Kossen's protected activity, and testified it was his decision to accept Mr. Kossen's resignation. (HT, p. 613.) According to Mr. Freeman, Mr. Ferguson, as President of APA, is solely responsible for personnel decisions. *Id.* at 515. But Mr. Ferguson also testified he relies on monthly "operational calls" with Mr. Yoder and Mr. Freeman to inform his personnel decision making. Id. at 610-611. Furthermore, Mr. Ferguson decided to send the January 11, 2018 separation letter to Mr. Kossen after one of these operational calls. *Id.* at 613. While Mr. Freeman testified he did not think of Mr. Kossen's actions as whistleblowing, he did acknowledge he knew of Mr. Kossen's protected activity – Mr. Freeman was "sure" the ensuing FAA investigation into flight time hours was because "Darren had brought this issue up." Id. at 498.

Thus, I find by a preponderance of evidence Respondent knew of Mr. Kossen's protected activity, given the evidence of (1) Mr. Freeman's knowledge of the proteced activity; (2) Mr. Ferguson's reliance on operational calls with Mr. Freeman to inform his personnel decisions; and, (3) Mr. Ferguson's decision

to draft a separation letter immediately after one of these operational calls.

**3. Adverse Action**

Air carriers may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee who has engaged in protected activity. *See* 29 C.F.R. § 1979.102(b) (AIR 21); *see also* 29 C.F.R. § 24.2(b)(2003) (adopting similar definitions under similar whistleblower protection statutes). But not everything that makes an employee unhappy constitutes an actionable adverse action under the *Act. Trimmer v. US DOL*, 174 F.3d 1098, 1103 (10th Cir. 1999). An actionable adverse action must be "more than trivial, either as a single event or in combination with other deliberate employer actions." *Williams v. American Airlines,* ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010); *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011) (emphasis added). Thus, "[a]lthough AIR 21 protections are not reserved for especially detrimental employment actions, such as termination, suspension, demotion, or loss of status or pay, these are certainly the most obvious examples of an adverse employment action." *Harding v. So. Cal Precision Aircraft,* ALJ No. 2011-AIR-005, slip op. at 22 (19 December 2011). Lastly, a complainant must file his complaint with OSHA within 90 days of an alleged adverse action for the complaint to be timely under the Act. 49 U.S.C. § 42121(b)(1).

Mr. Kossen puts forth a lengthy list of alleged adverse actions on the part of Respondent. (CB, pp. 6-9.) Many of these actions are vague, broad, and unaddressed or unsubstantiated beyond being mentioned within this list.[24] Within his complaint to OSHA, Mr. Kossen lists two alleged adverse activities which occurred on or about February 8, 2018: termination and blacklisting. (RX 2.) I understand this lengthy list, taken in entirety, along with Mr. Kossen's OSHA complaint, to comprise essentially three distinct allegations: (1) Respondent's denial of his request to be upgraded to captain; (2) Respondent's alleged "blacklisting" of Mr. Kossen; and, (3) Respondent's alleged termination of Mr. Kossen's employment.

a. Captain Upgrade

Mr. Kossen alleges APA's denial of his request for a captain upgrade constituted an adverse action in retaliation to his protected activity. But, first, since the record does not establish when the protected activity occurred, Mr. Kossen cannot show the failure to upgrade was retaliatory. Mr. Kossen testified he learned he would not be upgraded to captain before October, 2017. (HT, p. 304.) This prompted his application to Empire Airlines on October, 3, 2017, because he "wanted to be a captain," and his ultimate acceptance of a captain job at Empire Airlines on October 12, 2017. *Id*. at 305-306. On the record before me, it is as possible his protected activity occurred

*after* October of 2017 as it is that it occurred *before*. And if it occurred *after* the failure to upgrade, it cannot have been a contributing factor in the failure to upgrade. Establishing the correct temporal relationship between the two is part of Mr. Kossen's *prima facie* burden.

Second, APA's witnesses contend Mr. Kossen was not qualified to be promoted to captain. Mr. Kossen himself contends he was fully qualified, but he has presented no evidence to show APA promoted even one other equally or less-qualified first officer to captain at any time.[25] Absent any evidence of disparate treatment, I cannot, on the record before me, conclude APA's failure to promote Mr. Kossen was an adverse action. Mr. Kossen is not sufficiently credible for me to conclude he was qualified for promotion simply because he says he was.

Third, Mr. Kossen filed his OSHA complaint on February 13, 2018. (RX 2.) The alleged adverse action occurred before October, 2017. A timely complaint must have been filed within 90 days of the date upon which the employee knew or should have known of the adverse action. *Peters v. American Eagle Airlines*, Inc., ARB No. 04-140, ALJ Case No 2004-AIR-00009 (Apr. 3, 2007). Mr. Kossen's complaint about this alleged adverse action falls outside the 90 day window and is, therefore, untimely.

