

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

DARREN KOSSEN,

ARB CASE NO. 2022-0004

COMPLAINANT,

ALJ CASE NO. 2019-AIR-00022

ALJ CHRISTOPHER LARSEN

v.

DATE: June 13, 2023

EMPIRE AIRLINES,

RESPONDENT.

Appearances:

For the Complainant:

Darren Kossen; *pro se*; Honolulu, Hawaii

For the Respondent:

Dale A. De Felice, Esq. and Paul S. Stewart, Esq.; *Paine Hamblen LLP*; Spokane, Washington

Before PUST, BURRELL, and WARREN Administrative Appeals Judges

DECISION AND ORDER

BURRELL, Administrative Appeals Judge:

This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ Complainant Darren Kossen (Complainant or Kossen) filed a complaint alleging that his former employer, Respondent Empire Airlines, Inc., (Respondent or Empire) retaliated against him in violation of AIR 21's whistleblower protection provisions. After a formal hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order

¹ 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R. Part 1979 (2022).

(D. & O.) dismissing Kossen’s complaint. Kossen appealed the ALJ’s decision to the Administrative Review Board (ARB or Board). For the reasons set forth below, we affirm the ALJ’s decision.

BACKGROUND

Empire hired Kossen to work as a pilot on March 3, 2018. After completing company training, Kossen conducted his first flight as a qualified captain on July 4, 2018.² Roughly a month later, on August 18, 2018, First Officer (FO) Nathan Price (Price) and other FOs complained to Jake Russack (Russack), Respondent’s Director of Operational Support and Chief Pilot, about Kossen’s “weak” piloting skills and poor communications, all of which raised safety concerns.³ Based on these reports, Russack made the decision to reassign Kossen to FO duties (“right seat”) “for a time ‘to gain some more operating experience’ and ‘fly with some experienced captains to receive some mentorship.’”⁴ Russack testified that Kossen spent roughly two weeks as FO before returning to Pilot-in-Command (PIC) duties.⁵ Shortly thereafter, on September 24, 2018, Price submitted a formal complaint to Russack and other Empire managers accusing Kossen of directing other pilots to follow an unauthorized procedure for handling an aircraft engine failure.⁶ That same day, Kossen sent an email to Russack accusing Price of committing piloting errors and “making up false statements” about him.⁷ Russack followed up with Kossen on proper protocol.

On February 26, 2019, Kossen was the PIC of Empire Airlines Flight 602 from Honolulu to Molokai, Hawaii, and Price was the FO. The aircraft was in the process of landing at the Molokai Airport when Kossen and Price received flight warnings from the aircraft’s instruments. One of the warnings was a “stick shaker.” A stick shaker is a warning of an impending aerodynamic stall.⁸ According to Price, the “stick pusher” warning light was also activated. A stick pusher “occurs when the aircraft automatically drops its nose, independent of pilot control, to prevent a stall.”⁹

² Hearing Transcript (Tr.) 373-74.

³ D. & O. at 13.

⁴ *Id.* The “right seat” refers to the First Officer’s seat.

⁵ Tr. 472-73.

⁶ D. & O. at 14; Respondent’s Hearing Exhibit (RX) 5 at 1-2.

⁷ D. & O. at 14, 24; Joint Hearing Exhibit (JX) 2 at 3.

⁸ D. & O. at 2 n.4.

⁹ *Id.* at 3.

The pilots avoided a stall and returned to Honolulu. Kossen and Price continued to fly the aircraft for the remainder of the workday.¹⁰ On February 27, 2019, Price reported the incident to company management by completing an Aviation Safety Action Program (ASAP) report.¹¹ Price reported that, on February 26, the crew had experienced a “stick shaker” and he saw a warning light for a “stick pusher” as well.¹² Kossen completed a separate ASAP report about the February 26 incident on February 28, 2019. Kossen indicated that the “stick shaker” had activated at a higher speed than it should have (suggesting a mechanical defect), and the crew recovered with no loss of altitude and no other effect on the flight.¹³

