TABLE OF APPENDICES

Table of Appendices

Table of Appendices

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 29, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10758
Summary Calendar

ROBERT KREB,

Plaintiff-Appellant,

versus

INTEGRA AVIATION, L.L.C., DOING BUSINESS AS APOLLO MED FLIGHT; APOLLO MED FLIGHT, L.L.C.; PANAVIA AIR TAXI, L.L.C., DOING BUSINESS AS HAVEN AERO, L.L.C.; HAVEN AERO, L.L.C.; FLIGHT MECHANIX, L.L.C.; YOUNG FIRM, P.C.; LEE MCCAMMON, CORPORATE OFFICER OF APOLLO; THOMAS L. KLASSEN, DIRECTOR OF OPERATIONS; JOSEPH H. BELSHA, III, CHIEF PILOT; WHITNEY SMITH, VICE PRESIDENT OF HUMAN RESOURCES; TRAVIS LAMANCE, DIRECTOR OF MAINTENANCE; JEREMI K. YOUNG; SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:23-CV-88

Appendix A

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Robert Kreb, a pilot, was fired by Integra Aviation after his repeated reports that his flight operation assignments did not comply with federal aviation regulations. He sued, *pro se*, various private parties and the Secretary of Labor, claiming violations of the Privacy Act of 1974 and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, and asserting libel, defamation, and slander under state law. Those claims were also pending before the Department of Labor. Kreb sought a temporary restraining order to enjoin the DOL from initiating a review of his claims by an administrative law judge.

In a five-page order issued June 21, 2023, the district court denied the TRO and dismissed the action, without prejudice, for want of subject matter jurisdiction. We affirm that dismissal, essentially for the reasons assigned by the district court.

That court properly determined that the Administrative Procedure Act does not authorize judicial interference with an agency action that is not "final." The court distinguished *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 143 S. Ct. 890, 215 L. Ed. 2d 151 (2023), because it involved a structural, constitutional claim, which Kreb's

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

suit does not. The district court also observed that the claims related to the non-federal defendants "are not yet fit for adjudication in federal court." And the court noted that the suit includes non-diverse parties.

As carefully explained by the district court, the dismissal without prejudice is correct and is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF TEXAS, AMARILLO DIVISION, FILED JUNE 21, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

2:23-CV-088-Z

ROBERT KREB,

Plaintiff,

v.

INTEGRA AVIATION, LLC., *et al.*,

Defendants.

ORDER

Before the Court is Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion") (ECF No. 8), filed on June 18, 2023. Having considered the Motion, briefing, and relevant law, the Court **DENIES** the Motion and **DISMISSES** the case.

Background

Plaintiff, a pro se litigant, is a pilot who was terminated by Defendant Integra Aviation, LLC, following Plaintiff's

"repeated and escalating reports" that his flight operation assignments did not comply with federal aviation regulations. ECF No. 9 at 2. Plaintiff asserts violations of the Privacy Act of 1974 and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), and claims of libel, defamation, and slander under Texas law. ECF No. 3 at 22–24. Plaintiff's claims are currently before the United States Department of Labor ("DOL"). However, Plaintiff's Motion asks the Court to enjoin DOL "and all persons acting on its behalf" from initiating an administrative law judge's ("ALJ") review of his complaint "pending entry by the Court of a final judgment in this action." ECF No. 8 at 6.

LEGAL STANDARD

An applicant seeking a temporary restraining order must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012). Injunctive relief "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). The applicant bears the burden of persuasion on all four elements, and failure on any one of them warrants denial. *See Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009).

Appendix B

ANALYSIS

A. The APA Does Not Authorize Plaintiff's Requested Relief

Under the Administrative Procedure Act ("APA"), an agency's decisions during an agency action must generally await the "final" agency action to be reviewed. *See* 5 U.S.C. § 704. Additionally, the ripeness doctrine protects agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967). This Court has noted that the "general rule of nonreviewability is not absolute." *All. for Hippocratic Med. v. FDA*, No. 2:22-CV-223-Z, 2023 WL 2825871, at *13 (N.D. Tex. Apr. 7, 2023) (quoting *Myron v. Martin*, 670 F.2d 49, 52 (5th Cir. 1982)).[1] But Plaintiff cites a recent Supreme Court ruling for a much broader proposition: that individuals are entitled "as a matter of right" to judicial review in an Article III court "prior to any issues' potentially improper governance" by an ALJ irrespective of statutory "kick-out" provisions for removal to federal court. *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 902 (2023); ECF No. 8 at 2.

