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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Bahig Saliba, Plaintiff, Vs. American Airlines, Inc.; Chip Long; Timothy Raynor; Alison Devereux-Naumann Defendants.	CASE NO. 2:22-CV-00738-PHX-SPL **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S THIRD MOTION TO DISMISS**

Defendants American Airlines, Inc. ("American"), Chip Long ("Long"), Timothy Raynor ("Raynor"), and Alison Devereux-Naumann ("Devereux-Naumann") submit this reply in support of their motion to dismiss Plaintiff's Complaint under Rules 12(b)(1), 12(b)(2), and 12(b)(6) ("Motion").

As a preliminary matter, the undersigned Defense counsel would like to apologize for their Motion using a previous case caption containing Judge Rayes' name. This error was inadvertent. It is corrected here and will not occur in the future. This administrative

mistake, while important to correct, neither warrants denial of the Motion, as Plaintiff demands, nor renders the Motion untimely. *See* ECF No. 45 at 1.

INTRODUCTION

This dispute stems entirely from Plaintiff's refusal to wear a mask in Spokane International Airport in clear violation of American policy in place at the time. Plaintiff received discipline for this misconduct. He continues to insist American had no right to impose its masking rule. He also refuses to submit to a medical examination under Section 20 of the Joint Collective Bargaining Agreement ("JCBA"), the contract governing his employment with American. The Company has the right to impose a masking rule and to require Plaintiff to submit to a medical examination under the JCBA. Plaintiff's claim to the contrary creates a classic contract interpretation dispute—i.e., whether the JCBA does or does not give American these rights. That dispute is governed solely by the JCBA and its dispute resolution process, and only a labor arbitrator has the ability to decide these disputes under the RLA. Plaintiff's claim is thus preempted by the RLA.

Plaintiff attempts to avoid the preemptive effect of the RLA by continuing to argue he is not subject to any rules that he considers a "medical procedure," a term he construes so broadly as to include wearing a mask in a public area. *See* ECF No. 45 at 2. He further insists he alone has some absolute right to determine, without any check or balance, that he is medically capable of flying an airplane with hundreds of souls onboard. For example, he claims "[a]uthority granted to pilots to exercise is from and by the People under the Act. The People did not authorize pilots to pass any authority granted to them to their employer. The law dictates pilots makes their fitness for flight determination unencumbered [sic] and of their own free will and discretion." ECF No. 45 at 2. Plaintiff provides no direct support for this claim because there is none. Imagine if a pilot suffered a serious stroke that adversely affected his nervous system such that he could not fly a passenger aircraft, yet he

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insisted he was still medically able to fly. Under Plaintiff's theory, this pilot is the only person who can decide his fitness for flight. This is wrong for obvious safety reasons, and Plaintiff misconstrues the law in making these claims.

Almost all of Plaintiff's arguments depend on this erroneous, central thesis. He claims it is only he who can determine whether he is medically fit to fly based on an alleged employment contract (ECF No. 45 at 6) that is somehow outside the authority of the JCBA. The JCBA, however, is the contract that actually governs his employment with American (ECF No. 45 at 8), and it allows the Company to impose the masking rule (ECF 30-22 at 24-2 (recognizing Company's issuance of Policies and Procedures)) and to require Plaintiff to submit to a medical examination (ECF 30-22 at 20-1). Plaintiff does not identify any other legally viable employment contract, let alone one that contains the purported restrictions prohibiting American from imposing its masking rule or prohibiting American from requiring Plaintiff to submit to a medical examination. The Company does not create an unlawful hostile work environment by requiring Plaintiff to adhere to these rules and instructions. ECF No. 45 at 12. Plaintiff fails to refute the substantive arguments in the Motion that command dismissal of his Third Amended Complaint.

ARGUMENT

I. Plaintiff's Breach Of Contract Claim Must Be Dismissed.

As set forth in the Motion, Plaintiff's claims regarding an alleged breach of contract must be dismissed for lack of subject matter jurisdiction (Rule 12(b)(1)) and for failing to state a claim (Rule 12(b)(6)). *See* ECF No. 43 at 7-9. Plaintiff's Response does not overcome Defendants' arguments establishing that dismissal is warranted.