Russack and incoming Chief Pilot Steve Stringer (Stringer) interviewed Kossen on March 1, 2019, about the February 26, 2019 incident and flight procedures. During the recorded interview, Kossen acknowledged the “stick shaker” warning but denied there had been a “stick pusher.”¹⁴ Kossen minimized the event, but Russack and Stringer disagreed with him about the seriousness of the incident and correct flight procedure.¹⁵

Russack spoke to Kossen again on March 5, 2019, but neither of them recorded the conversation. Kossen asserts that in this phone call he told Russack that a mechanical failure caused the stick shaker event, and he would report Empire to the Federal Aviation Administration (FAA) if they blamed him for the aircraft’s performance.¹⁶ Russack’s version of the conversation differs considerably. On March 7, 2019, Russack summarized the March 5 and prior conversation in an email to several Empire managers including Peter Broschet (Broschet), Empire Airlines’ Director of Human Resources.¹⁷ Russack stated that he and Stringer had spoken to Kossen about the “stall event” and Kossen continued to blame others and outside conditions rather than take responsibility for his actions and duties as PIC. Russack was concerned with Kossen’s ability to safely operate an aircraft.¹⁸ Empire

¹⁰ *Id.* at 2-3; Tr. 340.

¹¹ D. & O. at 3; RX 6. The Federal Aviation Administration (FAA) administers an initiative called the Aviation Safety Action Program (ASAP) that allows air carriers and their employees to report aviation-related hazards and safety concerns to management and to the FAA.

¹² D. & O. at 3.

¹³ *Id.*; JX 3.

¹⁴ JX 4.

¹⁵ *Id.*

¹⁶ Tr. 181; Complainant’s Brief (Comp. Br.) at 30, 33.

¹⁷ JX 5.

¹⁸ *Id.* at 1-2.

terminated Kossen’s employment by letter that same day.¹⁹ According to Broschet, the decision to terminate Kossen’s employment was made by “the Safety Department, Flight Ops, HR and the executive team.”²⁰

Kossen filed a complaint with the Department of Labor’s Occupational Safety and Health Administration (OSHA) on June 12, 2019, asserting that Empire violated AIR 21 by terminating his employment. The complaint presented a general allegation that Empire’s “aircraft” and “first officer” were “unsafe.”²¹ On June 18, 2019, OSHA dismissed his complaint, and Kossen requested a hearing before an ALJ.

Prior to the hearing, Kossen filed a motion to disqualify the ALJ on the grounds of bias due to a prior decision and the fact that the ALJ’s son works for the airline industry. The ALJ denied Kossen’s motion and declined to recuse himself from the case.²² The ALJ conducted the hearing on May 10 and 11, 2021, and on October 8, 2021, issued a D. & O. denying Kossen’s complaint. The ALJ found Kossen to be not credible.²³ He concluded that Kossen engaged in protected activity, Empire knew of the protected activity, and Kossen suffered an adverse employment action.²⁴ The ALJ concluded, however, that protected activity was not a contributing factor in that decision.²⁵ Empire terminated Kossen’s employment in response to the lapses in judgment he displayed before engaging in protected activity and because of his attitude and responses to criticism.²⁶ The ALJ also concluded that

¹⁹ JX 1 at 1.

²⁰ Tr. 377.

²¹ JX 8 at 3.

²² Kossen filed an interlocutory appeal of the ALJ’s denial with the Board, which we denied on February 25, 2021. *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022 (ARB Feb. 25, 2021).

²³ *See, e.g.*, D. & O. at 10 (“Mr. Kossen is a passionate witness, but not a credible one. First, he scrupulously avoids the central issue in this case – namely, whether Respondent took adverse employment actions against him because he made a safety complaint – and focuses instead on collateral issues . . . Second, he is inclined to exaggerate or mischaracterize the content of writings. . . . Third, his testimony, like his written arguments, is simply confusing. Whether this is intentional I do not know, but his narratives are hard to follow, at times self-contradictory, and his questions of witnesses frequently unintelligible.”).

²⁴ *Id.* at 20-24.

²⁵ *Id.* at 24-25.

