

**U.S. Department of Labor**

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



**In the Matter of:**

**RODNEY GLOSS,**

**ARB CASE NO. 2022-0054**

**COMPLAINANT,**

**ALJ CASE NO. 2020-CAA-00008**

**v.**

**DATE: September 20, 2022**

**TATA CHEMICALS NORTH  
AMERICA,**

**RESPONDENT.**

**Appearances:**

***For the Respondent:***

**Ronald W. Taylor, Esq.; *Venable LLP*; Baltimore, Maryland; Michael  
J. Volpe, Esq. and Teresa M. Biviano, Esq.; *Venable LLP*; New York,  
New York**

***For the Complainant:***

**Rodney Gloss; *pro se*; Loveland, Colorado**

**Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL  
and PUST, Administrative Appeals Judges**

**ORDER DISMISSING INTERLOCUTORY APPEAL**

**HARTHILL, Chief Administrative Appeals Judge:**

On October 25, 2019, Rodney Gloss (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Tata

Chemicals North America (Respondent) unlawfully retaliated against him under the whistleblower protection provision of the Clean Air Act (CAA), 42 U.S.C. § 7622. After OSHA dismissed the complaint, Complainant requested a hearing with a Department of Labor Administrative Law Judge (ALJ). Complainant later amended his complaint to add a claim under the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A.

On July 15, 2022, the ALJ issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision on Complainant's claims. The ALJ granted summary decision on Complainant's claim under the SOX and the claims of retaliatory bonus reduction, hostile work environment, and post-termination harassment under the CAA but denied summary decision for Complainant's claim of retaliatory termination and denial of severance under the CAA. On August 1, 2022, Complainant filed a petition for review of the ALJ's order with the Administrative Review Board (Board). Because the ALJ has not yet issued a decision fully disposing of all claims in Complainant's complaint, the petition is for interlocutory review (i.e., review of a non-final decision).<sup>1</sup> The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals in stages before the final order.<sup>2</sup> On August 18, 2022, the Board issued an Order to Show Cause why the appeal should not be dismissed. The parties submitted briefs in response.

The Board's delegated authority includes the consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."<sup>3</sup> When a party seeks interlocutory review of an ALJ's non-final order, the Board has elected to look to the interlocutory review procedures

---

<sup>1</sup> *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012). Respondent states that the ALJ held a two-day hearing on the remaining claims ending on August 12, 2022, and that closing briefs are due in November 2022. Respondent's Opposition Brief at 2; Order Rescheduling Hearing (ALJ Apr. 21, 2022).

<sup>2</sup> See e.g., *Gunther*, ARB Nos. 2012-0097, -0099, slip op. at 2 (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec'y Sept. 28, 1994)).

<sup>3</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

providing for certification of issues involving a controlling question of law as set forth in 28 U.S.C. § 1292(b).<sup>4</sup>

The first step in the interlocutory appeal process is to have the ALJ certify the interlocutory issue for appellate review as provided in 28 U.S.C. § 1292(b).<sup>5</sup> Complainant did not ask the ALJ to certify this case for appeal. However, if a party has failed to obtain interlocutory certification, the Board may still consider reviewing an interlocutory order that meets the “collateral order” exception, which applies if the appealed decision 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.”<sup>6</sup> To fall within the “collateral order” exception first recognized in *Cohen*<sup>7</sup>, 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.”<sup>8</sup> This exception is “strictly construe[d]” to avoid “unnecessarily protracte[d] litigation.”<sup>9</sup> If the ALJ’s Order “fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291.”<sup>10</sup>

In his appeal of the ALJ’s order, Complainant presents several issues, which he argues are separate and collateral from the remaining claims before the ALJ.<sup>11</sup>

---

<sup>4</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005).

<sup>5</sup> *Kim v. SK Hynix Memory Sols.*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 4 (ARB Jan. 28, 2020).

<sup>6</sup> *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

<sup>7</sup> *Id.*

<sup>8</sup> *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 7 (ARB Jan. 26, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Kossen v. Empire Airlines*, ARB Case No. 2021-0017, ALJ Case No. 2019-AIR-00022, slip op. at 2 (ARB Feb. 25, 2021).

<sup>11</sup> Complainant argues that his “SOX claims are separable from and collateral to the rights afforded under the CAA” and “CAA-denied-elements are separable from and collateral to rights that remained to be adjudicated.” Complainant’s Response to Order to Show Cause at 2. Complainant appears to misunderstand the second prong of the *Cohen*

First, he argues that the ALJ incorrectly found that some of his CAA claims were untimely and contends that equitable modification applies even if they were untimely. Second, he contests the ALJ's decision that there was no genuine issue of material fact that Respondent subjected him to a hostile work environment. Third, he argues that the ALJ erred in concluding that the SOX's whistleblower protection provision did not apply to Respondent. Last, he contests the ALJ's decision that there was no genuine issue of material fact that Complainant engaged in an activity protected by the SOX. These are all orders that resolve the majority of Complainant's central claims and are not separate from the merits of the action, rather, they are squarely on the merits.<sup>12</sup> Thus, the ALJ's Order does not satisfy the second *Cohen* factor.

The ALJ's order also fails to satisfy the third *Cohen* factor because the claims that Complainant identifies for review are all fully reviewable upon appeal of the final decision of the ALJ. Complainant argues that these issues will be unreviewable on appeal from a final decision by the ALJ because the merits of the SOX claims were not permitted to be presented in the two-day hearing conducted by the ALJ on the remaining claims in August. However, we discern no reason why the Board could not review the ALJ's decision to grant summary decision on these claims after the ALJ issues a final post-hearing decision on the remaining claims of retaliatory termination and denial of severance under the CAA.

Therefore, because the ALJ's grant of summary decision in part on the SOX and CAA claims does not satisfy the second and third *Cohen* factors, the order does not fall within the collateral order exception.


---


test, which requires that the issue be separate from the *merits of the action* (i.e., collateral), not that the decided claims be severable from any remaining claims.

<sup>12</sup> See *Adm'r, Wage and Hour Div. v. Ten West Cattle, Inc.*, ARB No. 2020-0059, ALJ No. 2018-TAE-00035, slip op. at 4 (ARB Sept. 14, 2020); *Fla. Wildlife Fed'n, Inc. v. Adm'r, U.S. E.P.A.*, 737 F.3d 689, 693 (11th Cir. 2013) (“[B]ecause the District Court’s order, far from being collateral, resolves a majority of the central claims in this case . . . , it is squarely on the merits.”).

We therefore **DISMISS** Complainant's interlocutory appeal.<sup>13</sup>

**SO ORDERED.**

  
\_\_\_\_\_  
**SUSAN HARTHILL**  
**Chief Administrative Appeals Judge**

  
\_\_\_\_\_  
**THOMAS H. BURRELL**  
**Administrative Appeals Judge**

  
\_\_\_\_\_  
**TAMMY L. PUST**  
**Administrative Appeals Judge**

---

<sup>13</sup> We further note that Complainant's interlocutory appeal was untimely. A party desiring to seek review of an ALJ's decision on a CAA claim must file an appeal with the Board within ten business days of the date of the decision. 29 C.F.R. §§ 24.109(e), 24.110(a). A party seeking review of an ALJ's decision on a SOX claim must file an appeal within fourteen days of the decision. 29 C.F.R. § 1980.109(e). The ALJ issued the order granting summary decision in part on July 15, 2022. Complainant filed his petition for review on August 1, 2022. Therefore, Complainant did not file a timely appeal of the ALJ's summary decisions under either statute.