Plaintiff's breach of contract claim fails because he has not and cannot identify an actual contract, let alone any provision of a contract, that American breached. Plaintiff argues that "[t]he [Federal Aviation] Act imposes a pilot and copilot employment contract

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on the air carrier where a pilot medical certificate is central to the contract." This is simply untrue; a federal law cannot create a contract between a private employer and employee. Though federal law may impose restrictions on employers and may give enforceable rights to employees, this is not a contract. Plaintiff's argument here is a mere recasting of his already-dismissed "aviation law" claim as a breach of contract claim. Absent contract terms restricting American from imposing a masking rule or requiring him to submit to a medical examination, there can be no claim for breach of the contract.

Plaintiff cited no such contractual terms in his Third Amended Complaint or his Response. Plaintiff argues that he "executed an employment contract with American and improvements to certain terms of the contract, excluding the Plaintiff's FAA medical certificate and health decisions he makes, are then negotiated, or managed by the JCBA." ECF 40 at 9. However, Plaintiff does not cite to any provision of any purported employment contract that says this. He also does not provide any authority for his claim that the JCBA is simply some ancillary agreement that provides "improvements" to this other alleged "contract." In reality, the JCBA governs the terms and conditions of Plaintiff's employment and provides American with the ability to impose masking rules and to require Plaintiff to submit to a medical examination. Plaintiff disputes the JCBA enables the Company to take such actions, but this dispute is a classic contract interpretation dispute preempted by the RLA. *See* ECF 43 at 9.

In sum, Plaintiff has not identified an actual contract that contains terms restricting American from imposing masking rules or from requiring him to submit to a medical examination. Plaintiff's breach of contract claim, therefore, must be dismissed for failure to state a claim. And, to the extent Plaintiff disputes that American has a right to impose rules and to require a medical examination of Plaintiff, this dispute must be dismissed for lack of subject matter jurisdiction.

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II. Plaintiff's Claims Regarding "Aviation Law" Are Improper.

Plaintiff's "Aviation Law" claims were already dismissed without leave to amend. ECF 32 at 7-8. Plaintiff's Motion for Reconsideration on this point was likewise denied. ECF 34 at 4-5. Plaintiff's "invitation" to the Court to "reevaluate the decision to dismiss Plaintiff's claim of aviation law violation" is improper and should be stricken. At this point, Defendants are responding to a Third Amended Complaint, yet Plaintiff is continuing to argue claims (with no legal basis) that have been dismissed. Defendants understand that a *pro se* Plaintiff does not have the benefit of legal training to draw from, but Plaintiff's refusal to accept the Court's rulings (and force Defendants to respond again to his "aviation law" claims) necessitate some form of reprimand or sanction.

III. Plaintiff's Hostile Work Environment Claim Is Still Not Viable.

Despite multiple amended complaints and now two motions to dismiss, Plaintiff still has not overcome two fatal flaws in his hostile work environment claim: he fails to plead the elements of the claim, and he has not shown exhaustion of his administrative remedies. In response to Defendants' argument that he has not identified his protected class, an element of a hostile work environment claim, Plaintiff asserts in his Response that he believes he is being harassed because of his national origin. He did not plead this alleged fact in the Third Amended Complaint, however. And even if he had, it would not be enough to survive the Motion to Dismiss. His only stated bases for his belief that American required him to wear a mask in airports and to submit to a medical examination because of his national origin is (1) his purported settlement of a discrimination claim with his previous employer AmericaWest more than 20 years ago and (2) the police report identifies his ethnicity as "Middle Eastern" and Defendants would have seen this report.[1] Plaintiff provides no authority to support such inferences, and he certainly does not tie these alleged

[1] This allegation was already unsuccessfully raised in Plaintiff's response to a previous motion to dismiss. ECF 30 at 10.

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facts to any action of Defendants in this case. He thus has not alleged facts sufficient to support a claim of a hostile work environment.

Plaintiff also has not shown he exhausted his administrative remedies. He has now, after several rounds of briefing on this topic, produced a purported right to sue letter from the EEOC. Defendants were unaware of this alleged charge and have no record of receiving the same.[2] Though Defendants do not have reason to doubt the legitimacy of this right to sue letter, the requirement is *not* simply that the Plaintiff have filed an administrative charge; the charge must identify the same adverse parties and same basis of alleged discrimination.[3] *See Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) ("The specific claims made in district court ordinarily must be presented to the EEOC"); *Schroeder v. Brennan*, CV-17-01301-PHX-JJT, 2017 WL 6622383, at *2 (D. Ariz. Dec. 4, 2017) (*accord* with *Leong*); *Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th Cir. 1990) ("general rule that Title VII claimants may sue only those named in the EEOC charge because only they had an opportunity to respond to charges during the administrative proceeding"); *Alozie v. Arizona Bd. of Regents*, CV-16-03944-PHX-ROS, 2017 WL 11537899, at *4 (D. Ariz. Sept. 21, 2017) ("When a particular type of discrimination is not contained in the charge, the plaintiff likely cannot pursue that type of discrimination in litigation"). For example, if Plaintiff filed a charge alleging that American required him to submit to a medical examination request in retaliation for his use of sick leave (it did not), that would not

[2] Defendants immediately submitted a FOIA request in the hopes of determining why the Charge was not sent to them or otherwise how they were not alerted to its existence. No response has been received at the time of this filing.

[3] Additionally, Plaintiff's addition of a right to sue letter in his response, as opposed to any of the four versions of the Complaint he has filed, is insufficient. *See Krupa v. 5 & Diner N 16th St. LLC*, CV-20-00721-PHX-JJT, 2020 WL 7705986, at *3 (D. Ariz. Dec. 28, 2020)("the Court may not consider new assertions in Plaintiff's Response when evaluating LPM's Motion, but instead must restrict its review to allegations contained in the Complaint" when determining exhaustion).

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exhaust his hostile work environment claim based on his national origin. Plaintiff's Third Amended Complaint does not contain facts sufficient to show that he exhausted his administrative remedy (and in fact does not even allege that he has filed a charge).

For these reasons, Plaintiff's hostile work environment claim must be dismissed under Rule 12(b)(1) and (6).

IV. There Is No Personal Jurisdiction Over Long.

As the Court noted in its first Order dismissing Defendant Long, "the Court can consider only facts set forth in Plaintiff's Complaint, as Plaintiff has not submitted any affidavits setting forth jurisdictional facts." ECF No. 32 at 6 *citing Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). This has not changed in the Third Amended Complaint. The only allegation that is new and that ties Defendant Long to Arizona is that Defendant Long remotely appeared in a videoconference appeal hearing, which was convened at Plaintiff's insistence. This cannot be purposeful availment by Defendant Long to the laws of Arizona when he was simply performing a required function in order to provide Plaintiff with his right to an appeal hearing, nor would it comport with fair play and substantial justice. Defendant Long should remain dismissed from this case for lack of personal jurisdiction.

V. Plaintiff's Section 1983 Claims Still Fail For Lack Of State Action.

As stated in Defendants' Motion to Dismiss, Plaintiff's entire claim is *verbatim* the argument already rejected when he made it in his earlier response. *Compare* ECF 30 at 9-11 *with* ECF 40 at 18-20. Plaintiff now argues, inexplicably, that American's later actions were part of a joint government action because the police allowed him to proceed with an on-time departure. This, however, is not the behavior that Plaintiff is complaining about. He argues, "[p]olice power was passed on to American and American conducted without a lawful foundation their disciplinary action forcing the Plaintiff to accomplish what police

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began in the airport terminal." ECF No. 45 at 15. Through this statement, Plaintiff appears to claim that the decision by the police to allow him to command an aircraft that day benefitted American, and thus American's later decision to investigate Plaintiff's behavior that aroused police attention is part of the police action. This is nonsensical and simply ignores the Court's earlier ruling that disciplinary functions are a customary employer action and not state action. Plaintiff's Section 1983 claim must be dismissed for failure to state a claim.

VI. Plaintiff's Affidavit Has No Effect.

Plaintiff argues that the allegations in his affidavit, allegedly served on Defendants Long and Raynor in February 2022, must be deemed admitted by Long and Raynor because they failed to respond as Plaintiff demanded. This affidavit was purportedly "served" (without certificate of service) on Long and Raynor long before this lawsuit was initiated and has no legal effect. Plaintiff was not entitled to a response to his affidavit, which also sought $50,000,000 in damages for every "violation" of his rights. The only person who is bound by the contents of that affidavit (which alternately draws support from the Texas, Washington, and Federal Constitutions) is Plaintiff.

CONCLUSION

Defendants request that the Court dismiss the Complaint without leave to amend.

DATED this 23rd day of December, 2022.

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By: */s/ Nicholas Gillard-Byers*

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CERTIFICATE OF SERVICE

On December 23, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic filing to the following:

Bahig Saliba
[redacted]
medoverlook@protonmail.com

s/ Mendy Graves
Legal Secretary

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