

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 10,
2026

Lyle W. Cayce
Clerk

No. 25-60286

CORR FLIGHT S., *doing business as* NICHOLAS AIR,

Petitioner,

versus

DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of the Final Decision and Order of
the United States Department of Labor's Administrative Review Board
Agency No. ARB 2023-0036

Before KING, SMITH, and RAMIREZ, *Circuit Judges*.

PER CURIAM:*

Colin DeBuse, a captain-in-training with Corr Flight S., observed during a flight that Captain Stacey Lee engaged in numerous safety violations. DeBuse informed Corr Flight S.'s management of the violations and stated that he would not fly with Lee. In response, Corr Flight placed DeBuse on unpaid leave and ultimately terminated him. An Administrative Law Judge found that DeBuse's report of Lee's safety violation to Corr Flight

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

No. 25-60286

S. and refusal to fly with Lee were protected activities that contributed to his unpaid leave. The Administrative Law Judge ordered Corr Flight S. to give DeBuse back pay and attorney's fees. The Administrative Review Board affirmed. Corr Flight S. now petitions for review. For the following reasons, we deny the petition.

I.

Corr Flight S. ("Corr Flight") is a pilot-management company. Corr Flight employed Colin DeBuse from October 15, 2018, to December 10, 2019, when Corr Flight terminated DeBuse.

DeBuse's role with Corr Flight was an observer. According to Corr Flight's observer responsibilities guide, "[t]he Observer's primary role is to observe [Corr Flight's] operation until the Observer becomes qualified on the airframe as either a [pilot-in-command] or [a second-in-command]." Observers are not assigned any flight duties; may not manipulate the flight controls; may not assume any duties that must be performed by a qualified crew member under federal regulations or company policies; cannot brief passengers; and must identify themselves as a passenger if a Federal Aviation Administration inspector conducts a ramp check.

In October 2019, Corr Flight assigned DeBuse to act as an observer on flights with Captain Stacey Lee. During those flights, DeBuse observed numerous safety issues: Lee did not record mechanical issues in the aircraft's logbook, Lee left DeBuse alone in the cockpit, and Lee did not ensure that a member of the crew was wearing an oxygen mask.

On October 16, 2019, DeBuse had a profanity-laced phone call with flight dispatcher Cody Shears, in which DeBuse expressed his personal displeasure with Lee. On October 19, DeBuse reported to his manager, Chief Pilot Nick James, his safety concern with Lee leaving the flight deck.

No. 25-60286

DeBuse told Corr Flight management that he would not fly with Lee because of Lee's previous safety violations. In a telephone conference call, Corr Flight managers informed DeBuse that they had discussed the safety violation with Lee and instructed DeBuse that he must either train with Lee or resign. DeBuse refused to do either.

Following that conference call, the managers discussed whether to terminate DeBuse. Instead, Corr Flight decided to suspend DeBuse without pay and offered him the opportunity to complete his training with a third-party flight-simulator course, which would allow him to avoid flying or interacting with Lee. Corr Flight informed DeBuse that he had until November 27 to accept the offer, which included a training agreement that, according to DeBuse, other persons completing in-house flight training were not required to sign. DeBuse did not accept or reject the offer because he considered it an unfair attempt to force him out of Corr Flight. On December 10, Corr Flight terminated DeBuse.

DeBuse filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that Corr Flight violated the whistleblower protection provisions in 49 U.S.C. § 42121 ("AIR 21"). OSHA dismissed the complaint because it found that DeBuse's refusal to accept his training assignment was not a protected activity. DeBuse appealed to the Department of Labor ("Department") Office of Administrative Law Judges.

The assigned Administrative Law Judge ("ALJ") initially held that (1) DeBuse's report that Lee departed from the flight deck constituted protected activity; (2) DeBuse's unpaid leave and termination were adverse actions; (3) the flight simulator course was an attempt to resolve DeBuse's concerns, not an adverse action; (4) DeBuse's reporting contributed to his unpaid leave; and (5) DeBuse's refusal of the simulator training was not a

No. 25-60286

protected activity and was the sole cause of his termination. The ALJ awarded back pay for the 15-day period of unpaid leave plus post-judgment interest and attorney's fees and costs. After a limited remand from the Administrative Review Board ("ARB") for clarification, the ALJ further held that DeBuse's refusal to fly with Lee constituted protected activity that was a contributing factor to his unpaid leave. The ALJ thereby reaffirmed the award order.

Corr Flight appealed to the ARB. The ARB affirmed the ALJ's order and denied Corr Flight's subsequent motion to reconsider. Corr Flight then filed this petition for review.

II.

This court has jurisdiction to review the final order of the ARB under 49 U.S.C. § 42121(b)(4)(A). Corr Flight filed a timely petition for review and invoked § 42121(b)(4)(A) in its Jurisdictional Statement. But it also cast doubt on its own invocation of jurisdiction, stating that "DeBuse's fee petition remains pending before the ALJ, and the ALJ's judgment is not final until the petition is resolved. Thus, Corr maintains this appeal is premature and should be dismissed or stayed."

Corr Flight's jurisdictional contention is untrue. A pending fee petition alone does not render a judgment non-final. *See, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) (explaining that a decision on the merits is a final appealable decision "whether or not there remains for adjudication a request for attorney's fees attributable to the case"); *Peacock v. United States*, 597 F.3d 654, 658-59 (5th Cir. 2010) (applying *Budinich* in a case where the unresolved issue of attorney's fees remained with the district court); *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94, 96 (11th Cir. 1997) (applying *Budinich* and holding that "for the purposes of an appeal from an administrative agency, both the imposition and the

No. 25-60286

amount of attorney’s fees are collateral to the merits of an action”). Corr Flight cites no authority in support of its contradictory contention that we lack jurisdiction.¹

Judicial review of the ARB’s decisions is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). 49 U.S.C. § 42121(b)(4)(A). Under the APA, this Court must “hold unlawful and set aside” the ARB’s decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or is “unsupported by substantial evidence.” *See* 5 U.S.C. § 706(2)(A), (E). Under that standard, “[a]n agency’s conclusions of law are reviewed *de novo* and its findings of fact are reviewed for substantial evidence.” *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 771 F.3d 268, 272 (5th Cir. 2014).

III.

Corr Flight raises two issues in its petition for review: (1) the ALJ’s two-layered removal protection violates the Appointments Clause of the United States Constitution; and (2) “[t]he ALJ and ARB erred in holding that DeBuse engaged in protected activity that caused him to be placed on unpaid leave.” We take these issues in turn.

A.

The Department concedes that the Fifth Circuit has already held that the challenged removal restrictions violate the constitution, *Jarkesy v. SEC*, 34 F.4th 446, 463–65 (5th Cir. 2022), *aff’d on other grounds*, 603 U.S. 109 (2024),² but argues that this court should not vacate the ALJ’s order because

¹ If Corr Flight wishes to dismiss the petition for review, it can file a Rule 42 motion to voluntarily dismiss. *See* Fed. R. App. P. 42(b)(2).

² Department of Labor ALJs exercise the same “substantial authority” as the Securities and Exchange Commission ALJs in *Jarkesy* and the National Labor Relations

No. 25-60286

Corr Flight forfeited its removal challenge by not properly preserving it in the administrative proceedings, and because Corr Flight failed to establish harm. Again, we take the arguments in turn.

1.

The Department asserts that Corr Flight forfeited its removal argument because it was required to raise any objections to the ARB, yet “Corr Flight participated in the ALJ litigation and the ARB appeals without raising any constitutional objections to the administrative proceedings.”

Where agency regulations require issue exhaustion, “courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.” *Sims v. Apfel*, 530 U.S. 103, 108 (2000). But “[c]laimants who exhaust administrative remedies need not also exhaust issues in a request for review” where the agency regulations are silent on issue exhaustion. *Id.* at 112.

The Department claims that 29 C.F.R. § 1979.110(a) requires issue exhaustion. Section 1979.110(a) provides that a “petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties.” We find that the provision does not require issue exhaustion. Agency regulations requiring *issue* exhaustion, instead of mere *claim* exhaustion, do so explicitly. *See, e.g.*, 20 C.F.R. § 802.211 (“Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which[] [s]pecifically states the *issues* to be

Board ALJs in *Space Exploration Technologies Corporation v. National Labor Relations Board*, 151 F.4th 761 (5th Cir. 2025). *See* 29 C.F.R. §§ 18.57, 18.81, 18.95. They are thus “inferior officers.” *See Space Expl.*, 151 F.4th at 775. The two-layer removal-protection scheme, *see* 5 C.F.R. § 930.211, is therefore unconstitutional. *See Space Expl.*, 151 F.4th at 775.

No. 25-60286

considered by the Board[.]” (emphasis added)); 7 C.F.R. § 1.145 (Arguments considered on appeal “shall be limited to the *issues* raised in the appeal or in the response to the appeal[.]” (emphasis added)). Section 1979.110(a) does not contain this explicit language. Therefore, because § 1979.110(a) does not require issue exhaustion in the agency, it does not require issue exhaustion for this petition for review.³

Accordingly, Corr Flight did not forfeit its constitutional challenge. Rather, Corr Flight complied with 29 C.F.R. § 1979.110(a) because it identified the ALJ’s order and conclusions to which it took exception.

