

UNITED STATES COURT OF APPEALS APR 30 2024
MOLLY C. DWYER, CLERK
FOR THE NINTH CIRCUIT
U.S. COURT OF APPEALS

BAHIG SALIBA, Plaintiff-Appellant,
v.
ALLIED PILOTS ASSOCIATION, Defendant-Appellee.
No. 23-15631
D.C. No. 2:22-cv-01025-DLR

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted April 22, 2024**

Before: CALLAHAN, LEE, and FORREST, Circuit
Judges.

Bahig Saliba appeals pro se from the district court's judgment dismissing his federal action challenging Allied Pilots Association's COVID-19 policies and conduct during Saliba's workplace disciplinary process. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

APPENDIX A

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). Saliba's request for oral argument, set forth in the reply brief, is denied.

Civil Procedure 12(b)(6). Puri v. Khalsa, 844 F.3d 1152, 1157 (9th Cir. 2017). We affirm.

The district court properly dismissed Saliba's claims alleging that Allied Pilots Association violated its duty of fair representation because Saliba failed to allege facts sufficient to show that it acted arbitrarily, discriminatorily, or in bad faith. See Demetris v. Transp. Workers Union of Am., AFL-CIO, 862 F.3d 799, 804-05 (9th Cir. 2017) (explaining that a union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith; and that a union's conduct will only be deemed arbitrary if "so far outside" a "wide range of reasonableness" that it is "wholly irrational" (citations and internal quotation marks omitted)).

The district court properly dismissed Saliba's remaining claims because Saliba failed to allege facts sufficient to state any plausible claim. See Pasadena Republican Club v. W. Justice Ctr., 985 F.3d 1161, 1166-67 (9th Cir. 2021) (explaining that 42 U.S.C. § 1983 liability requires a defendant to act under color of state law, which is analyzed by "whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" (citation and internal quotation marks omitted)); Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006) (explaining that 18 U.S.C. § 242 does not give rise to private civil liability); G.S.

2 23-15631

(4 of 4)

Case: 23-15631, 04/30/2024, ID: 12881475, Dkt Entry:
13-1, Page 3 of 3

Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.,
958 F.2d 896, 902 (9th Cir. 1992) (explaining that there
is no private right of action under the Federal Aviation

Act, “particularly where plaintiff’s claim is grounded in
the regulations rather than the statute itself”).

The district court did not abuse its discretion in denying
reconsideration because Saliba failed to establish a basis
for such relief. See Sch. Dist. No. 1J, Multnomah
County, Or. v. ACandS, Inc., 5 F.3d 1255, 1262-63 (9th
Cir. 1993) (setting forth standard of review and grounds
for reconsideration).

AFFIRMED.

3 23-15631

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bahig Saliba,

Plaintiff,

v.

Allied Pilots Association,

Defendant.

No. CV-22-01025-PHX-DLR

ORDER

The Court dismissed this action on March 27, 2023. (Doc. 17.) Plaintiff seeks reconsideration of that order. (Doc. 18.)

Motions for reconsideration should be granted only in rare circumstances. Defenders of Wildlife v. Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration. See Leong v. Hilton Hotels Corp., 689 F. Supp. 1572, 1573 (D. Haw. 1988).

“Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

APPENDIX B

Such motions should not be used for the purpose of asking a court “to rethink what the court had already thought through—rightly or wrongly.” Defenders of Wildlife, 909 F. Supp.

at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). The Court has reviewed Plaintiff's motion and finds reconsideration is not warranted. Plaintiff does not identify any intervening change in controlling law, nor does he present any material information or argument that could not have been presented earlier with reasonable diligence. Instead, Plaintiff quarrels with the correctness of the Court's order and essentially asks that the Court re-think what it has already thought through. That is not the purpose of a motion for reconsideration. IT IS ORDERED that Plaintiff's motion for reconsideration (Doc. 18) is DENIED.

Dated this 20th day of April, 2023.

Douglas L. Rayes

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bahig Saliba,
Plaintiff,
v.
Allied Pilots Association,
Defendant.

