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,

No. 23-15249
D.C. No. 2:22-cv-00738-SPL

v.

MEMORANDUM*
AMERICAN AIRLINES, INC.; CHIP LONG, Sr., VP of Flight; TIMOTHY RAYNOR, Director of Flight; ALISON DEVEREUX-NAUMANN, Chief Pilot, Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Steven Paul Logan, 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 action alleging various federal and state law claims arising from his employment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal

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APPENDIX A

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. under Federal Rule of Civil Procedure 12(b)(6). Puri v. Khalsa, 844 F.3d1152, 1157 (9th Cir. 2017). We affirm.

The district court properly dismissed Saliba's claims challenging American Airlines' COVID-19 masking and vaccination policies because Saliba failed to allege facts sufficient to show that American Airlines violated a contractual obligation, acted under color of state law, or violated any federal aviation law enforceable by a private right of action. See Pasadena Republican Club v. W. Justice Ctr., 985 F.3d 1161, 1166-67 (9thCir. 2021) (explaining that 42 U.S.C. §1983liability 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)); G.S. 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"); Graham v. Asbury, 540 P.2d656, 657 (Ariz. 1975) (setting forth elements of contract claim under Arizona law).

The district court properly dismissed Saliba's claim alleging a hostile work environment because Saliba failed to allege facts sufficient to show that

defendants took any action against him on the basis of his national origin. See Kang v. U. Lim Am., Inc., 296 F.3d 810, 817 (9th Cir. 2002) (setting forth elements of hostile work environment claim based on national origin).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. See Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bahig Saliba,

Plaintiff,

vs.

American Airlines Incorporated, et al.,

Defendants.

No. CV-22-00738-PHX-SPL

ORDER

Before the Court is Defendants' Motion to Dismiss (Doc. 43), in which they seek dismissal for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. For the following reasons, the Motion will be granted.

I. BACKGROUND

On May 2, 2022, pro se Plaintiff Bahig Saliba, a pilot for Defendant American Airlines ("American") since 1997, initiated this action alleging various claims arising out of American's company mask policy. (Doc. 1). The Complaint alleged claims against American; Chip Long, American's Senior Vice President of Flight; and Timothy Raynor, American's Director of Flight. (Doc. 1 at 1).

On September 12, 2022, the Court granted Defendants' Motion to Dismiss the Complaint. (Doc. 32). The Court dismissed Plaintiff's claims against Defendant

Long without prejudice for lack of personal jurisdiction; dismissed Plaintiff's claims for violations of aviation law and breach of the Joint Collective Bargaining Agreement without prejudice and without leave to amend for lack of subject matter jurisdiction; and dismissed Plaintiff's hostile work environment, defamation, and § 1983 claims with leave to amend for failure to state a claim. (Doc. 32 at 12). On September 30, 2022, the Court denied Plaintiff's Motion for Reconsideration. (Doc. 34).

On October 10, 2022, Plaintiff filed his First Amended Complaint, which purported to "preserve[ ] the remaining claims in the original complaint." (Doc. 35 at 1). On October 11, 2022, the Court issued an Order advising that an amended complaint supersedes the original complaint and setting a deadline if Plaintiff elected to file another amended complaint. (Doc. 36). On October 17, 2022, Plaintiff filed a Motion to Add New Defendant (Doc. 37)—specifically, Alison Devereux-Naumann, American's chief pilot for the Phoenix pilot base—followed two days later by a Second Amended Complaint that did not name Ms. Devereux-Naumann as a defendant. (Doc. 38). On October 20, 2022, the Court therefore denied the Motion to Add Defendant as moot and set a deadline for Plaintiff to file another amended complaint if he wished to do so. (Doc. 39).

On October 25, 2022, Plaintiff filed the operative Third Amended Complaint ("TAC") against Defendants American, Long, Raynor, and Devereux-Naumann. (Doc. 40). Plaintiff's claims arise from his objections to two American policies related to the COVID-19 pandemic. First was a vaccination policy that was instituted pursuant to a March 25, 2021 Letter of Agreement between American and the Allied Pilots Association, which is the union that represents American's pilots.