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[24] For example, Mr. Kossen lists "making threats" without expanding upon this allegation anywhere within the 799-page hearing transcript or 86 admitted complainant exhibits; lists "denied overtime" as an adverse action; and lists promotion of a "new hire" to captain "instead of Darren Kossen" as just a few examples of the many allegations put forth. (CB, p. 6.)

[25] In his post-hearing brief, Mr. Kossen suggests APA may have hired Captains Sergei Rybakov, Max Griffin, and Dennis Nutting as captains in reference to him (CB, p. 5), but this assertion in the brief is unsupported by any evidence in the record about the comparative qualifications of any of the four.

b. Alleged Blacklisting

Mr. Kossen contends APA blacklisted him because of his protected activity. Specifically, he argues APA "had contact with Empire [Airlines] to poison his well" and APA engaged in blacklisting by "not providing Mr. Kossen with a recommendation letter." (CB, p. 8.) Mr. Kossen also argues Mr. Freeman dissuaded TransAir from hiring him, effectively blacklisting him. (CB, p. 50.) Lastly, Mr. Kossen believes he was fired from Wing Spirit in December of 2019 because Mr. Freeman informed the airline of his AIR 21 complaint.

The record does not demonstrate that Respondent blacklisted Mr. Kossen. First, without further evidence, I find APA's failure to provide a recommendation letter does not constitute blacklisting, *per se*. Second, Mr. Kossen's belief that APA tampered with his position at Empire Airlines hinges on his argument that Mr. Yoder spoke with Empire Airlines in July of 2018, resulting in Mr. Kossen not being offered a chief pilot position. (CB, p. 54.) Not only is there no evidence of record to substantiate the conversation between Mr. Yoder and Empire Airlines, but also, by November of 2017, Mr. Yoder had already left APA (*see fn. 17, supra*).

Third, the record does not show Mr. Kossen had a bona fide contract with TransAir, which it breached after speaking with Mr. Freeman. If anything, the record indicates precisely the opposite – that no such contract had been finalized yet. Mr. Freeman provided only neutral feedback,[26] and TransAir decided against employing Mr. Kossen because of several "red flags" regarding Mr. Kossen's own demeanor and professionalism. Other than speculation, there is no evidence to suggest Mr. Freeman in any way alerted TransAir to those "red flags," and Mr. Freeman testified he did not.

Fourth, the record demonstrates only that Mr. Freeman was invited to speak with Wing Spirit about job opportunities, and while there, mentioned Mr. Kossen had filed a lawsuit in which Mr. Freeman was involved. The record does not show Mr. Freeman

mentioned the context or nature of this lawsuit, as Mr. Kossen believes. And it does not follow that a passing reference to "litigation" between Mr. Kossen and APA shows a conscious attempt to harm Mr. Kossen. To be sure, filing an AIR 21 complaint may cause problems for a pilot in a close-knit community, but there is no evidence Mr. Freeman identified the "litigation" as an AIR 21 complaint, or suggested the "litigation" lacked merit, or in any way implied Mr. Kossen's position in the "litigation" was unreasonable. Mr. Kossen asks me to infer as much from the record, but I find insufficient evidentiary support for such a conclusion in the record before me.

Fifth, and finally, Mr. Kossen's later employers not only deny any blacklisting, but offer other reasons for their actions. TransAir discovered "red flags" independently of APA; Empire Airlines reports poor CRM skills, a month-long demotion, and serious safety events with passengers onboard; and Wing Spirit told Mr. Kossen of his "bad attitude" and reportedly said he was spreading "rumors" about the company.

In sum, I find insufficient evidence to support a conclusion that APA blacklisted Mr. Kossen, however sincerely he may believe it happened. But his own unsupported suspicion – particularly when coupled with express denials from other witnesses, and evidence of a serious performance issue at Empire Airlines – does not carry the day on this issue.

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[26] The Director of Operations and Flight Operations at TransAir called APA while it was considering hiring Mr. Kossen to "see what kind of employee" he was. (RX 7, p. 29.) He spoke with Mr. Freeman, who gave "the standard HR answer, you know. Typically, when you call a place, they'd say, yeah, he worked here, or he didn't work here. And that's pretty much all they give you, so unfortunately, that's all I got from Mr. Freeman." *Id*. at 30.

c. Alleged Termination

Mr. Kossen carries the burden of establishing an alleged adverse action by a preponderance of evidence. He must show his interpretation of events is supported by superior evidentiary weight "to incline a fair and impartial mind to one side of the issue rather than the other." *Brune, supra*, slip op. at 13.

