

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 15 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DARREN JAMES KOSSEN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF
LABOR; EMPIRE AIRLINES, INC.,

Respondents.

No. 23-2299

Agency No. Department of Labor

MEMORANDUM*

On Petition for Review of an Order of the
Department of Labor

Submitted October 15, 2026**

Before: O’SANNLAIN, SILVERMAN, and N.R. SMITH, Circuit Judges.

Darren Kossen petitions pro se for review of the Department of Labor
Administrative Review Board’s decision and order affirming an Administrative
Law Judge’s decision dismissing his complaint under the Wendell H. Ford
Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. §

* 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. 34(a)(2).

42121 et seq. We have jurisdiction pursuant to 49 U.S.C. § 42121(b)(4)(A).

We review the Board's decision under the Administrative Procedure Act.

We sustain the Board's legal conclusions "unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and sustain its factual findings if they are supported by substantial evidence in the record as a whole.

Calmat Co. v. U.S. Dep't of Labor, 364 F.3d 1117, 1121 (9th Cir. 2004). We deny the petition for review.

Substantial evidence supports the agency's determination that Empire Airlines established by clear and convincing evidence that it would have terminated Kossen's employment in the absence of his protected activity. *See* 49 U.S.C. § 42121(a)(1), (b)(2)(B) (setting forth the two-part analysis for an AIR21 claim); *see also Retlaw Broad. Co. v. N.L.R.B.*, 53 F.3d 1002, 1006 (9th Cir. 1995) ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.") (internal quotation marks omitted).

Kossen has not established an abuse of discretion or prejudice arising out of any of the ALJ's evidentiary rulings. *See Calmat Co.*, 364 F.3d at 1122 (explaining that we review evidentiary rulings for abuse of discretion and may only reverse if the error was prejudicial).

Nor has Kossen established that actual bias that would disqualify the ALJ.

See Bunnell v. Barnhart, 336 F.3d 1112, 1114-15 (9th Cir. 2003) (noting that we review the denial of a recusal motion for an abuse of discretion and holding that “actual bias must be shown to disqualify an administrative law judge”).

We do not consider arguments Kossen failed to raise before the Board or in the opening brief. *See* 29 C.F.R. § 1979.110(a); *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam).

PETITION FOR REVIEW DENIED.