1. For example, courts have excused a claimant's failure to exhaust administrative remedies where exhaustion "would be futile because the administrative agency will clearly reject the claim." *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 176 (5th Cir. 2012). And "[a]dministrative remedies that are inadequate need not be exhausted." *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

Plaintiff misreads *Axon*. There, the Court held the relevant SEC/FTC statutes did not displace a district court's federal question jurisdiction because the plaintiffs' constitutional challenges were "structural" — and therefore "collateral" to the agencies' core competence and typical enforcement actions. *Axon*, 143 S. Ct. at 899–900. Specifically, one case challenged FTC's combination of prosecutorial and adjudicative duties and the tenure protection FTC affords its ALJs. *Id.* at 897. The Court reasoned that those claims were outside the agency's area of expertise and did not implicate considerations of agency policy. *Axon*, 143 S. Ct. at 902. Additionally, the claims would have prevented the ALJs "from exercising any power" and were challenges "to the structure or very existence of an agency." *Id.* Thus, the harm alleged was "being subjected to unconstitutional agency authority — a proceeding by an unaccountable ALJ." *Id.* at 903 (internal marks omitted). In other words, the parties objected to the agencies' "power generally, not to anything particular about how that power was wielded." *Id.* at 904. However, the Court made clear that it is true "and will remain so" that parties must generally wait before appealing, even when doing so subjects them to "significant burdens." *Id.* at 904 ("Nothing we say today portends newfound enthusiasm for interlocutory review.").[2] The Court also clarified that the "expense and disruption of protracted adjudicatory proceedings" on a claim do not justify immediate review. *Id.* (internal marks omitted).

---

2. *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) ("Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court.").

Here, Plaintiff has not asserted claims outside of DOL's "sphere of expertise" or claims that are "collateral" to any decisions DOL will make on his complaint. *Id.* at 906; *see also id.* at 901 (a "challenge to [a discharge] is precisely the type of personnel action regularly adjudicated" by an agency review board). Plaintiff does not assert constitutional claims against the structure of DOL. Rather, Plaintiff complains over *how* DOL has handled his claims thus far. *See* ECF No. 8 at 2–3. At least one court has declined to disturb DOL's treatment of the underlying facts of this case.[3] And Plaintiff provides no evidence of DOL's "historically dysfunctional and inconsistent treatment of AIR21 complaints." ECF No. 3 at 25. So Plaintiffs' pleadings are insufficient to convince the Court that DOL is biased or that its procedures are inadequate. Therefore, the Court will not afford Plaintiff the extraordinary remedy of enjoining DOL from carrying out its statutory duties in adjudicating Plaintiff's claims.

B. The Case Must Be Dismissed for Lack of Jurisdiction

For the reasons explained above, Plaintiff's claims related to the non-federal Defendants are not yet fit for adjudication in federal court. Because Plaintiff asserts no constitutional claims against DOL that implicate *Axon*, the Court lacks federal question jurisdiction under 28

3. *See Kreb v. DOL*, No. 20-73497, 2022 WL 2188408, at *1 (9th Cir. June 17, 2022), *cert. denied sub nom. Kreb v. DOL*, No. 22-762, 2023 WL 2959405 (U.S. Apr. 17, 2023) (substantial evidence supported DOL's finding that Plaintiff failed to establish a *prima facie* retaliation case because he did not engage in protected activity).

U.S.C. § 1331. Defendants also include non-diverse parties. *See* 28 U.S.C. § 1332. Thus, there can be no supplemental jurisdiction for Plaintiff's claims under Texas law. *See* 28 U.S.C. § 1367(c)(3). Finally, Plaintiff asserts the Court has jurisdiction under 28 U.S.C. § 1361, which gives district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *See* ECF No. 3 at 15. Of course, the Court cannot enjoin DOL from adjudicating Plaintiff's claims and simultaneously compel its officers to do just that. But in any case, to obtain mandamus: "(1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). Plaintiff has not shown he is entitled to mandamus. Therefore, the court lacks subject matter jurisdiction, and the case must be dismissed. *See* FED. R. CIV. P. 12(b)(2).

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Motion and **ORDERS** that this case be **DISMISSED** without prejudice for lack of subject-matter jurisdiction.

SO ORDERED.

June 21, 2023

/s/ Matthew J. Kacsmaryk
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION, FILED JUNE 26, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:23-CV-088-Z

ROBERT KREB,

Plaintiff,

v.