Here, I find Mr. Kossen does not meet that burden with respect to his alleged termination in January, 2018. There is no question Mr. Kossen himself resigned on November 22, 2017. And there are a number of material discrepancies between his testimony and the testimony of several credible witnesses. Because Mr. Kossen's own credibility is impaired, I cannot take his testimony as true and the

contradictory testimony as false, especially where the contradictory witness was credible.

Mr. Kossen and Respondent disagree on many material issues. Primarily, they do not agree on whether the January 12 exit date constituted Mr. Kossen's resignation or termination. Both parties acknowledge Mr. Kossen "agreed to work through the month of December," but Respondent maintains "there was no agreement beyond December." (RB, pp. 1-2.) There is no documentary evidence of any agreement between APA and Mr. Kossen extending his post-resignation employment either temporarily or permanently.

There is no question Mr. Kossen took a job with a competitor on October 12, 2017. There is also no question he resigned from APA on November 22, 2017. His letter of resignation (RX 5) is unequivocal on its face. Mr. Kossen argues he later effectively "rescinded" his resignation, apparently contending the rescission restored his original employment status, so that the end of his employment in January, 2018, must have been a termination.

But as Respondent observes, the events following Mr. Kossen's unequivocal resignation are "muddied." (RB, p. 1.) There is no written record of the purported rescission in the record (*see* fn. 14, supra). In addition, APA's hiring of replacement personnel (RB, p. 44; HT, p. 609), and the credible testimony of Mr. Freeman and Mr. Ferguson, suggests APA did not

understood Mr. Kossen, after "rescinding," intended to stay at APA indefinitely.

Moreover, there is conflicting evidence about whether Mr. Kossen ever told Empire Airlines he had decided to stay at APA indefinitely. Mr. Kossen testified he did, but the record indicates Mr. Kossen e-mailed Empire Airlines asking to "postpone" his start date because of a family emergency, rather than withdrawing his application in order to stay at APA. (RX 4.) Mr. Broschet of Empire Airlines also understood Mr. Kossen had merely postponed his start date. (Fn. 16, supra.) Mr. Kossen's testimony about having rescinded his APA resignation would be more persuasive if the record showed he simultaneously made a clean break with Empire Airlines as well. It does not. Neither is there any suggestion in the record that APA had any intention of terminating Mr. Kossen's employment at any time before he resigned. Managers at the hearing expressed some criticisms of his performance as an employee, and the company did not promote him to captain when he sought the promotion; but there is nothing in the record to show anyone at APA had any thought of terminating his employment, or even disciplining him,[27] before he submitted his facially-unequivocal resignation on November 22, 2017. On the contrary, just in the previous month, APA gave Mr. Kossen a pay raise (HT, p. 319). Nothing in the record suggests Mr. Kossen's employment at APA would have ended in 2018 if Mr. Kossen had not first, of his own volition, resigned from APA in 2017. The

confusing chain of events which followed his resignation – the purported "rescission" of his resignation, his continuing to work for APA while maintaining a start date for a new job at Empire Airlines, and APA's hiring of replacement personnel – was set in motion not by any act of APA's, but by Mr. Kossen's resignation in order to take a job as a captain with another airline.

For all of these reasons, the record does not demonstrate Mr. Kossen's version of these events by a preponderance of the evidence. With respect to the alleged termination, Mr. Kossen does not establish a prima facie showing of an adverse action.

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[27] As discussed above, there is no evidence, beyond Mr. Kossen's own conclusory testimony, that APA's failure to grant the promotion he sought to captain was in any way discriminatory or retaliatory, or in any way a departure from its usual practice.

**4. Causal Link**

Finally, a successful AIR 21 complainant must establish the protected activity was a contributing factor to any adverse action. 49 U.S.C. § 2121(b)(2)(B). That is, the complainant must show the adverse action was motivated, at least in part, by a retaliatory or discriminatory response to complainant's protected

activity. A discriminatory reference may be inferred where the adverse action closely follows the protected activity in time. But temporal proximity is not always dispositive. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001). Furthermore, "if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 12-13 (ARB Nov. 30, 2006).

Considering an intervening event is essential to upholding the intended pupose of the Act. Whistleblower provisions "are intended to promote a working envronment in which employees are elatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir.1993). But "[t]hey are not, however, intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999). A complainant cannot use his whistleblower status to evade termination for nondiscriminatory reasons. *Trimmer,* 174 F.3d 1098 at 1104. Thus, the occurrence of an intervening event, especially one undertaken by the employee himself, may undermine a causal

inference between the protected activity and the alleged adverse action.