(Doc. 40 at 7). Plaintiff asserts that COVID-19 vaccinations "were incentivized by American and the Plaintiff was coerced, under threat of termination, into accepting medical treatment in violation of his Contract." (Doc. 40 at 7). Second was American's face mask policy. (Doc. 40 at 9). He asserts that "[f]acial masking is a procedure that interferes with the standards of issuance of [a Federal Aviation Administration ("FAA")] medical certificate," which is required by federal regulations for a pilot to fly. (Doc. 40 at 4, 9). Plaintiff refused to abide by the policy, and that disagreement came to a head on December 6, 2021. (Doc. 40 at 9). Plaintiff arrived at the Spokane International Airport for a flight to Dallas Fort Worth, and police at the airport attempted to enforce the then-existing federal mask mandate against Plaintiff. (Doc. 40 at 18). The police reported the incident to American, which initiated disciplinary proceedings against Plaintiff. (Doc. 40 at 18–19).

On January 6, 2022, Defendant Raynor conducted a disciplinary hearing and threatened Plaintiff with consequences up to and including termination. (Doc. 40 at 11). On March 30, 2022, Defendant Long conducted an appear hearing via videoconference. (Doc. 40 at 14–15). Thereafter, Plaintiff expressed that he felt he was being discriminated against. (Doc. 40 at 12). Later, Defendant Devereux-Naumann demanded that Plaintiff undergo a fitness-for-duty examination with a forensic psychiatrist under threat of termination, without providing Plaintiff a reason for the assessment. (Doc. 40 at 12–13). The examination was rescheduled several times, and Plaintiff reported sick on August 19, 2022, the day on which it was ultimately set. (Doc. 40 at 13). Defendant Devereux-Naumann issued an investigation letter for Plaintiff's failure to appear for the appointment and

placed him on unpaid leave. (Doc. 40 at 13). On September 1, 2022, Plaintiff obtained a new FAA-issued medical certificate. (Doc. 40 at 13). Plaintiff has been removed from flight status since December 6, 2021 (Doc. 40 at 25).

The TAC alleges four causes of action: (1) breach of contract; (2) hostile work environment; (3) violation of § 1983; and (4) violation of aviation law and related regulations. (Doc. 40 at 2). On November 8, 2022, Defendants filed the pending Motion to Dismiss, which has been fully briefed. (Docs. 43, 45, 46).

II. LEGAL STANDARDS

a. Personal Jurisdiction

Federal Rule of Civil Procedure ("Rule") 12(b)(2) authorizes dismissal for lack of personal jurisdiction. When a defendant moves to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that jurisdiction is appropriate." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). When the motion is based on written materials rather than an evidentiary hearing, as here, the Court must determine "whether the plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction." Id. (internal quotation marks omitted). Plaintiffs "cannot simply rest on the bare allegations of [their] complaint," but "uncontroverted allegations in the complaint must be taken as true." Id. (internal quotation marks and citation omitted).

b. Subject Matter Jurisdiction

Rule 12(b)(1) "allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction." Kinlichee v. United States, 929 F. Supp. 2d 951, 954 (D. Ariz. 2013) (internal quotation marks omitted).

"A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may attack either the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction, or the existence of subject matter jurisdiction in fact." Renteria v. United States, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006); see also Edison v. United States, 822 F.3d 510, 517 (9th Cir. 2016). "When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Renteria, 452 F. Supp. 2d at 919. "When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact." Id. "A plaintiff has the burden of proving that jurisdiction does in fact exist." Id.

c. Failure to State a Claim

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (internal quotation marks omitted). A claim is facially plausible when it contains "factual content that allows the court to draw the reasonable inference" that the moving party is liable. Id. Factual allegations in the complaint should be assumed true, and a court should then "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. Facts should be viewed "in the
light most favorable to the non-moving party." Faulkner v. ADT Sec. Servs., Inc., 706 F.3d 1017, 1019 (9th Cir. 2013).