No. CV-22-01025-PHX-DLR

ORDER

At issue is Defendant Allied Pilots Association’s (“APA”) motion to dismiss Plaintiff Bahig Saliba’s complaint (Doc. 9), which is fully briefed (Docs. 12, 15). For reasons explained below, APA’s motion is granted, and this case is dismissed.

I. Background⁹

Saliba is a pilot employed by American Airlines (“American”). APA is the union that represents American’s pilots. Though Saliba is not a member of the union, he is in a bargaining unit represented by APA.

⁹ The following background is based on the allegations in Saliba’s complaint (Doc. 1) along with documents properly subject to judicial notice.

APPENDIX C

During the COVID-19 pandemic, American adopted a policy requiring passengers to wear masks during flights and requiring employees to wear masks while at work. Pilots were required to wear masks while facing passengers but were not required to wear a mask in the flight deck. APA supported American's mask policy and encouraged its pilots to comply.

American's internal mask policy was only one of many mask mandates that applied to air travelers during the pandemic. For example, Executive Order 13998 imposed a federal mask mandate for air travel. And the Federal Aviation Administration ("FAA") issued guidance mirroring the executive order.

On December 6, 2021, Saliba approached a Transportation Security Administration ("TSA") checkpoint without a mask. The TSA officer asked him to wear one, but he refused. The TSA officer contacted airport police, and Saliba told the officers that he was exempt from the mask mandate because, in his personal judgment, wearing a mask could compromise his fitness for duty. After a brief detention, Saliba was released, still not wearing a mask.

Airport police reported the incident to American, after which Saliba was removed from active flying duty and placed on administrative leave pending disciplinary action. On December 9, 2021, American informed Saliba that it was proposing disciplinary action against him. A hearing on that proposal was held on January 6, 2022. And in the month leading up to hearing, Saliba exchanged numerous emails with APA's in-house lawyer, Rupa Baskaran. Saliba insisted that APA both represent him at the hearing and argue his preferred defense, which was that Federal Aviation Regulation ("FAR") § 61.53 gave him unilateral authority to determine

whether to wear a mask. Ms. Baskaran explained to Saliba that APA will represent him at the hearing, if he so chooses, but APA would not advance Saliba's preferred defense because APA agreed with American's mask policy and disagreed with Saliba's idiosyncratic reading of FAR § 61.53. Ms. Baskaran also explained to Saliba that, if he does not affirmatively elect APA representation, he may represent himself at the hearing and advance whatever arguments he would like. Saliba never affirmatively elected APA representation.

During the disciplinary hearing, Saliba was given an opportunity to, and in fact did, argue his FAR § 61.53 defense. He also acknowledged that, on December 6, 2021, he was not wearing a mask at the TSA checkpoint. Ultimately, a written advisory was placed into Saliba's personnel file regarding his failure to comply with American's mask policy. With APA's assistance, Saliba filed a grievance challenging American's decision to issue a written advisory. Those administrative proceedings remain ongoing.

In the meantime, Saliba filed this action against APA, accusing it of violating its statutory duty of fair representation by not opposing American's mask policy and not advancing Saliba's preferred defense at this disciplinary hearing. Saliba also accuses APA of violating 18 U.S.C. § 242, which criminalizes certain deprivation of constitutional rights under color of state law, 42 U.S.C. § 1983, which provides civil remedies for the same, and 14 C.F.R. § 91.11, an FAA regulation that prohibits interference with an airplane crew member's performance of their duties. APA has moved to dismiss all claims.

II. Legal Standard

When analyzing a complaint for failure to state a claim to relief under Federal Rule of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). Nor is the Court required to accept as true “allegations that contradict matters properly subject to judicial notice,” or that merely are “unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). To avoid dismissal, the complaint must plead sufficient facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

III. Analysis

Saliba’s claims under §§ 242, 1983, and 91.11 fail as a matter of law. Section 242 is a criminal statute that does not provide a private civil right of action. See *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006). Section 1983 provides a civil right of action, but

only against those acting under color of state law. APA is a union, and generally “[u]nions are not state actors; they are private actors.” *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). Although there are some limited circumstances under which the conduct of an otherwise private actor may be deemed state action, see *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003), none of those limited circumstances are present here. And the

Ninth Circuit has held that the FAA does not create an implied right of action. *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (“[W]e have previously held that there is no implied private right of action under the Federal Aviation Act. We reach the same conclusion . . . where plaintiff’s claim is grounded in the regulations rather than the statute itself.” (citation omitted)).

