U.S. Department of Labor

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

In the Matter of:

KARLENE PETITT,

COMPLAINANT,

v.

DELTA AIR LINES, INC.,

RESPONDENT.

ARB CASE NO. 2019-0087

ALJ CASE NO. 2018-AIR-00041

DATE: August 26, 2020

Appearances:

***For the Complainant*:**
Lee Seham, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

***For the Respondent*:**
Ira G. Rosenstein, Esq. and Lincoln O. Bisbee, Esq.; *Morgan, Lewis, & Bockius LLP*; New York, New York

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") (April 5, 2000). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.[1] Complainant, Karlene Petitt, filed a complaint alleging that Respondent, Delta Air Lines, Inc., retaliated against her in violation of AIR 21's

[1] 49 U.S.C. § 42121 (2000), implementing regulations are at 29 C.F.R. Part 1979 (2019).

whistleblower protection provisions. Respondent brings this interlocutory appeal[2] from an Order Denying Respondent's Motion for Protective Order issued by the Department of Labor Administrative Law Judge (ALJ) on August 20, 2019, finding in favor of Complainant. For the following reasons, we deny the petition for interlocutory review.

BACKGROUND

1. Procedural History

On October 17, 2018, Complainant filed her Pleading Complaint with an allegation of retaliation in violation of AIR 21. Respondent Delta Air Lines, Inc. Petition for Review of the Decision and Order Denying Motion for Protective Order Concerning Public Posting of Videotaped Depositions (Petition) at 49. Thereafter, on November 19, 2018, Respondent provided its timely response to the complaint. *Id.*

The ALJ held a series of hearings on the matter from March 25 to March 29, 2019. *Id*. at 50. These hearings continued on April 25, 2019, and from April 29 to May 1, 2019. *Id*. Importantly, based on witness availability issues, two of the Respondent's witnesses were allowed to use deposition testimony in lieu of live testimony at the hearing. The first witness was Ed Bastian, Delta's Chief Executive Officer, and the second witness was Captain James Graham, Delta's Senior Vice President of Flight Operations. *Id.*

According to the ALJ, "the purpose for offering Mr. Bastian's deposition was Respondent's representation that he was a busy person and too important to Respondent's operations to attend the hearing." *Id*. at 52. Separately, Captain Graham appeared in person for his direct examination, and then was supposed to be cross-examined by video teleconference. However, on April 25, 2019, when the hearing continued, Captain Graham was unable to join the hearing because his attempt to establish video teleconference link failed. *Id*. at 50.

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[2] Respondent's petition is styled, "Respondent Delta Air Lines, Inc. Petition for Review of the Decision and Order Denying Motion for Protective Order Concerning Public Posting of Videotaped Depositions" (Petition). The Petition was filed as an 81 page electronic document with 8 exhibits chronicling the motion file in this matter. For clarity and brevity the references in this opinion will cite the page numbers of the electronic file rather than identify the protracted names of each filing, thereby avoiding the confusion of subsequent duplicative exhibit and page numbers.

2. Deposition Transcripts Entered as Evidence

Eventually, the parties both stipulated that the written transcripts of the video depositions of Mr. Bastian and Captain Graham would be entered into the trial record in lieu of live testimony for Mr. Bastian, and in lieu of cross-examination and redirect for Captain Graham. *Id*. at 52. The ALJ was careful to point out that this admission into the record waived any claims of privilege as to the content of the transcripts. *Id.* Significantly, the ALJ also noted that the admission of the transcripts into the record was specifically requested by the Respondent solely for the Respondent's convenience. *Id.*

3. Deposition Videos Uploaded to YouTube.com

At some point after the conclusion of the hearing, the Complainant's counsel posted the deposition videos on YouTube.com with hyperlinks from counsel's law firm's website. *Id*. at 18. On July 10, 2019, Respondent's counsel wrote to Complainant's counsel objecting to the use of the videos, and requested that he immediately take down the videos from the internet. *Id*. at 19. Complainant's counsel declined the Respondent's request. *Id.*

4. Protective Order, Reconsideration, and Interlocutory Appeal

In response to Complainant's counsel's refusal to cease using the deposition videos, the Respondent filed with the ALJ a Motion for Protective Order on July 19, 2019. *Id*. at 27. The ALJ summarily denied the Motion on August 20, 2019. *Id*. at 49. The ALJ noted that the confidentiality agreement specified that it would not carry forward if the depositions were admitted into evidence. *Id.* at 52. Similarly, on September 18, 2019, Respondent's Motion for Reconsideration and to Certify for Interlocutory Appeal was also denied. *Id*. at 80. Thereafter, Respondent's Interlocutory Petition for Review was submitted to the Administrative Review Board on September 30, 2019. *Id.* at 11.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to review ALJ decisions in cases arising under AIR 21 and its implementing regulations at 29 C.F.R. Part 1979. 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). The Board reviews the ALJ's protective order determinations under the abuse of discretion standard. *Kelly-Lusk, v. Delta Airlines, Inc.*, ARB No. 2016-0041, ALJ No. 2014-TSC-00003, slip op. at 13 (ARB Sept. 18, 2017); *McCarthy v. Barnett Bank of Polk Cty.*, 876 F.2d 89, 92 (11th Cir. 1989).

DISCUSSION

The Secretary of Labor and the Board have repeatedly held that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals. *Kim v. SK Hynix Memory Sols.,* ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3 (ARB Jan. 28, 2020). And, although the Secretary has given the Board discretion to consider interlocutory appeals, such discretion may only be exercised in "exceptional circumstances." Secretary's Order No. 01-2020, § 5(b)(69).