A pro se complaint must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal quotation marks omitted).

II. DISCUSSION

Plaintiff's TAC alleges four causes of action: (1) breach of employment contract; (2) hostile work environment; (3) violation of 42 U.S.C. § 1983 by violating Plaintiff's Fourteenth Amendment rights; and (4) violation of aviation law and regulations. (Doc. 40 at 2). Defendants argue that Plaintiff has failed to meet the pleading standard for any of his claims, and Defendant Long argues that the Court lacks personal jurisdiction over him. The Court will begin by addressing personal jurisdiction, then will address each claim in turn.

a. Personal Jurisdiction as to Defendant Long

When no federal statute is applicable to govern personal jurisdiction, as is the case here, "the district court applies the law of the state in which the district

court sits." Id. at 800. "Arizona's long-arm jurisdictional statute is co-extensive with federal due process requirements; therefore, the analysis of personal jurisdiction under Arizona law and federal due process is the same." Biliack v. Paul Revere Life Ins. Co., 265 F. Supp. 3d 1003, 1007 (D. Ariz. 2017).

For a court to exercise personal jurisdiction, federal due process requires that a defendant have "certain minimum contacts" with the forum state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Personal jurisdiction can be general or specific. Biliack, 265 F. Supp. 3d at 1007. A court may exercise general jurisdiction "only when a defendant is essentially at home in the State." Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (internal quotation marks omitted). That is plainly inapplicable here, where Defendant Long is alleged only to have responded to an email from and conducted a videoconference disciplinary appeal hearing for Plaintiff, who was located in Arizona.

The Ninth Circuit applies a three-prong test for specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802. Plaintiff bears the burden of establishing the first two prongs. Id. If Plaintiff satisfies them, the burden shifts to Defendant "to present a compelling case that the exercise of jurisdiction would not be reasonable." Id. (internal quotation marks omitted).

Regarding the first prong, Plaintiff argues that Defendant Long purposefully directed his activity at Arizona. "Purposeful direction requires that the defendant have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1142 (9th Cir. 2017) (internal quotation marks and alteration omitted). "An intentional act is one denoting an external manifestation of the actor's will[,] not including any of its results, even the most direct, immediate, and intended." Id. (internal quotation marks and alterations omitted). When considering whether a defendant's conduct is expressly aimed at the forum state, the Court must look at "contacts that the defendant himself creates with the forum" and "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." Id. at 1143 (internal quotation marks omitted). "[R]andom, fortuitous, or attenuated contacts are insufficient to create the requisite connection with the forum." Id. at 1142 (internal quotation marks omitted).

As noted, the only allegations regarding Defendant Long's contacts with Arizona are that (1) he

responded to an email from Plaintiff, and (2) he held an appeal hearing for Plaintiff using videoconference. (Doc. 40 at 14–16). A defendant's injurious communications with a plaintiff known to reside in the forum state give rise to personal jurisdiction even if the defendant himself was out of state. For example, in Atkins v. Calypso Systems, Inc., the plaintiff alleged that a defendant "intentionally called and emailed a person in Arizona, and those communications caused injury." No. CV-14-02706-PHX-NVW, 2015 WL 5856881, at *7 (D. Ariz. Oct. 8, 2015). The Court found those allegations sufficient for specific personal
jurisdiction. Likewise, here, Plaintiff alleges that Defendant Long intentionally emailed and held a videoconference with Plaintiff, a known Arizona resident, and that those communications caused injury. Plaintiff has therefore satisfied the first two prongs of the personal jurisdiction test, and Defendant Long makes no argument that the exercise of jurisdiction would be unreasonable. Accordingly, the Court has personal jurisdiction over Defendant Long.

b. Breach of Contract Claim

Plaintiff's breach of contract claim alleges that "Defendants created and implemented a mandatory health-related company policy . . . that directly violated the employment Contract between Plaintiff and Defendant American that the Plaintiff rejected." (Doc. 40 at 2). To state a breach of contract claim under Arizona law, "a plaintiff must allege that (1) a contract existed, (2) it was breached, and (3) the breach resulted in damages." Steinberger v. McVey ex rel. County of Maricopa, 318 P.3d 419, 435 (Ariz. Ct. App. 2014).

Defendants argue that Plaintiff has failed to plead either of the first two elements.

The TAC alleges that Plaintiff has an employment contract with American, pointing to certain documents attached as Exhibit A "in support of Plaintiff's employment contract." (Doc. 40 at 3). Those documents include Plaintiff's employment application, a pre-employment notification, notes from his job interview, and excerpts of an employee handbook and flight operations manuals. (Doc. 40-2). Pre-hiring documents certainly do not establish the existence of an employment contract, but employee handbooks or manuals can create contractual promises, depending on the circumstances.
See Bollfrass v. City of Phoenix, --- F. Supp. 3d ---, 2022 WL 4290591, at *8–9 (D. Ariz. Sept. 16, 2022). The Court assumes without deciding that Plaintiff has sufficiently alleged that the attached employee handbook and flight operations manuals are contractual, because Plaintiff's failure to allege a breach of any of the terms contained therein—or elsewhere—is dispositive.

The TAC alleges that American's mask policy breached terms in the flight operations manual requiring pilots "to maintain a current medical certificate appropriate for the crew position he/she currently holds" and to "bar themselves from flight duty and advise the Chief Pilot's office immediately . . . any time they know themselves to be unable to meet the medical or physical standards required by regulation or common sense for their crew position." (Doc. 40-2 at 11; Doc. 40 at 3). These terms plainly impose obligations on Plaintiff, not Defendants. American's implementation of a mask policy simply does not violate these terms.

Plaintiff's arguments to the contrary are unavailing. He argues that "[a]ny imposition by

American of any medical procedure is . . . a violation of the very term of the employment contract." (Doc. 45 at 7). This argument is utterly baseless. The terms at issue merely bar Plaintiff from flying if he lacks the appropriate certification or is not in the requisite condition to do so. They do not prevent American from imposing a policy that Plaintiff personally believes affects his certification or ability to meet the medical or physical standards. Plaintiff also misses the point with his argument that his "pilot and medical certificates are contractual terms of the employment contract benefiting American, without either one there is no contract to provide air transportation." (Doc. 45 at 8). Of course, Plaintiff cannot fly without the proper certificates, pursuant to both American policies and federal regulations. But Plaintiff has not established any contractual term that would prevent American from imposing additional requirements, such as its mask and vaccination policies, even if Plaintiff believed those requirements would affect his certificates. Thus, the TAC fails to allege any breach of contract.

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c. Hostile Work Environment Claim

Plaintiff's hostile work environment claim alleges that "Defendants created and continue to create a hostile work environment and wrongfully invoked a disciplinary process reserved for disputes rooted in terms and conditions agreed to in Collective Bargaining Agreements."[4] (Doc. 40 at 2). Title VII prohibits

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[4] To the extent Plaintiff attempts to state a claim for breach of the Joint Collective Bargaining Agreement, that claim was already dismissed without leave to

discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment because of his race, color, religion, sex, or national origin." Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003). To state a hostile work environment claim based on national origin, a plaintiff must allege that "(1) [he] was subjected to verbal or physical conduct of a harassing nature that was based on [his] national origin . . . , (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." Nagar v. Found. Health Sys., Inc., 57 F. App'x 304, 306 (9th Cir. 2003). Moreover, to establish subject matter jurisdiction over a Title VII claim, however, a plaintiff must exhaust his administrative remedies "by filing a timely charge with the [Equal Employment Opportunity Commission ("EEOC")], or the appropriate state agency." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002) (citing 42 U.S.C. § 2000e-5(b)). Defendants argue that Plaintiff's hostile work environment must be dismissed both because he failed to exhaust his administrative remedies and he fails to state a claim.
d. Section 1983 Claim e. Aviation Law Claim

First, it is true that the TAC does not plead exhaustion, as it makes no mention of an EEOC charge. This is despite the fact that the Court previously dismissed the hostile work environment claim in Plaintiff's Complaint based on the exhaustion

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amend for lack of subject matter jurisdiction due to preemption by the Railway Labor Act. (Doc. 32 at 9–10).

requirement. (Doc. 32 at 8). Still, "[t]he Supreme Court has held that failure to exhaust is an affirmative defense that does not require a Plaintiff to specifically plead or demonstrate
exhaustion in the complaint." Cabrera v. Serv. Emps. Int'l Union, No. 2:18-cv-00304-RFB-DJA, 2020 WL 2559385, at *5 (D. Nev. May 19, 2020) (citing Jones v. Bock, 549 U.S. 199, 216 (2007)). Attached to Plaintiff's Response to the Motion to Dismiss is a Notice of Right to Sue letter issued by the EEOC to Plaintiff on November 30, 2022, so the Court will not dismiss the hostile work environment claim for failure to exhaust. (Doc. 45-3).

Moving to the merits, Plaintiff fails to state a claim because he does not allege that he experienced harassing conduct based on his national origin. In fact, the only reference to Plaintiff's national origin in the TAC is the allegation that "the police report that was offered to [American] by the Spokane Airport police . . . referenced the plaintiff as a Middle Eastern individual under race and Plaintiff contends that racial profiling by the police was passed on to [American]." (Doc. 40 at 19). But there is no basis on which to infer that any Defendant took any action against Plaintiff because of his national origin. Although Plaintiff alleges that he "felt he was being discriminated against," he provides no basis for that belief, and belief alone is insufficient to state a plausible claim for relief. (Doc. 40 at 12); see Ashcroft, 556 U.S. at 678 (stating that a complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," not "naked assertions devoid of further factual enhancement" (internal quotation marks omitted)).

Instead, in the "hostile work environment" section of the TAC, Plaintiff specifically alleges that he "feels he is being targeted for refusing to accept an amendment to his employment contract." (Doc. 40 at 10; see also Doc. 40 at 14 ("Plaintiff is being targeted by the Defendants and he can only conclude that every one of the Defendants[']actions is calculated to exert maximum pressure to force the plaintiff into submission and surrendering his authority over his medical Certificate."). The facts alleged in the TAC support an inference that Plaintiff was disciplined due to his refusal to comply with American's mask policy, which is not, of course, a protected characteristic under Title VII. This further detracts from Plaintiff's bare assertion of national-origin discrimination. See Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations . . . [p]laintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible."). Given the lack of facts suggesting national origin discrimination and Plaintiff's own allegations about why he was disciplined, Plaintiff has failed to plead a plausible hostile work environment claim.

d. Section 1983 Claim

Plaintiff's § 1983 claim alleges that "Defendants became State actors by their actions following the event of December 6, 2021, violating Plaintiff's constitutional rights, namely his Fourteenth Amendment rights." (Doc. 40 at 2). "To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was

violated, and (2) that the alleged violation was committed by a person acting under the color of State law." Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). Defendants argue that this claim must be dismissed because they are not state actors. Indeed, the "defendants as state actors" section of the TAC is largely taken word-for-word from Plaintiff's Response to Defendants' first Motion to Dismiss. (Compare Doc. 40 at 18–20 with Doc. 30 at 9–11). The Court has already rejected those arguments in its September 12, 2022 Order, but because there are at least some additional allegations in the TAC, the Court will address them anew. (Doc. 32 at 10–12).