2.

The Department also posits that an unconstitutional removal restriction alone does not warrant vacatur of an ALJ’s decision; to successfully challenge a final agency action based on unconstitutional removal protections, a party must show that it suffered harm from the removal protections. The Department argues Corr Flight has not met this burden. Corr Flight counters that it need not show a particular harm flowing from the removal protections.

In *Collins v. Yellen*, the Supreme Court held that the statutory removal protections for the director of the Federal Housing Finance Agency were unconstitutional. 594 U.S. 220, 251 (2021). But the Supreme Court did not set aside the challenged agency action, because the director had authority to

³ A judicially-imposed issue exhaustion requirement would also be improper here because Corr Flight’s removal challenge is purely constitutional. *See Carr v. Saul*, 593 U.S. 83, 92 (2021) (“[A]gency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators’ areas of technical expertise.”); *Traffic Jam Events, L.L.C. v. Fed. Trade Comm’n*, No. 21-60947, 2025 WL 1904566, at *3 (5th Cir. July 10, 2025) (petitioner did not forfeit Appointments Clause claims because “the agency could not have remedied such claims had [petitioner] raised them in the administrative proceeding”).

No. 25-60286

carry out the functions of the office and the plaintiffs did not show harm stemming from the removal protections. *Id.* at 258–59. We distilled from *Collins* “three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor.” *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 632 (5th Cir. 2022), *rev’d and remanded on other grounds*, 601 U.S. 416 (2024), *reinstated in part by*, 104 F.4th 930 (5th Cir. 2024). Later, in *Space Exploration Technologies*, we explained that “backward-looking relief requires a causal link between the violation and the outcome.” 151 F.4th at 779.

Corr Flight does not challenge any ongoing proceeding before the ALJ; rather, it seeks retrospective relief—vacatur of the ALJ’s order. Corr Flight therefore must meet the *Collins* factors. But Corr Flight has not presented any evidence or argument that it meets those factors. Accordingly, vacatur of the ALJ’s decision is unwarranted.

In sum, although Corr Flight did not forfeit its constitutional removal challenge, the challenge fails because Corr Flight presented no evidence to show harm stemming from the removal protections.

B.

We now turn to Corr Flight’s assertion that the ARB erred in affirming the ALJ’s conclusion that Corr Flight violated AIR 21 by suspending DeBuse.

To prevail on an AIR 21 claim, a complainant must prove that (1) he engaged in protected activity; (2) an unfavorable personnel action was taken against him; and (3) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

No. 25-60286

The ALJ ordered Corr Flight to pay back pay for two independent reasons. First, the ALJ found that DeBuse engaged in protected activity when he reported Lee's safety violation to Corr Flight management, and this reporting was a contributing factor toward the adverse action of unpaid leave. Second, the ALJ found that DeBuse engaged in protected activity when he refused to train with Lee, and this, too, was a contributing factor to his unpaid leave. Specifically, the ALJ found that the reporting and refusal were, "individually and in combination," contributing factors to Corr Flight's decision to suspend DeBuse without pay.

In its petition for review, Corr Flight only challenges the second justification for the ALJ's order: refusal to fly. Corr Flight in no way challenges the ALJ's determination that DeBuse's report of Lee's safety violation to Corr Flight management was a protected activity. Instead, because Corr Flight erroneously believed "it is undisputed that [DeBuse's] report did not lead to [his] suspension," "that is not the question presented." Appellants must raise issues in their briefs to preserve them. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument . . . by failing to adequately brief the argument on appeal."). Corr Flight has forfeited on petition for review the ALJ's determination that DeBuse's report constituted protected activity.

Accordingly, one justification for the ALJ's order remains undisturbed and independently allows the ALJ's order to stand. We deny the petition for review of the ARB's order on that basis and do not address the failure-to-train rationale. *Cf. United States v. Real Prop. Located at 14301 Gateway Blvd. W.*, 123 F.3d 312, 313 (5th Cir. 1997) (per curiam) ("[W]e will not reverse a judgment of the district court if it can be affirmed on any ground[.]").

No. 25-60286

IV.

Corr Flight raised two issues in its petition for review, neither of which was successful. First, although the ALJ's removal protections violate the Constitution, and Corr Flight has not forfeited its constitutional challenge, vacatur of the ALJ's order is not appropriate because Corr Flight has not shown a particularized harm flowing from the removal protections. Second, Corr Flight only challenged one of the independent bases for the ALJ's order, leaving the other as a ground for denial of the petition for review.

The petition for review is DENIED.