When a party seeks review of an ALJ's interlocutory order, the Board has elected to look to the interlocutory review procedure provided in 28 U.S.C. § 1292(b). The first step in this process is to have the ALJ certify the interlocutory issue for appellate review.[3] Respondent asked the ALJ to certify the issue of a protective order for interlocutory review. Rejecting Respondent's concerns of embarrassment and potential misuse as speculative, the ALJ denied the motion to certify, finding the Respondent failed to satisfy the high criteria for interlocutory review.

But even if a party has failed to obtain interlocutory certification, the ARB may also consider interlocutory appeals under the "collateral order" exception. The Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949), that if the decision appealed belongs to that "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546; *Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 17-0004, ALJ No. 2010-SOX-00018, slip op. at 3 (ARB Apr. 20, 2017). To fall within the "collateral order" exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Respondent argues that the *Cohen* collateral order doctrine is met because of the need for clear rules preventing abuse of video and other manipulable media. According to Respondent, the publication of the videos on the law firm's website and on YouTube subjects the individuals to unwanted exposure and chills participation in the judicial process. Further, a delay while the merits opinion is issued and appealed to the ARB would render relief from the posted videos unattainable.

The Solicitor filed an amicus brief arguing that the ARB should uphold its policy that interlocutory orders are disfavored because piecemeal appeals burden

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[3] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2015); *Johnson v. U.S. Bancorp*, ARB No. 2011-0018, ALJ No. 2010-SOX-00037, slip op. at 4 n. 15 (ARB Mar. 14, 2011).

the efficacious administration of justice and unnecessarily protract litigation. The Solicitor argues that Respondent failed to demonstrate exceptional circumstances or an abuse of discretion because Respondent's fears of embarrassment are too speculative to warrant interlocutory review.

We conclude that the matter does not warrant the ARB's discretionary interlocutory review. In considering protective orders, ALJs are guided by the standards set out in 29 C.F.R. §18.52(a) which states in pertinent part: "The judge may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Even though the regulation by its own terms is set out to guide discovery disputes, we find that it is equally instructive in considering the identical issues in the context of evidence at trial.

In reviewing the ALJ's Order denying Respondent's motion for a protective order, the issue for the ARB would be whether the ALJ's order denying Respondent's Motion for Protective Order was an abuse of discretion. A "court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Klipsch Group, Inc. v. ePRO E-Commerce Limited*, 880 F.3d 620, 627 (2d Cir. 2018) (quoting *KarenKim*, 698 F.3d 92, 99–100 (2d Cir. 2012) (internal quotation marks omitted)).

Denying Respondent's Motion, the ALJ observed, "[h]ere, essentially Respondent is complaining about the format of publicly available information, one Respondent apparently does not like. But the medium of the information is not the focus of the protective order or the rationale for issuing a protective order." Petition at 52. Protective orders usually issue based on content as a whole, not the format of content. *Id.* Consequently, the ALJ concluded, "any argument as to annoyance, embarrassment, oppression, or undue burden carries little weight. *Id*.

Respondent claims that the ALJ's view that the harm was speculative was error because it is an inaccurate description of the facts. Respondent's strongest argument in favor of a protective order is the implicit claim that having video deposition testimony posted to the internet is embarrassing. In the Petition for interlocutory review, Respondent argues that it does not object to a written transcript of the depositions, rather it only objects to the release of video images where the viewer can see the deponent speak the words.

Respondent's Protective Order is insufficient to warrant interlocutory review under the collateral order exception.[4] Respondent has not shown how the law firm's distribution has caused Respondent any harm beyond the kind of unwelcome attention that accompanies litigation. Respondent's own glowing characterization of the testimony critically undercuts the claim of embarrassment, noting, "both Mr. Bastian and Captain Graham testified truthfully and competently . . . ." *Id.* at 25. We note that the deposition transcripts are available and the case has received significant publicity. This theme is also restated in the introduction to Respondent's Petition thusly: "Delta's leaders testified truthfully and frankly about Delta's absolute commitment to safety as a complete review of those transcripts demonstrates." *Id.* at 4. The added embarrassment in this case is the video component of the deposition. The fact that a party suffers embarrassment does not make the matter unreviewable upon final review. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009) ("The crucial question . . . is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system."). As a result, Respondent's claim that this "truthful," "competent," and "frank" testimony becomes embarrassing as soon as the public views the deponent is neither compelling nor persuasive to satisfy the *Cohen* exception and warrant interlocutory review. As the Supreme Court in *Carpenter* recognized "[p]ermitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals … 'Routine appeal from disputed discovery orders would disrupt the orderly progress of the litigation, swamp the courts of appeals, and substantially reduce the district court's ability to control the discovery process.'" 558 U.S. at 112-13.

CONCLUSION

For the above reasons, we **DENY** Respondent's motion for interlocutory review of the ALJ's Order Denying Protective Order.

SO ORDERED.

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[4] Importantly, we note that video has become a ubiquitous part of society permeating all aspects of public life. With the explosive growth of video cameras, it is no longer possible to avoid security cameras, dashcams, bodycams, webcams, phonecams, nannycams, minicams, spycams, and doorbell cams. We also note that it is routine for senior corporate officers to appear on business news programs, communicate by video teleconference, and appear in television advertising as the lead pitchman for their brand. Although this experience is not controlling, it does inform our analysis when contrasting it with claims of "embarrassment" discussed in legacy decisions through the years.