This leaves Saliba’s duty-of-fair-representation claim. A union has a duty to fairly represent all employees within the bargaining unit. *Demetris v. TWU*, 862 F.3d 799, 804-05 (9th Cir. 2017). A union breaches this duty when it acts arbitrarily, discriminatorily, or in bad faith. *Id.* at 805. This standard is highly deferential to the union, especially when the challenged conduct involves a union’s judgment. *Id.* This is so because unions must balance the interests of individuals and of the group as whole but pursuing every individual’s goals would make it impossible to effectively pursue the broader goals of the entire group. Therefore, absent discrimination or bad faith, courts defer to a union’s judgment because “[a union] must be able to focus on the needs of its whole membership without undue fear of lawsuits from individual members.” *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990).

Here, it is implausible that APA acted arbitrarily, discriminatorily, or in bad faith when it refused to opposed American's mask policy or to advance Saliba's idiosyncratic view of FAA regulations. American's mask policy was generally consistent with those adopted by the federal government, as well as many state and local governments. It also was based on a scientific consensus that wearing masks helps reduce the transmission of COVID-19. Saliba might disagree with the science, but his disagreement does not make APA's endorsement of American's mask policy arbitrary, discriminatory, or in bad faith.

Likewise, it is implausible that APA's refusal to advance Saliba's preferred defense at his disciplinary hearing was arbitrary, discriminatory, or in bad faith. The two merely had a disagreement over the proper reading of the relevant FAA regulations. These types of differences of opinion are insufficient to support a breach of the duty of fair representation claims. See *Conkle v. Jeong*, 73 F.3d 909, 915-16 (9th Cir. 1995). This is especially true here, where Saliba's interpretation of FAR § 61.53 is idiosyncratic and almost certainly incorrect. That regulation provides, in relevant part:

[N]o person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person:

- (1) Knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation; or
- (2) Is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the

41a

requirements for the medical certificate necessary for the pilot operation.

14 C.F.R. § 61.53. Nothing in this section even arguably gives Saliba the unilateral authority to decide whether to comply with a mask mandate policy, especially when that policy did not require him to wear a mask while actually piloting the airplane from the flight deck.

///

///

///

For these reasons,

IT IS ORDERED that APA's motion to dismiss (Doc. 9) is GRANTED. The Clerk is directed to terminate this action.

Dated this 27th day of March, 2023.

Douglas L. Rayes

United States District Judge

PUBLIC LAW 85-726-AUG. 23, 1958

AN ACT

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act, divided into titles and

sections according to the following table of contents, may be cited as the "Federal Aviation Act of 1958"

Title IV, Sec. 401 K

COMPLIANCE WITH LABOR LEGISLATION

(K) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbers 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air

APPENDIX D

transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Noting herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as use in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and hold a currently effective airman certificate authorizing him to serve as such pilot or copilot.

RAILWAY LABOR ACT

AN ACT to provide for the prompt disposition of disputes between carriers and their employees and for other purposes

SEC. 2. The purposes of the Act are:

- (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein.*
- (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization.*
- (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act.*
- (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.*
- (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.*

APPENDIX E

SD1542-21-02 and SD1544-21-02

§F.

This SD exempts the following categories of persons from wearing masks:

1. Children under the age of 2.
2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).⁷
3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

APPENDIX F

FEDERAL AVAITION REGUALTIONS

§1.1 General definitions

Administrator. means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned.

§61.1 Applicability and definitions.

(a)(1) The requirements for issuing pilot, flight instructor, and ground instructor certificates and ratings; the conditions under which those certificates and rating are necessary; and the privileges and limitation of those certificates and ratings.

§67.1 Applicability.

46a

This part prescribes the medical standards and certification procedures for issuing medical certificates for airmen and for remaining eligible for a medical certificate.

§91.1 Applicability.