²⁶ *Id.*

Empire had proven by clear and convincing evidence that it would have discharged Kossen in the absence of his protected activity.²⁷

On October 21, 2021, Kossen filed a petition for review of the ALJ's D. & O. Kossen also filed five additional motions to reopen the record and vacate the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR 21.²⁸ In AIR 21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.²⁹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁰ The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.³¹

DISCUSSION

1. Governing Law

AIR 21 provides that an air carrier:

[M]ay not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . 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 aviation safety^[32]

²⁷ *Id.* at 21, 25.

²⁸ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

²⁹ 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019) (citation omitted).

³⁰ *Consol. Edison Co. of N.Y. v. Nat'l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938) (citations omitted); *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

³¹ *Vander Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citation omitted).

³² 49 U.S.C. § 42121(a)(1).

To prevail in a retaliation case under AIR 21, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity and that protected activity was a contributing factor in the adverse employment action taken against them.³³ If the complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.³⁴

2. Kossen Engaged in Protected Activity

To meet his burden of proof, Kossen is required to provide credible evidence that he engaged in activities protected by AIR 21. Protected activity under AIR 21 includes information provided to the employer or Federal Government relating to violations or alleged violations of orders, regulations, or standards of the FAA or federal law related to aviation safety.³⁵ The ALJ correctly concluded that complaints filed with OSHA may be oral or written and must be specific enough to provide the employer with notice of the alleged violation or protected activity.³⁶ The complainant need not prove an actual violation or cite to a statutory provision as long as he or she has a reasonable belief (containing both objective and subjective components) of a violation.³⁷ As summarized below, we agree with the ALJ's conclusion that Kossen engaged in protected activity, but we also agree that some of Kossen's alleged activities do not qualify for protection under AIR 21.

On September 24, 2018, Price submitted a formal complaint to Russack and other Empire managers accusing Kossen of directing other pilots to follow an unauthorized procedure for handling an engine failure.³⁸ That same day, Kossen sent an email to Russack accusing Price of committing piloting errors and "making up false statements" about him.³⁹ The ALJ's finding that Kossen's criticism of Price's performance "may" constitute activity protected by AIR 21 is supported by

³³ *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021) (citation omitted); 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

³⁴ *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

³⁵ 49 U.S.C. § 42121(a)(1).

³⁶ D. & O. at 22 (citing *Simpson v. United Parcel Serv.*, ARB No. 2006-0065, ALJ No. 2005-AIR-00031 (ARB Mar. 14, 2008)).

³⁷ *Id.* (citing *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR-00014 (ARB Sept. 30, 2009)).

³⁸ RX 5 at 1-2.

³⁹ JX 2 at 3.

substantial evidence.⁴⁰ We note that the ALJ's use of "may" creates an ambiguity as to whether the communication constitutes protected activity. Because we affirm the ALJ's findings that protected activity did not contribute to Kossen's termination, any error the ALJ committed concerning ambiguity is harmless. We will treat the ALJ's use of "may" as an affirmative finding of protected activity.

On February 28, 2019, Kossen submitted an ASAP report to Empire containing information that could be interpreted as informing the company of a violation of an applicable safety standard.⁴¹ The ALJ concluded that Kossen provided sufficient evidence to prove that he engaged in protected activity under AIR 21. The record supports this conclusion. Kossen's complaints about Price and the aircraft involved in the February 26 incident were made directly to Empire, so the ALJ's finding that Empire had knowledge of these protected activities is also supported by substantial evidence.⁴²

The ALJ found that Kossen "may" have engaged in protected activity in his conversations with Empire during the first week of March 2019.⁴³ We agree with the ALJ's conclusion that Kossen engaged in protected activity on March 1st when he opined, "that the aircraft [involved in the February 26, 2019 incident] should be grounded."⁴⁴ Kossen also claims that when he spoke to Russack on March 5, 2019, he threatened to report Empire to the FAA.⁴⁵ Russack denies that Kossen made these statements during the call.⁴⁶ The ALJ found Russack's denial of this exchange more credible than Kossen's assertion.⁴⁷ Kossen has failed to persuade us that the ALJ erred.