Plaintiff alleges that "[o]n December 6, 2021, the Defendants[']] interests and that of the police officers at the Spokane International Airport aligned, that is enforce the facial masking on Plaintiff at any cost and protect the travel service provided by the airline" and that "the police were in violation of the Plaintiff[']s] Fourteenth Amendment rights and . . . the violation continued by the Defendants." (Doc. 40 at 18–19). Courts use four tests to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotation marks omitted).

First, the public function test applies only when a private entity is "endowed by the State with powers or functions" that are "both traditionally and exclusively governmental." Id. at 1093 (internal quotation marks omitted). The TAC alleges that "police power was delegated to the defendants and only the defendants could have continued targeted police action against the plaintiff on [American] property." (Doc. 40). But Plaintiff does not allege any specific government power that was

delegated; rather, the allegations make clear that American was enforcing its own mask policy using its own disciplinary procedures. As the Court stated in its previous Order, "[a] private employer's disciplinary proceedings against its employee are certainly not a traditional and exclusive government function." (Doc. 32 at 11).

Second, the joint action test applies "when the state knowingly accepts the benefits derived from unconstitutional behavior." Kirtley, 326 F.3d at 1093 (internal quotation marks omitted). The TAC alleges that "the Defendants jointly with the Spokane police carried on what the police had started, a benefit the police were intending on receiving, lawfully or unlawfully is immaterial here, they intended on forcing the Plaintiff to use facial masking." (Doc. 40 at 19). In short, Plaintiff argues that the joint action test applies because American's actions were designed to make Plaintiff wear a mask—which, at the time, was required by federal law (see Doc. 40 at 17)—and the Spokane Police accepted that benefit. But the TAC makes no effort to explain how American's efforts use of its disciplinary process in response to Plaintiff's noncompliance with company policy and federal law amounted to unconstitutional behavior with benefits knowingly accepted by the Spokane Police.

Third, "[t]he compulsion test considers whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action." Id. at 1094. The TAC alleges that "[t]he Police compelled the Defendants to pursue the Plaintiff" by notifying American of their encounter on December 6, 2021 and following up with a manager. (Doc. 40 at 19), Specifically, Plaintiff cites to the police report and an email from a police officer providing

information about how to request public records and body camera footage "if investigated" and offering to provide additional information. (Doc. 40-8). The Court finds no authority suggesting that the mere provision of factual information—or any other contact alleged between the police and American in the TAC—amounts to coercion or significant encouragement. Nothing in the TAC leads to an inference that American's decision to pursue disciplinary proceedings against Plaintiff was influenced by the government rather than by independent, internal decision-making.

Closely related is the nexus test, which "asks whether there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." Kirtley, 326 F.3d at 1094–95 (internal quotation marks omitted). Again, given the relatively minimal contact between the airport police and American, there is no such nexus. Because Plaintiff has failed to plead that Defendants were acting under color of state law, his § 1983 claim must be dismissed.

e. Aviation Law Claim

Finally, the TAC alleges that Defendants violated aviation law and regulations. The Court previously dismissed this claim without leave to amend, finding that there is no private right of action under the Federal Aviation Act or its associated regulations. (Doc. 32 at 7–8). The Court reaffirmed that finding in its Order denying reconsideration. (Doc. 34 at 4–5). There is no need for the Court to repeat itself a third time; Plaintiff's aviation law claims must be dismissed.

III. CONCLUSION

"A district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (internal quotation marks omitted). Here, Plaintiff has had ample opportunity to amend his complaint and has repeatedly failed to state a plausible claim for the same or similar reasons. Thus, the Court finds that the deficiencies of the TAC cannot be cured, and this case will be dismissed with prejudice. See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 n.3 (9th Cir. 1987).

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 43) is granted and this case is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly and terminate this action.

Dated this 27th day of January, 2023.

Honorable Steven P. Logan

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 LEGISTLATION

(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 withing 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 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 D

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 E

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.

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 F

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 G

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 H

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, theAdministrator, 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 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 I