INTEGRA AVIATION, LLC., *et al.*,

Defendants.

ORDER

Before the Court is Plaintiff's Motion for Reconsideration of Order Denying Requests for an Injunction and Dismissal ("Motion") (ECF No. 12), filed on June 21, 2023. Having considered the Motion, briefing, and relevant law, the Court **DENIES** the Motion.

"Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). A Rule 59(e) motion "may not be used to relitigate issues that were resolved to the movant's dissatisfaction." *Parks v. Hinojosa*, No. 4:21-CV-00111-0, 2021 WL

2783989, at *2 (N.D. Tex. July 2, 2021). Rather, a Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). "Manifest error" is "one that is plain and indisputable, and that amounts to a complete disregard of the controlling law or an obvious mistake or departure from the truth." *Berezowsky v. Rendon Ojeda*, 652 Fed. Appx. 249, 251 (5th Cir. 2016).

Here, Plaintiff identifies no manifest error of law or fact and presents no new evidence. Therefore, the Court will not reconsider its June 21, 2023, Order. *See* ECF No. 10. But the Court writes additionally to add clarity to the Order concerning Plaintiff's claims arising under the Privacy Act of 1974. The Act's remedies provision provides a cause of action "against the agency" for violations of the Act, thereby precluding liability under the Act for the non-agency Defendants. *See* 5 U.S.C. § 552a(g)(l). Accordingly, Plaintiff fails to state a claim under the Privacy Act as to those Defendants. Additionally, the Fifth Circuit has held that "failure to present a request that comported with applicable Privacy Act regulations constitute[s] a failure to exhaust administrative remedies," which equals a failure to state a claim upon which relief can be granted. *Taylor v. US. Treasury Dep't*, 127 F .3d 470, 476 (5th Cir. 1997). To the extent Plaintiff seeks to pursue an exhausted claim under the Privacy Act against the Secretary of the Department of Labor, Plaintiff has not pled facts that would make relief plausible. Therefore, Plaintiffs' claims

under the Privacy Act should also be dismissed under Rule 12(b)(6).

SO ORDERED.

June 26, 2023

/s/ Matthew J. Kacsmaryk
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION, FILED JULY 19, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

2:23-CV-088-Z

ROBERT KREB,

Plaintiff,

v.

INTEGRA AVIATION, LLC., *et al.*,

Defendants.

ORDER

Before the Court is Plaintiff's Joint Motion for Relief from a Final Judgment and for Leave to File an Amended Complaint ("Motion") (ECF No. 26), filed on July 9, 2023. Having considered the Motion, briefing, and relevant law, the Court **DENIES** the Motion.

Background

Plaintiff, a pro se litigant, is a pilot who was terminated by Defendant Integra Aviation, LLC, following Plaintiff's "repeated and escalating reports"

that his flight operation assignments did not comply with federal aviation regulations. ECF No. 9 at 2. Plaintiff alleges violations of the Privacy Act of 1974, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), and claims of libel, defamation, and slander under Texas law. ECF No. 3 at 22-24. Plaintiff's claims are currently before the United States Department of Labor ("DOL"). But Plaintiff filed a motion for a temporary restraining order ("TRO") asking the Court to enjoin DOL "and all persons acting on its behalf' from initiating a review of his complaint "pending entry by the Court of a final judgment in this action." ECF No. 8 at 6. The Court denied the motion and dismissed the case. ECF No. 10. Plaintiff then filed a motion for reconsideration, which the Court also denied. ECF Nos. 12, 25. Plaintiff now moves for relief from judgment under Rule 60(b) and leave to amend his complaint.

LEGAL STANDARD

"Courts are disinclined to disturb judgments under the aegis of Rule 60(b)." *Pease v. Pakhoed Corp.*, 980 F.2d 995,998 (5th Cir. 1993). "It is well established that Rule 60(b) requires the movant to demonstrate that he possesses a meritorious cause of action." *Id.* And "it is not enough that a grant of the motion might have been permissible or warranted; rather, the decision to deny the motion must have been sufficiently *unwarranted* as to amount to an abuse of discretion." *Id.; see also Thunderhorse v. Pierce,* 715 Fed. Appx. 357, 358 (5th Cir. 2017) (a movant seeking relief under Rule 60(b) has the burden of establishing "extraordinary circumstances").