Kossen failed to meet his burden to prove that other alleged activities that he presented to the ALJ and has repeated on appeal to the Board were protected under AIR 21. Kossen failed to prove that he "wrote up an airplane with an uncontrolled yaw damper activation"⁴⁸ on February 25, 2019. The ALJ ruled that "there is no

⁴⁰ D. & O. at 23.

⁴¹ *Id.* ("In his February 28, 2019, ASAP report, Mr. Kossen suggests "maybe ops check airplane" (JX 3 at 3), which can reasonably be construed as information related to a violation or alleged violation of an applicable safety standard.").

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Comp. Br. at 30, 33.

⁴⁶ *See* Tr. 504-05.

⁴⁷ D. & O. at 23 n.18.

⁴⁸ *Id.* at 22.

documentary evidence of this report, either in the record before [him], nor in the records of Empire Airlines.”⁴⁹ We concur with this determination.

The record also supports the ALJ’s conclusion that Kossen failed to cite to any evidence that he presented complaints about Empire’s attendance policies or a terrain fault that would constitute protected activity.⁵⁰ And assuming that Kossen contacted the FAA on March 15 and June 12, 2019, to report maintenance issues,⁵¹ those actions occurred after Kossen’s discharge from Empire and therefore could not have contributed to his discharge.

3. Kossen’s Protected Activities Did Not Contribute to His Discharge

We have reviewed the record, and substantial evidence supports the ALJ’s finding that Kossen’s protected activity did not contribute to his discharge.⁵² The record indicates that Empire had serious concerns about allowing Kossen to continue working as a pilot. In an August 2018 email, Russack commented on Kossen’s performance:

We have had feedback from several FOs that Kossen is a very weak captain and can exhibit behavior that is dangerous. Anthony has done two observations this weekend that have confirmed Kossen is a weak captain. Also, Kossen is being carried by FOs who may not always be the strongest. Issues include aircraft control and PIC judgment.

Based on safety for our customers, crews and assets, I have placed Kossen in that right seat starting tomorrow, Sunday. . . . If anyone disagrees or has other ideas, please understand I do take full ownership for making this decision over the weekend out of concern for safety of flight and avoiding an accident when we have evidence he isn’t performing to PIC standards.^[53]

⁴⁹ *Id.* at 23.

⁵⁰ *Id.*

⁵¹ Comp. Br. at 36.

⁵² There is no dispute that Kossen suffered an adverse employment action when Empire terminated his employment on March 7, 2019. Kossen’s brief contains several sections that purport to discuss additional adverse employment actions (*See* Comp. Br. at 45-65), but we can discern no additional actions that warrant consideration.

⁵³ RX 3.

Following the investigation into the February 26, 2019 incident, Russack conveyed his perception of Kossen's performance to officials in a March 7, 2019 email. According to Russack, Kossen:

[C]ontinued to blame the FO, the airplane, the weather . . . Steve and I both told him he could have killed a plane load of people, didn't know the correct procedures and used poor judgment. We were getting nowhere with him and concluded the call by telling him he would continue to be offline until further notice . . . I followed up Tuesday with a call to Darren and he was still deflecting and blaming . . . In my opinion he has no business being in the cockpit of a plane . . . I am not sure how I personally could explain to investigators and Capital Hill [sic] his background and why he was at the controls of an aircraft in either seat if there were to be an accident.^[54]

Kossen's employment was terminated for poor performance that same day, March 7, 2019.

The reason for your separation will be recorded 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.^[55]

Empire's concerns extended beyond evaluating Kossen's competency and ability as a pilot in command to include his attitude and acceptance of responsibility. The ALJ's finding that Kossen "rais[ed] complaints against others in response to questions about his own proficiency" is supported by substantial evidence.⁵⁶ Kossen criticized Price on September 24, 2018, in response to Russack's questions about Price's complaint about Kossen.⁵⁷ Kossen's February 28, 2019 ASAP report followed Price's ASAP report which contained complaints regarding Kossen's performance. And the March complaints he presented about the aircraft involved in the February 26, 2019 incident came after the March 1, 2019 conversation with Russack and Stringer about the incident. The ALJ credited the

⁵⁴ See JX 5 at 1-2.

⁵⁵ JX 1 at 1.

⁵⁶ D. & O. at 24.

⁵⁷ *Id.*

testimony of Arlon Rosenoff, Empire Airlines' Director of Safety and Security, who asserted that it was Kossen's practice of raising complaints against others in response to questions about his own proficiency that led Empire to terminate his employment.⁵⁸

On appeal, Kossen repeats his assertion that Empire improperly referred to his PRIA records when it terminated his employment.⁵⁹ The ALJ explained that:

The Pilot Records Improvement Act of 1996 ("PRIA"), enacted as part of the Federal Aviation Reauthorization Act of 1996, 110 Stat. 3213, 3259-63 (1996), requires an air carrier, before allowing a new hire to begin service as a pilot, to request and receive a large volume of records, such as the pilot's license, medical certificate, type ratings, and any enforcement actions that resulted in a finding against the pilot that has not been overturned. The carrier must also request records from the pilot's previous employer.^[60]

We agree with the ALJ's conclusion that "interpreting the PRIA and determining whether Empire violated it, whether when terminating Mr. Kossen's employment or in its dealings with a third party, are better decided by the FAA than the Department of Labor."⁶¹ Further, Kossen has not explained how Empire's violating a rule related to PRIA constitutes a violation of AIR 21, or alters the ALJ's findings and conclusions as to Empire's termination of Kossen's employment for performance related reasons.

4. Empire Would Have Fired Kossen in the Absence of His Protected Activities

The record also supports the ALJ's conclusion that Empire would have discharged Kossen in the absence of any protected activity. The ALJ "fully credit[ed] Mr. Russack's and Mr. Rosenoff's testimony, and [found] and conclude[d] Empire reasonably believed Mr. Kossen did not understand, or was not willing to assume, the responsibility of a pilot-in-command."⁶² As discussed above, Kossen failed to

⁵⁸ *Id.*

⁵⁹ Comp. Br. at 10 ("... the FAA prohibits employers from going back to the PRIA after hiring specifically to stop the Empires of the world trumping up reasons for firing from these documents provided at hiring...").

⁶⁰ D. & O. at 3 n.6.

⁶¹ *Id.* at 3-4 n.6 (noting that Kossen had initiated an FAA investigation related to Empire's use of his PRIA records).

⁶² *Id.* at 25.

take responsibility for actions and shifted blame to others.⁶³ Even if Kossen had not filed an ASAP report or made any other protected complaints prior to his discharge, Empire would still have received Price's report, which would still have led to the conversations about Kossen's behavior and performance that culminated in his discharge.

5. Kossen's Other Motions and Allegations

A. *Motions to Reopen the Record*

Kossen has submitted five motions asking the Board to reopen the record to admit additional exhibits. The Board may order an ALJ to reopen the record based upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial."⁶⁴ The Board will grant such relief only in limited circumstances.⁶⁵ Under this standard, the moving party must show that "(1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result."⁶⁶

We deny each of these motions because they do not meet the above-stated criteria. Kossen's January 11, 2022 "Motion to ARB to Opening (sic) the Record for Newly Discovered Evidence" accuses Empire of violating various airline safety laws, but it does not indicate how those violations were related to his discharge. Similarly, his February 25, 2022 "Motion to Open the Record for Newly Discovered Evidence" describes a "manufacturing defect that can cause a malfunction in the stick shaker/pusher and potential for a total loss of control," but whether or not the shaker or pusher warnings were a result of a malfunction is irrelevant because Kossen's employment was terminated because of his performance and attitude while responding to the incident.

