



IN THE MATTER OF:

SHARYN A. ERICKSON,

**ARB CASE NOS. 15-026
15-049**

COMPLAINANT,

ALJ CASE NOS. 2004-CAA-007

v.

2004-CAA-011

2005-CAA-010

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**

2005-CAA-012

2005-CAA-015

RESPONDENT.

2006-CER-003

2007-CER-002

DATE: May 12, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Sharyn A. Erickson *pro se*, Lawrenceville, Georgia

For the Respondent:

Robin B. Allen, Esq.; *U.S. Environmental Protection Agency, Office of Regional Counsel; Atlanta, Georgia*

Before: Luis A. Corchado, *Administrative Appeals Judge*, Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*. Judge Brown, concurring.

ORDER DISMISSING INTERLOCUTORY APPEALS

Complainant Sharyn A. Erickson and Respondent U.S. Environmental Protection Agency have filed interlocutory appeals of a Department of Labor Administrative Law Judge's Decision and Order Granting in Part and Otherwise Dismissing First Set of Complaints Except for Hostile Work Environment Allegations (D. & O.), issued on

December 29, 2014. Erickson brought the administrative law judge cases listed in the caption to this order (collectively, *Erickson III*) under the employee protection provisions of various environmental statutes.¹

The ALJ determined that

These complaints will . . . be dismissed, with the exception of the allegations in the first complaint relating to [Erickson's] reassignment, which I find to be meritorious, and the hostile work environment allegations, which will be considered collectively along with the allegations made in the later group of complaints [collectively *Erickson IV*]. Inasmuch as the reassignment issue is intertwined with the hostile environment allegations, the damages issue will be reserved until the latter part of the case is tried (including later individual allegations of retaliation and hostile work environment allegations).^[2]

The Secretary of Labor has delegated authority to issue final administrative decisions in cases, arising under the employee protection provisions of the environmental statutes under which this appeal arises, to the Administrative Review Board.³ The Secretary's delegated authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."⁴ Because the ALJ has not issued a final Decision and Order in this matter fully disposing of the Erickson's complaints as to merits and damages, the parties' requests that the Board review the ALJ's Order are interlocutory appeals.

Accordingly, we ordered Complainant and Respondent to show cause why the Board should not dismiss their interlocutory appeals without prejudice to refile them, if

¹ These statutes include the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (Thomson/West 2005); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) ((Thomson Reuters 2011).); Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (Thomson/West 2003); Toxic Substances Control Act, 15 U.S.C.A. § 2622 (Thomson Reuters 2009); and the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001). These statutes' implementing regulations are found at 29 C.F.R. Part 24.

² D. & O. at 2.

³ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

⁴ *Id.* at § 5(c)(48).

necessary, at the conclusion of the litigation of the issues arising in the cases from which the appeals have been filed. Respondent did not reply to the Board's Order. Erickson filed a response conceding that her current appeal is interlocutory and her interlocutory appeal of all issues, other than the issue of her transfer back to contracting, should be dismissed.⁵ But she filed a separate motion requesting the Board to make a prompt decision solely on the issue of her transfer back to contracting.⁶ Respondent filed a reply to the motion arguing that the Board should deny Erickson's motion on the grounds that she has not satisfied the grounds recognized by the Board for granting interlocutory appeals.⁷

Where an ALJ has issued an order of which the party seeks interlocutory review, the ARB has elected to look to the procedures providing for certification of issues involving a controlling question of law as to which there is substantial ground for difference of opinion, an immediate appeal of which would materially advance the ultimate termination of the litigation, as set forth in 28 U.S.C.A. § 1292(b) (Thomson/West 2006), to determine whether to accept an interlocutory appeal for review.⁸ In *Plumley v. Federal Bureau of Prisons*,⁹ the Secretary ultimately concluded that because no ALJ had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken."¹⁰ Furthermore, 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.¹¹

⁵ Complainant's Response to Show Cause at 1 (Feb. 17, 2015).

⁶ Motion for Interim Relief and for Remand to Determine Scope of Remedy (Feb. 17, 2015).

⁷ Agency Response to the Administrative Review Board's Order Dated March 18, 2015 (Apr. 1, 2015).

⁸ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y Apr. 29, 1987).

⁹ 1986-CAA-006 (Sec'y Apr. 29, 1987).

¹⁰ *Id.*, slip op. at 3 (citation omitted).

¹¹ Order to Show Cause, slip op. at 3 (ARB Dec. 16, 2014). See e.g., *Gunther v. Deltek*, ARB Nos. 12-097, 12-099; ALJ No. 2010-SOX-049, (ARB Sept. 11, 2012); *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004).