Rule 15(a)(2) provides that leave to amend should be freely given by the court when justice so requires. FED. R. CIV. P. 15(a)(2). The determination of whether a party should be granted leave to amend is entrusted to the sound discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "[A]lthough a district court's discretion to deny leave to amend is limited, leave to amend is *not* automatic." *Fin. Acquisition Ps. LP v. Blackwell*, 440 F.3d 278,291 (5th Cir. 2006). To conduct the inquiry, the Fifth Circuit "examines five considerations to determine whether to allow leave to amend a pleading: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). "An amendment is futile if it would fail to survive a Rule 12(b)(6) motion." *Mariucci Sports, L.L.C. v. NCAA*, 751 F.3d 368,378 (5th Cir. 2014).

ANALYSIS

A. The Court's Dismissal of Plaintiffs Complaint Was Not Unwarranted

The Court's June 21, 2023, Order explained that Plaintiffs requested relief was not authorized by the Administrative Procedure Act because the DOL action is not yet "final"[1] and because Plaintiff did not demonstrate

1. Plaintiff has attached no documents from the DOL proceedings or any evidence outside of his pleadings and declarations. Although not stated in the complaint, Plaintiffs TRO briefing asserted that DOL issued a "Final Determination" on April 26, 2023. ECF No. 8-1

he was entitled to mandamus relief. ECF No. 10 at 2-5; *see also Veldhoen v. US. Coast Guard,* 35 F.3d 222, 225 (5th Cir. 1994) ("An agency's initiation of an investigation does not constitute final agency action."). The Order also explained that the Supreme Court's ruling in *Axon Enter., Inc. v. FTC* did not bestow upon Plaintiff judicial review of agency adjudication in an Article III court "as a matter of right." 143 S. Ct. 890 (2023); ECF No. 10 at 2-4. Additionally, Plaintiffs claims under 49 U.S.C. § 42121 were already denied by the Ninth Circuit and the Supreme Court. *See Kreb v. DOL,* No. 20-73497, 2022 WL 2188408, at *1 (9th Cir. June 17, 2022), *cert. denied sub nom. Kreb v. DOL,* 143 S. Ct. 1751 (2023). And the Court explained

---

at 5. Plaintiff's motion for reconsideration then provides conflicting dates of April 17 and thirty days *after* April 26 for the supposed final agency action. ECF No. 12 at 3, *5.* That latter date falls after the date Plaintiff filed his complaint. *See Dos Santos v. BeLmere Ltd P'ship,* 516 Fed. Appx. 401, 403 (5th Cir. 2013) (subject matter jurisdiction must exist "at the time the suit was filed"). But in any case, Plaintiff's assertions of finality are contradicted by his other pleadings. *See, e.g.,* ECF No. 3 at 11 (accusing DOL of forwarding the investigation "to the DOL Office of Administrative Law Judges for a de novo review should Mr. Kreb or Defendants object to those findings"); *id.* at 25 (noting the complaint is "currently before the DOL and Pending objection for the OALJ"); *id.* (asking the Court to order DOL to "suspend tolling of the 30-day period to object to the Secretary's Preliminary Order"); ECF No. 8 at 3 ("The Cherry Hill ALJ is currently attempting to rush the parties into pretrial activities, correspondence and conference"); *id* at 5 (asking the Court to enjoin "a hasty moving DOL in Plaintiff's Air21 complaint"); ECF No. 9 at 5 (seeking to prevent "further Administrative Action by the DOL"); ECF No. 12 at 2 (acknowledging Plaintiff's "current Air21 matter before the DOL"); ECF No. 26 at 4 ("[T]he ALJ is intent to maintain his jurisdiction and rapidly adjudicate this matter").

why it lacks supplemental jurisdiction over Plaintiffs claims under Texas law. ECF No. 10 at 4.[2] Furthermore, even if the Court has subject matter jurisdiction, Plaintiff failed to state a claim under the Privacy Act of 1974. *See* ECF No. 25 at 1-2.

"The Court understands that Plaintiff feels strongly about the circumstances leading up to this action and disagrees with the Court's consideration of his claim against Defendants. But his feelings upon the same, no matter how fervent, are not a basis for relief from a final judgment." *Kreb v. Jacksons Food Stores, Inc.*, No. 3:16-CV-00444-REP, 2021 WL 6135565, at *4 (D. Idaho Dec. 29, 2021), *appeal dismissed*, No. 22-35093, 2022 WL 1321208 (9th Cir. Mar. 25, 2022). Therefore, the Court **DENIES** Plaintiffs Rule 60(b) motion.

B. Plaintiff May Not File an Amended Complaint

Because the Court has declined to vacate its judgment, Plaintiffs motion for leave to amend his complaint must also be denied. But in any case, Plaintiffs proposed amendment would be futile because it does not cure the defects in the original complaint. *See* ECF No. 26-3. Therefore, the Court **DENIES** Plaintiffs Rule 15 motion.

---

2. Even if the Court has supplemental jurisdiction over Plaintiff's defamation-related claims, those claims are preempted by federal law. *See* 49 U.S.C. § 447030(j).

Appendix D

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Motion.

SO ORDERED.

July 19, 2023

/s/ Matthew J. Kacsmaryk
MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE ADMINISTRATIVE LAW JUDGE, FILED AUGUST 1, 2023

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Cherry Hill, New Jersey

Issue Date: 01 August 2023

OALJ Case No.: 2023-AIR-00008
OSHA Case No.: 6-4140-22-02

In the Matter of

ROBERT KREB,

Complainant,

v.

INTEGRA AVIATION, LLC
d/b/a APOLLO MEDFLIGHT, LLC

Respondent.

ORDER DENYING COMPLAINANT'S MOTION FOR DISQUALIFCATION OF ADMINISTRATIVE LAW JUDGE

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") which was signed into law on April 5, 2000, as amended by The Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Division V, Title I, § 118, 134 Stat. 1182 (2020), signed into law December 27, 2020. The Act includes a whistleblower protection provision, with a

Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979.

On May 23, 2023, OSHA referred this matter to the Office of Administrative Law Judges. On May 24, 2023, the Chief Judge issued a Notice of Docketing. On June 5, 2023, the District Chief Judge assigned this matter to the undersigned who issued a Notice of Assignment the following day setting an initial prehearing conference for June 27, 2023. Because Complainant did not appear at scheduled prehearing conference, on June 30, 2023, the Tribunal issued another Notice of Assignment and Initial Prehearing Order rescheduling the initial prehearing conference for July 11, 2023. On July 11, 2023, the Tribunal held this conference and set procedural deadlines as well as set the hearing to begin on February 5, 2024. During this teleconference, the Tribunal notified the parties that it was changing the identity of Respondent in the caption for all future filings.[1]

On July 11, 2023, Complainant, a self-represented litigant, filed the instant motion. The motion has attached to it no affidavits or other declarations. *See* 29 C.F.R. § 18.33(a)(4).

Complainant contends that the undersigned's prior conduct during an earlier AIR-21 case filed by Complainant, and the undersigned's subsequent decision where Complainant did not prevail, constitute grounds for

1. At the time of this order a copy of the transcript of this meeting was not available; however, the July 12, 2023, Notice of Hearing itself reflects this change.

disqualification. Complainant cites as authority for this proposition 29 C.F.R. § 18.16(b). Mot. at 1. Complainant avers a "more consequential consideration" is DOL's failure to correctly identify the appropriate entity as the Respondent. Mot. at 2. Complainant contends that, in the current case, OSHA's not publicizing its proposed finding of an award in an Enforcement Office Press Releases demonstrates its disinterest and/or some resentment by the Regional Administrator against him. Complainant alleges the Regional Administrator did not properly calculate his damages in his award below. Mot. at 3. Complainant alleges that the undersigned "is generally hesitant to accept blacklisting in complaints already investigated." Mot. at 3. Complainant moves to disqualify the undersigned "as a matter of law because of the double-for-cause tenure protection violates Article II of the Constitution." Mot. at 5. Complainant alleges that the undersigned "has repeatedly dismissed complaints where the complainant has not appropriately named a covered employer under the AIR 21 statute. Mot. at 6. Complainant takes umbrage with the undersigned's experience in aviation. Mot. at 7 – 8. Complainant asserts that 29 C.F.R. § 18.16 is "thinly veiled" and that the Tribunal should be guided by 28 U.S.C. § 455. Finally, Complainant seems to take umbrage with the expedited nature of the proceedings, once assigned to the Tribunal.

On July 24, 2023, Respondent filed its reply. Respondent points out that the Tribunal has already changed the identity of the parties in the caption to all future pleadings. It notes that Complainant's prior AIR-21 case involved a completely different entity with no

association to Respondent. Further, that matter is closed and removed in time from the instant matter by almost five years. Further, in the prior case, OSHA did not find in Complainant's favor where here OSHA has found a violation occurred. Respondent notes that 29 C.F.R. § 18.16(b) requires supporting affidavits, declarations, or other documents to accompany such a motion, and Complainant provided none. Respondent agrees with Complainant that 28 U.S.C. § 144 is the applicable statute for a party to bring a motion seeking recusal of a judge based on bias. And in the Fifth Circuit, the bias "must be of a continuing and personal nature and not simply bias against the attorney or in favor of another attorney because of his misconduct." Reply at 4, quoting *Henderson v. Dept. of Pub. Safety and Corrections*, 901 F.2d 1288, 1296 (5th Cir. 1990). Counsel notes that the Supreme Court has held that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Respondent again emphasizes that Complainant raised no arguments in an affidavit to meet the threshold requirement for recusal. Thus, his motion fails.

Discussion

Complainant raises several allegations that are simply not germane to the proceedings at this stage. Therefore, the Tribunal will only address those allegations levied against it and not those levied against OSHA or other DOL officials, for whom the Tribunal has no jurisdiction.

A party filing a motion to disqualify an ALJ must "allege grounds for disqualification, and include any appropriate supporting affidavits, declarations or other

documents." 29 C.F.R. § 18.16(b). Requiring supporting proof through an affidavit, declaration, or other document is consistent with the Administrative Procedures Act and the Judicial Code which provide for disqualification only upon sufficient showing of bias by affidavit. *See* 5 U.S.C. § 556(b)(3)(requiring "timely and sufficient affidavit of personal bias or other disqualification"); 28 U.S.C. § 144 (requiring "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice"). Complainant has submitted no evidence to support his claim and therefore the Motion can be denied for that reason alone.[2] However, the Tribunal will briefly address several of the allegations raised by Complainant.[3]

One of Complainant's allegations concern the proper identification of Respondent. The Tribunal specifically recognized this as an issue during its review of the file once it was assigned the case. Consequently, the Tribunal *sua sponte* raised the issue during the initial prehearing conference and thereafter corrected the name of the Respondent. The caption now identifies the exact same party that Complainant identified when he first filed his

2. Should a party fail to provide evidence that the ALJ acted on bias, either stemming from an extrajudicial source or demonstrated by deep-seated antagonism that precludes the exercise of fair judgment by the ALJ, a motion to disqualify will be denied. *Partree v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011); *Reddy v. Commodity Futures Trading Comm.*, 191 F.3d 109, 119 - 20 (2d Cir. 1999); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992).

3. For example, the Tribunal need not further address the pace of these proceedings for the statute and the regulation each make clear that these are to be expedited proceedings. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1979.107(b).

OSHA complaint. Therefore, this allegation not only is moot, but does not serve as reasonable grounds for recusal.

Complainant further alleges the undersigned should recuse because he adjudicated Complainant's prior AIR-21 complaint. The Tribunal acknowledges that it presided over Complainant's prior AIR-21 claim. *See Kreb v. Jackson Jet Center et al.*, Case No. 2016-AIR-00028 (Aug. 6, 2018) (D&O denying Complaint), *aff'd*, ARB Case No. 2018-0065 (Sept. 28, 2020). The Tribunal notes that Complainant made no allegation of the undersigned's misconduct during his appeal of that D&O.

There is a strong presumption that ALJs are unbiased. *See Prof'l Massage Training Ctr., Inc. v. Accreditation Alliance of Career Schs. & Colls.*, 781 F.3d 161, 178 (4th Cir. 2015) (citing *Morris v. City of Danville*, 744 F.2d 1041, 1044 (4th Cir. 1984)); *Perkins v. Astrue*, 648 F.3d 892, 902 (8th Cir. 2011) (quoting *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("ALJs and other similar quasi-judicial administrative officers are presumed to be unbiased.")); *Partree v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("There is a 'presumption of honesty and integrity in those serving as adjudicators.'")). "[T]he burden of establishing a disqualifying interest [of an ALJ] is upon the person making the contention." *West v. Astrue*, Civ. A. No. 5:07-133 (CAR), 2008 U.S. Dist. LEXIS 92334, 2008 WL 2024963, at *9 (M.D. Ga. May 8, 2008). Remarks "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510

U.S. 540, 555 (1994). Furthermore, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* at 555. "Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias." *Matthews*, slip op. at 3 (quoting *Powers v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004AIR-019, slip op. at 17 (ARB Aug. 31. 2007)).

Additionally, ALJs are presumed to act impartially. *Matter of Slavin*, ARB No. 04- 088, ALJ No. 2004-MIS-002, slip op. at 16 (ARB Apr. 29, 2005); *see also Billings v. Tennessee Valley Auth.*, Case No. 1991-ERA-12, slip op. at 4 (ARB June 26, 1996) ("Under 28 U.S.C. § 144, a judge is presumed to be impartial, and a substantial burden is imposed on the requesting party to prove otherwise."). The Administrative Review Board ("ARB") recently adopted the following rationale for when disqualification is or is not warranted:

> [R]ecusal is appropriate when a party demonstrates that the ALJ "has a personal bias or prejudice either against him or in favor of any adverse party... or that his impartiality might reasonably be questioned...or that he had a personal bias or prejudice concerning a party." *Billings*, slip op. at 4. "Absent specific allegations of personal bias or prejudice, neither prior adverse rulings of a judge nor his participation in a prior proceeding are sufficient for recusal." *Id.*

Appendix E

> "The ARB generally presumes that an ALJ is unbiased unless a party alleging bias can support that allegation; and bias generally cannot be shown without proof of an extra-judicial source of bias." *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026, slip op. at 3 (ARB May 31, 2012). "Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias." *Matthews*, slip op. at 3 (quoting *Powers v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004AIR-019, slip op. at 17 (ARB Aug. 31. 2007)).

Vudhamari v. Advent Global Solutions, ARB Case No. 2021-0018, ALJ Case No. 2018-LCA-00022 (April 26, 2021).

Likewise, unsupported speculation regarding bias or partiality is insufficient to warrant judicial recusal. *Talley v. Tyer*, __F.Supp.3d__, 2023 LEXIS 129 (D. Mass. Jan. 3, 2023); *see also Ndoromo v. Barr*, 486 F.Supp.3d 388, 394 (D.D.C. 2020) ("A party moving for recusal pursuant to Section 455(b) must likewise demonstrate 'actual bias or prejudice based upon an extrajudicial source.'"). In short, given this issue was not raised in the prior matter and Complainant has provided no evidence to support his very serious contentions, the Tribunal finds such allegations meritless.

Here, Complainant expresses concern that the undersigned, rather than an ALJ from a different office, was assigned the current case, his second before

the Tribunal. The undersigned had nothing to do with assigning this case to me for decision. That assignment occurred in the ordinary course of business.[4] From the motion and other filings, the Tribunal can glean that Complainant is concerned about the Tribunal's prior rulings. But he has articulated no reasonable basis for the undersigned's disqualification under 29 C.F.R. § 18.16. "Federal judges are obligated not to recuse themselves when there is no reason to question their impartiality just as they are obligated to recuse themselves when there is a reason." *New York City Housing Develop. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 578 F.Supp.3d 1011, 1016 (E.D. Ark. 2022), citing *Adams v. Rivera*, No. 11-3021, 2011 WL 3555665 at *1 (W.D. Ark. Aug. 11, 2011), quoting *Laird v. Tatum*, 409 U.S. 824, 837, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972). It is for this reason that mere allegations, without supporting evidence, is required for this type of motion.

Complainant alleges that the undersigned "has repeatedly dismissed complaints where the complainant has not appropriately named a covered employer under the AIR 21 statute." Mot. at 6. However, Complainant has failed to cite to an instance where this was the case.

Complainant further alleges that the undersigned "is generally hesitant to accept blacklisting in complaints already investigated." Mot. at 3. Yet again, he provides no evidence to support this claim. The Tribunal can

4. Within OALJ, there is no geographic region assigned to its district offices for whistleblower cases.

represent that when blacklisting has been raised by a party, the undersigned has addressed it. *See, e.g., Reed v. American Airlines,* ALJ Case No. 2020-AIR-00001 (Sept. 22, 2020), *aff'd* ARB Case No. 2021-0044 (Dec. 16, 2021), *pet. rev. denied,* 2023 U.S. App. LEXIS 15014 (7th Cir. June 15, 2023); *Bell v. Bald Mtn. Air Service,* ALJ Case No. 2016-AIR-00016 (Oct. 10, 2018)(settled after appeal to the ARB); *Carnahan v. Harris Aircraft Svcs.,* ALJ Case No. 2016-AIR-00025 (Dec. 12, 2017); and *Kreb, supra.*

Complainant also objects to the undersigned because the "double-protections" afforded him by virtue of his appointment violates Article II of the Constitution. For the reasons set forth below, the Tribunal does not find this a basis for recusal. Complainant cites to *Free Enter. Fund v. Public Co. Accounting Oversight Bd.* 561 U.S. 477, 491 (2010) as support for its position. The Supreme Court has found that ALJs are "inferior officers" and thus subject to the appointments clause. *Lucia v. SEC,* 585 U.S. ___, 138 S. Ct. 2044 (2018). However, even prior to the issuance of that decision, on December 21, 2017, the Secretary of Labor ratified the undersigned's initial 2014 appointment as an ALJ.[5] Following *Lucia*, on September 5, 2018, the undersigned was duly readministered his oath of office.

Actions to remove an ALJ from office, as well as lesser forms of discipline, are governed by 5 U.S.C. § 7521. However, the only court to squarely address this

5. A copy of this document can be found at www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf.

issue as it pertains to DOL ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021). The ARB's sister Board, the Benefits Review Board, has similarly recently rejected the contention that there is a constitutional violation in how ALJs are ensured judicial independence. In *Howard v. Apogee Coal Co.*, BRB No. 20-0229 BLA, slip op. at 4 - 5 (Oct. 18, 2022), that Board wrote:

> [I]n rejecting a similar argument raised regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise Fund* the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Id.* (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021)). Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id.* at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

> Nor do *Seila Law* or *Arthrex* support Employer's argument. In *Seila Law*, the Supreme Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch because the CFPB was an "independent agency led by a single Director and vested with significant executive power." 140 S. Ct. at 2201. It did not address ALJs. Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1970. The Court explained "*the unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Here, Complainant has similarly not explained how these authorities would apply to a DOL ALJ let alone undermine the undersigned's ability to hear and decide this case. In short, Complainant has failed to establish that the removal provision contained in 5 U.S.C. § 7521 is unconstitutional. Thus, to the extent the Tribunal has the authority to even decide constitutional issue, it finds that the double-protection provisions do not violate the principle of the separation of powers.

Finally, Complainant asserts that 28 U.S.C. § 455–which applies to judicial proceedings–should be the

Tribunal's guide to disqualify himself. This statute does not apply here because these are administrative, not judicial, proceedings. Further, the undersigned is not an Article III judge, nor appointed nor supervised by an Article III judge. Unlike Article III judges, ALJs are beholden to the standards of the Administrative Procedure Act ("APA"). This notwithstanding and even assuming 28 U.S.C. § 455 should apply in this case, Complainant still has failed to establish grounds for disqualification. Section 455 provides that disqualification of a judge is appropriate when the judge is a party to the proceeding, has a relative who is a party, has personal bias against a party, has personal knowledge of disputed facts, has served as counsel on the case, has a personal (or family) financial interest in the outcome, or has served in a governmental position and expressed an adverse opinion as counsel, an advisor, or a material witness on the merits of the case. None of those scenarios exist here.[6]

In short, Complainant has provided no persuasive reason for the Tribunal to recuse itself. Therefore, the Complainant's Motion is **DENIED.**

SO ORDERED.

---

6. The undersigned is not a party to the proceedings, has no relative who is a party, has no personal bias against a party, has no personal knowledge of disputed facts, has not served as counsel on the case, neither he nor his family has a personal financial interest in the outcome, has not served in a government position where the undersigned has express an adverse opinion as counsel, advisor, or material witness in this case.

Appendix E

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey-District Office

Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=CHERRY HILL, S=NJ, C=US
Location: Washington DC

Digitally signed by Donna M. Broome
DN: CN=Donna M. Broome, OU=Paralegal Specialist,
O=US DOL Office of Administrative Law Judges,
L=CHERRY HILL, S=NJ, C=US
Location: Washington DC

APPENDIX F — ORDER DENYING REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10758

ROBERT KREB,

Plaintiff–Appellant,

versus

INTEGRA AVIATION, L.L.C., DOING BUSINESS AS APOLLO MED FLIGHT; APOLLO MED FLIGHT, L.L.C.; PANAVIA AIR TAXI, L.L.C., DOING BUSINESS AS HAVEN AERO, L.L.C.; HAVEN AERO, L.L.C.; FLIGHT MECHANIX, L.L.C.; YOUNG FIRM, P.C.; LEE MCCAMMON, CORPORATE OFFICER OF APOLLO; THOMAS L. KLASSEN, DIRECTOR OF OPERATIONS; JOSEPH H. BELSHA, III, CHIEF PILOT; WHITNEY SMITH, VICE PRESIDENT OF HUMAN RESOURCES; TRAVIS LAMANCE, DIRECTOR OF MAINTENANCE; JEREMI K. YOUNG; SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Defendants–Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:23-CV-88

Appendix F

ON PETITION FOR REHEARING EN BANC

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Additional material from this filing is available in the Clerk's Office.