Kossen also submitted an April 11, 2022 "Motion to Open the Record for Newly Discovered Evidence of Darren Kossen's Pilot Records (PRIA) Documentation from Employment at Empire Airlines" and an August 25, 2022 "Motion for Opening

⁶³ *Id.*

⁶⁴ *Benson v. N. Alabama Radiopharmacy, Inc.*, ARB No. 2008-0037, ALJ No. 2006-ERA-00017, slip op. at 2 (ARB May 27, 2010) (Order Denying Reconsideration) (quoting Fed. R. Civ. P. 60(b)(2)); *Smith v. Lake City Enters., Inc.*, ARB No. 2014-0063, ALJ No. 2006-STA-00032, slip op. at 3 (ARB Dec. 10, 2014), *aff'd*, Nos. 13-4342, 15-3071 (6th Cir. Aug. 25, 2016).

⁶⁵ *Benson*, ARB No. 2008-0037, slip op. at 2.

⁶⁶ *Id.* (quoting *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (D.C. Cir. 1995)).

the Record for Newly Discovered Evidence” to prove his competence as a pilot.⁶⁷ But Kossen’s employment history is not the subject of this case. Neither of the motions proffer new evidence that satisfy the elements for reopening the record. And his November 17, 2022 “Motion for Opening the Record for Newly Discovered Evidence, Ruling on Previous Motions Filed by Kossen for Admittance of New Evidence and Summary Judgment on Favor of Kossen” describes alleged equipment malfunctions that were “presented to Kossen over a phone call the week of 11/6-11/22.”⁶⁸ Kossen has not explained how additional evidence of malfunctioning equipment would change the outcome of his dismissal for performance and attitude problems.

B. Kossen’s Motion for the ALJ’s Recusal

Kossen asserts that the ALJ was biased against him because the ALJ did not rule in his favor in a prior case and because the ALJ’s son is employed by an airline.⁶⁹ An ALJ may recuse themselves if their “impartiality might reasonably be questioned” or they have “a personal bias or prejudice concerning a party.”⁷⁰ Recusal generally is not warranted without “proof of an extra-judicial source of bias,”⁷¹ and legal errors in ALJ orders are not sufficient to prove bias.⁷² ALJs are “presumed to be impartial,” and a party moving for recusal has a “substantial burden” to prove otherwise.⁷³

Kossen has presented no evidence that the ALJ engaged in improper behavior while adjudicating this matter. In contrast, the record indicates that the ALJ went out of his way to ensure that Kossen was allowed to proceed in this

⁶⁷ We note at the outset that Kossen, appearing before the ALJ and the Board pro se, focused mainly on establishing his professional knowledge instead of the facts relevant to his discharge. Empire, in response, presented evidence that its employees complained about Kossen’s performance as a pilot. *See, e.g.*, RX 3 and Tr. 434. The ALJ did not issue findings of fact establishing Kossen’s general proficiency as a pilot, and such findings are unnecessary for resolution of this matter.

⁶⁸ Motion for Opening the Record for Newly Discovered Evidence, Ruling on Previous Motions Filed by Kossen for Admittance of New Evidence and Summary Judgment on Favor of Kossen at 1.

⁶⁹ *See, e.g.*, Comp. Br. at 94.

⁷⁰ *Vudhamari v. Advent Glob. Sols.*, ALJ No. 2018-LCA-00022, slip op. at 4-5 (ALJ Jan. 29, 2021) (citation omitted), *adopted and attached*, ARB No. 2021-0018 (ARB Apr. 26, 2021).

⁷¹ *Vudhamari*, ALJ No. 2018-LCA-00022, slip op. at 5.

⁷² *Id.* (quoting *Matthews v. Ametek, Inc.*, ARB No. 2011-0036, ALJ No. 2009-SOX-00026, slip op. at 3 (ARB May 31, 2012)).

⁷³ *Id.* at 4 (referring to the Judicial Code) (quoting *Billings v. Tennessee Valley Auth.*, ALJ No. 1991-ERA-00012, slip op. at 4 (ARB June 26, 1996)).

matter despite his failure to comply with the ALJ's written orders and verbal directions.⁷⁴ We therefore re-affirm our February 25, 2021 ruling denying Kossen's request for the ALJ's recusal.⁷⁵