Here, Mr. Kossen's resignation separates his alleged termination from his protected activity. He submitted his resignation letter on November 22, 2017. In this letter, he acknowledges he has accepted a job as a captain with another airline. He also requests time off in January for training for his new position at Empire Airlines. (RB, p. 43.) I find Mr. Kossen's November 22, 2017, resignation letter constitutes an "an intervening event that independently could have caused" his final departure from the company. *Clark, supra*, slip op. at 12-13. By submitting his resignation, he risked his position at the company (the very purpose of a resignation is to sever employment, after all). The resignation caused APA to hire a new pilot in his place. (HT, pp. 609-610.) Thus, I find Mr. Kossen cannot use his whistleblower status to "shield" himself from the foreseeable consequences he put into play by resigning, particularly in light of the conflict between his hearing testimony and his statements to Empire Airlines after his purported "rescission" of that resignation. *Trimmer* at 1104.

## V. ORDER

Mr. Kossen's claim for relief under AIR 21 is **DENIED.**

SO ORDERED.

DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU= Administrative Law Judge,)=US
DOL Office of Administrative Law
Judges, L=San Francisco S=CA C=US
Location: San Francisco CA

**CHRISTOPHER LARSEN**

**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a). If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

**IMPORTANT NOTICE ABOUT FILING APPEALS:**

**The Notice of Appeal Rights has changed because the system for electronic filing is changing beginning on Monday, December 7, 2020, at 8:30 a.m.**

**Thus, if you intend to e-file your appeal online on or after December 7, 2020, at 8:30 a.m., be sure to allow sufficient time to register under the new system and to learn how to file an appeal.**

**You may pre-register to use the new system from November 9, 2020, until 5:00 pm EST on December 3, 2020. As part of the migration to EFS, the Board's current EFSR system will go offline permanently at 5:00 pm Eastern Standard Time (EST) on December 3, 2020. This means that you will not be able to e-file any appeals or other documents with the ARB after 5:00 pm EST on December 3rd through December 7th, at 8:30 a.m. If you intend to file on these dates, please plan to file by other means (conventional mail, hand delivery, etc.).**

**Although you may pre-register earlier, you will not be able to file using the new system until December 7, 2020, at 8:30 a.m.**

In addition, the Office of the Chief Information Officer ("OCIO") will conduct an informational webinar on how to register and how to conduct basic filing operations:

**Tuesday, November 17, 1:00 to 2:00 p.m. EST**.

Webinar link:
https://usdolevents.webex.com/usdolevents/onstage/g.php?MTID=e7dbc7a29dbb7f5ec26f4a717032cfb02
US Toll Free 1-877-465-7975
US Toll 1-210-795-0506
Access code: 199 118 1372
Password for all meetings: Welcome!68

**Information for webinars on the new system will also be available on the OALJ (www.dol.gov/agencies/oalj), the ARB (www.dol.gov/agencies/arb), and the new EFS (https://efile.dol.gov/) websites.**

*Filing Your Appeal Online*

If you e-file your appeal on or before 5 p.m. on December 3, 2020, you must use the Board's current Electronic File and Service Request (EFSR) system at dolappeals.entellitrak.com. Again, the Board's current EFSR system will go offline at 5 p.m. Eastern Time on December 3, 2020, for deployment related activities. Please plan your filings accordingly. Information regarding registration for access to the EFSR system, a step by step user guide, and answers to FAQs are found at that website link. If you have any questions or comments, please contact Boards-EFSR-Help@dol.gov Beginning on Monday, December 7, 2020, at 8:30 a.m., the U.S. Department of Labor will implement a new eFile/eServe system ("EFS") at https://efile.dol.gov/. If you use the current website link, dol-appeals.entellitrak.com, you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/. Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do

not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-brb.pdf and the video tutorial at https://efile.dol.gov/support/boards/new-appeal-brb.

**BE SURE TO REGISTER IN ADVANCE!** Again, you may preregister for EFS from November 9, 2020, until 5:00 pm EST on December 3, 2020. stablishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

*Filing Your Appeal by Mail*

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board

ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210–0001

*Access to EFS for Non-Appealing Parties*

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at: https://efile.dol.gov/support/boards/request-access-an-appeal

*After An Appeal Is Filed*

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

*Service by the Board*

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, on or after December 7, 2020, at 8:30 a.m., you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.

SERVICE SHEET

Case Name:
**KOSSEN_DARREN_v_ASIA_PACIFIC_AIRLINE**
**_**

Case Number: **2019AIR00011**

Document Title: **DECISION AND ORDER DENYING COMPLAINT**

I hereby certify that a copy of the above-referenced document was sent to the following this 9th day of November, 2020:

DEPARTMENT OF LABOR UNITED STATES OF AMERICA

Digitally signed by MARYANNE B. BALLARD
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