(a) Except as provided in paragraphs (b), (c), (e), and (f) of this section and §§91.701 and 91.703, this part prescribes rules governing the operation of aircraft within the United States, including the waters within 3 nautical miles of the U.S. coast.

§117.1 Applicability.

This part prescribes flight and duty limitations and rest requirements for all flightcrew members and certificate holders conducting passenger operations under part 121 of this chapter.

§121.1 Applicability.

This part prescribes rules governing the domestic, flag, and supplemental operations of each person who holds or is required to hold an Air Carrier Certificate or Operating Certificate under part 119 of this chapter.

(b) Each person employed or used by a certificate holder conducting operations under this part including maintenance, preventive maintenance, and alteration of aircraft.

(c) Each person who applies for provisional approval of an Advanced Qualification Program curriculum, curriculum segment, or portion of a curriculum segment under subpart Y of this part, and each person employed or used by an air carrier or commercial operator under this part to perform training, qualification, or evaluation functions under an

Advanced Qualification Program under subpart Y of this part.

(d) Nonstop Commercial Air Tours conducted for compensation or hire in accordance with § 119.1(e)(2) of this chapter must comply with drug and alcohol requirements in §§ 121.455, 121.457, 121.458 and 121.459, and with the provisions of part 136, subpart A of this chapter by September 11, 2007. An operator who does not hold an air carrier certificate or an operating certificate is permitted to use a person who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to anti-drug and alcohol misuse prevention programs to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would otherwise be required to transport the aircraft more than 50 nautical miles further than the repair point closest to the operator's principal base of operations to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to FAA-approved programs can perform the repairs.

(e) Each person who is on board an aircraft being operated under this part.

(f) Each person who is an applicant for an Air Carrier Certificate or an Operating Certificate under part 119 of this chapter, when conducting proving tests.

(g) This part also establishes requirements for operators to take actions to support the continued airworthiness of each aircraft.

APPENDIX G

18 U.S. Code § 1001 - Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

APPENDIX H

**49 U.S.C. § 42112 - U.S. Code - Unannotated Title
49. Transportation § 42112. Labor requirements of
air carriers**

(a) Definitions.--In this section--

(1) "copilot" means an employee whose duties include assisting or relieving the pilot in manipulating an aircraft and who is qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a copilot.

(2) "pilot" means an employee who is--

(A) responsible for manipulating or who manipulates the flight controls of an aircraft when under way, including the landing and takeoff of an aircraft; and

(B) qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a pilot.

(b) Duties of air carriers.--An air carrier shall--

(1) maintain rates of compensation, maximum hours, and other working conditions and relations for its pilots and copilots who are providing interstate air transportation in the 48 contiguous States and the District of Columbia to conform with decision number 83, May 10, 1934, National Labor Board, notwithstanding any limitation in that decision on the period of its effectiveness;

(2) maintain rates of compensation for its pilots and copilots who are providing foreign air transportation or air transportation only in one territory or possession of the United States; and

(3) comply with title II of the Railway Labor Act (45 U.S.C. 181 et seq.) as long as it holds its certificate.

(c) Minimum annual rate of compensation.--A minimum annual rate under subsection (b)(2) of this section may not be less than the annual rate required to be paid for comparable service to a pilot or copilot under subsection (b)(1) of this section.

(d) Collective bargaining.--This section does not prevent pilots or copilots of an air carrier from obtaining by collective bargaining higher rates of compensation or more favorable working conditions or relations.

APPENDIX I

49 U.S.Code 114 (g)(2)

(g)National Emergency Responsibilities.—

(1)In general.—Subject to the direction and control of the Secretary of Homeland Security, the Administrator, during a national emergency, shall have the following responsibilities:

(A)

To coordinate domestic transportation, including aviation, rail, and other surface transportation, and maritime transportation (including port security).

(B)

To coordinate and oversee the transportation-related responsibilities of other departments and agencies of

51a

the Federal Government other than the Department of Defense and the military departments.

(C)

To coordinate and provide notice to other departments and agencies of the Federal Government, and appropriate agencies of State and local governments, including departments and agencies for transportation, law enforcement, and border control, about threats to transportation.

(D)

To carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe.

(2) Authority of other departments and agencies.—

The authority of the Administrator under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency.

APPENDIX J