C. Kossen Alleges that the ALJ Erred in Denying Witness Testimony

Kossen also argues that the ALJ abused his discretion by not allowing Jack Vandelaar, an experienced pilot and an adjunct professor at Embry-Riddle Aeronautical University, to testify as an expert witness.⁷⁶ We disagree. The ALJ correctly concluded that Vandelaar's opinions were irrelevant to Kossen's complaint.⁷⁷ Kossen also contends that the ALJ erred by not allowing several individuals to testify at his hearing.⁷⁸ To the contrary, the ALJ informed Kossen of

⁷⁴ See, e.g., March 26, 2021 Order Imposing Sanctions at 1-7 (“The Complainant, Mr. Kossen, has repeatedly missed discovery and pre-hearing deadlines in this case, even after I have given him multiple opportunities to comply. . . . Mr. Kossen did not file the required pre-hearing statement listing disputed issues, the witnesses he intended to call at the hearing, and the exhibits he intended to introduce at the hearing. . . . [H]e failed to appear for properly-noticed deposition three times – the third time after assuring me directly in a pre-hearing conference he would attend. . . . To be sure, Mr. Kossen is a self-represented litigant. No one expects him to cite statutes or case law with professional fluency. But it does not take professional training to keep one's word, meet important deadlines, or to share the details of one's case when called upon appropriately to do so. What is more, Mr. Kossen was (and is) represented by experienced counsel in *Kossen v. Asia Pacific Airlines*, 2019-AIR-00011, which went to hearing in February 2020; so he has experienced pre-hearing discovery and deadlines, as well as a contested hearing, with the assistance of counsel once before. He should by now have some rudimentary appreciation for what to expect.”).

⁷⁵ *Kossen*, ARB No. 2021-0017 (ARB Feb. 25, 2021) (Order denying interlocutory appeal).

⁷⁶ Comp. Br. at 77.

⁷⁷ D. & O. at 20 (“Without disrespecting Mr. Vandelaar's experience in aviation, I conclude he does not have specialized knowledge with respect to the facts of this case that is helpful to deciding the issues before me. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Madden v. U.S. Dep't of Veterans Affs.*, 873 F.3d 971 (7th Cir. 2017). He essentially heard Mr. Kossen's version of the events, concluded it was true, and drew consistent inferences from information Mr. Kossen gave him. Essentially, Mr. Vandelaar cast himself in the role of trier of fact, rather than independent expert.”).

⁷⁸ Comp. Br. at 57.

the requirements for presenting witnesses,⁷⁹ and Kossen failed to follow the ALJ's instructions.⁸⁰

CONCLUSION

For the reasons stated above, we **AFFIRM** the ALJ's conclusion that Empire did not violate AIR 21 by terminating Kossen's employment because he engaged in protected activity. Accordingly, Kossen's complaint is **DENIED**.

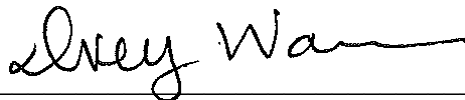
SO ORDERED.⁸¹



THOMAS H. BURRELL
Administrative Appeals Judge



TAMMY L. PUST
Administrative Appeals Judge



IVEY WARREN
Administrative Appeals Judge

⁷⁹ See March 26, 2021 Order Imposing Sanctions at 8 (“Under the June 3, 2020, Pre-Hearing Order, the pre-hearing statement must include: A list of the witnesses to be called to testify, including each witness’s name and address with a summary of the testimony the witness will provide, a precise statement of what the testimony will prove, and a detailed explanation of the relevance of that testimony. General statements about the topics the testimony will cover are not sufficient. A witness need not be disclosed to the extent that disclosure would be privileged, in which case the privilege asserted shall be identified, and the facts making the privilege applicable shall be stated.”).

⁸⁰ *Id.* (“Mr. Kossen’s untimely Pre-Hearing Statement lists twelve witnesses. It does not provide the addresses of any of them, and for eight of them it provides not a single word about the witness’s expected testimony. Accordingly, those eight witnesses – Eric Herrle, David Byrde, Brian Dolan, Jim Dickinson, Kenneth Kurr, Nathan Price, William Barrett, and Gary Sharpe – will not be allowed to testify at the May 7, 2021, videoconference hearing.”).

⁸¹ In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.