Erickson did not seek certification of the issues arising in the ALJ's interlocutory order in this case. But, even though the ALJ's D. & O. is non-final, it did include a Notice of Appeal Rights, so it is understandable why the parties would seek to protect those rights by filing protective interlocutory appeals. Nevertheless, after conceding that her appeal is interlocutory, Erickson asks the Board to make "a prompt decision solely on the issue of her transfer back to contracting, to make just that issue a final decision."¹² However, this is the issue on which Erickson prevailed before the ALJ. As an administrative appellate body, the ARB may only properly consider that issue if the losing party appeals it. The Board's regulations provide, "[a]ny party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB"¹³ But Erickson does not want the ARB to review the ALJ's finding on the issue of her transfer back to contracting; she simply wants the Board to make the ALJ's decision "final." Erickson has cited to no statutory or regulatory provisions that would permit the Board to act in this case in which she has not filed a petition asking the Board to review the ALJ's final order on this issue.

Respondent has conceded that its appeal was protective only and that the case does not meet the Board's requirements for interlocutory review.¹⁴ We agree. Given that Respondent, the party with standing to appeal the transfer back issue, concedes that it is interlocutory and that there are no exceptional circumstances justifying interlocutory review, we **DISMISS** the parties' petitions for interlocutory review and **DENY** Erickson's motion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur with the majority's dismissal of the present appeals. I write separately to make it clear that I do so because the ALJ has not issued a final Decision and Order in this matter fully disposing of Erickson's several complaints on the merits and with

¹² Complainant's Response to Order to Show Cause at 1.

¹³ 29 C.F.R. § 24.110(a).

¹⁴ Agency Response to the Administrative Review Board's Order Dated March 18, 2015 at 2-3.

respect to any damages to which she may be entitled. Because the ALJ's Decision and Order from which the appeals have been taken does not constitute a final adjudication of all claims asserted by Ms. Erickson, thus rendering the Decision and Order interlocutory in nature, and because the test for accepting review of an interlocutory ruling is not met, I agree that the appeals should be dismissed without prejudice to either party's right to reassert the issues that have by these appeals been raised as part of any appeal that may be filed upon final resolution by the presiding ALJ of Erickson's several complaints.

The ALJ's Decision and Order purports to render a final decision with regard to ALJ Case Nos. 2004-CAA-011, 2005-CAA-010, 2005-CAA-012, 2005-CAA-015, 2006-CER-003, and 2007-CER-002), and notifies the parties of their right to appeal within ten business days from the date of the Decision and Order. In rendering this decision, the ALJ did not address Erickson's allegations in the several complaints of hostile work environment retaliation, but instead preserved the allegations for resolution by transferring them, and any issues related to possible damages, into Erickson's seventh complaint (Case No. 2004-CAA-007), which the ALJ had found meritorious but had not as yet ruled on the question of damages and which the ALJ consolidated with another group of complaints filed by Erickson.¹⁵

Despite designation by the ALJ of the Decision and Order herein appealed as "final," and thus subject to ARB review pursuant to 29 C.F.R. § 24.110(a), the ALJ's bifurcation of the complaints, reserving for adjudication as part of other proceedings Erickson's hostile work environment claims (and any resulting award of damages), renders the ALJ's ruling interlocutory in nature. *OFCCP v. Bank of America*, ARB No. 10-048, ALJ No. 1997-OFC-016 (ARB Apr. 29, 2010); *Walsh v. Res. Consultants*, ARB No. 05-123, ALJ No. 2004-TSC-001 (ARB Aug. 10, 2005); *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004).

Where an ALJ issues an interlocutory order from which a party seeks review, the initial question before the ARB is whether the ALJ has certified the ruling or order for interlocutory review because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal would materially advance the ultimate termination of the litigation. *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065 (ARB Oct. 31, 2005). In the instant case, Erickson did not seek certification of the issues arising in the ALJ's interlocutory decision, obviously because the Notice of Appeal Rights accompanying the Decision and Order directed that appeal was as a matter of right. It is thus understandable why the parties would seek to protect their rights by filing the instant appeals.

¹⁵ ALJ Case Nos. 2009-ERA-008, 2011-CAA-004, 2012-ERA-001, 2012-CAA-003, 2012-ERA-016, 2013-CAA-004, 2013-CAA-005, and 2014-CAA-001 (collectively "Erickson IV"). D. & O. at 48.

Notwithstanding the lack of ALJ interlocutory certification, the ARB will review an interlocutory order meeting the “collateral order” exception recognized by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Interlocutory review notwithstanding lack of a lower court’s certification may be granted for 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.” *Cohen*, 337 U.S. at 546. 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).

In determining whether to entertain review of an interlocutory ruling under the *Cohen* “collateral order” exception, the Board is studiously careful that it avoid the serious “hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.” *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2 (5th Cir. 1980)(citations omitted). The purpose of the finality requirement underlying the Board’s interlocutory appeal policy derives from that articulated by the Supreme Court: “to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.” *Cohen*, 337 U.S. at 546. In the instant appeal, the challenge to the ALJ’s dismissal of Erickson’s six complaints will not result in a final determination of any claim of right separable from, and thus collateral to, rights asserted as part of Erickson’s underlying complaints. Nor does the ALJ decision otherwise meet the requirements of the *Cohen* “collateral order” exception that would warrant adjudication of the appeal at this time and in the absence of a complete and final resolution of Erickson’s claims.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge