U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

PLAINTIFF,

v.

INTERSTATE BRANDS CORPORATION,

DEFENDANT.

ARB CASE NO. 00-071

ALJ CASE NO. 97-OFC-6

DATE: September 29, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
Jennifer Robinson, Esq., *Bioff Singer & Finucane, LLP, Kansas City, Missouri*

For the Defendant:
Beverly Dankowitz, Esq., *U. S. Department of Labor, Washington, D.C.*

REMAND ORDER

On July 19, 2000, an Administrative Law Judge (ALJ) issued a Recommended Decision (R.D.) in this case arising under Executive Order 11246 and 41 C.F.R. Part 60. The ALJ found that the defendant, Interstate Brands Corporation (Interstate), discriminated in entry-level laborer hiring in violation of the Executive Order and regulations. The ALJ issued his R.D. only on the liability issue, having bifurcated the liability and remedy issues in the case. The ALJ instructed the parties that "[I]f necessary, following review by the Administrative Review Board, I will contact the parties concerning the remedy phase of this proceeding." R.D. at 31-32. Thus, the ALJ has issued no recommended decision on the remedy.

On August 11, 2000, we issued an Order to show cause "why the ARB, consistent with the Secretary's decision in *The Cleveland Clinic Foundation*, [91-OFC-20 (Apr. 18, 1995),] should not remand this case to the ALJ for further proceedings and issuance of a recommended decision on both liability and remedial relief." We have considered the parties' responses to our Order, and for the following reasons we remand the case to the ALJ to conduct further proceedings and to issue a recommended decision on both liability and remedy.

DISCUSSION

The ARB generally disfavors interlocutory appeals resulting in piecemeal litigation of cases. *Cook v. Shaffer Trucking, Inc.,* ALJ Case No. 00-STA-17, ARB Case No. 00-57, Order Denying Interlocutory Appeal, slip op. at 2 (Aug. 31, 2000); *Amato v. Assured Transportation and Delivery, Inc*., ALJ Case No. 98-TSC-6, ARB Case No. 98-167, Order Denying Interlocutory Appeal, slip op. at 2 (Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ALJ Case No. 99-ERA-17, ARB Case No. 99-097, Order Denying Interlocutory Appeal, slip op. at 2; *Allen v. EG &G Defense Materials, Inc.*, ALJ Case No. 97-SWD-8 & 10, ARB Case No. 98-073, Order Denying Interlocutory Appeal, slip op. at 2 (Sept. 28, 1998). Consistent with this general rule, the Secretary of Labor, in *The Cleveland Clinic Foundation*, refused to consider the Foundation's interlocutory appeal of an administrative law judge's liability finding in a case arising under Executive Order 11246 where the judge had bifurcated the liability and damages issues. The Secretary noted that interlocutory appeals are only "rarely accepted" and distinguished *The Cleveland Clinic Foundation* from *OFCCP v. Honeywell, Inc.*, Case No. 77-OFCCP-3, Secretary's Decision and Order, (June 2, 1993), in which an interlocutory appeal was accepted stating that:

> [*Honeywell*] was the unusual case in which the ALJ submitted a Recommended Interlocutory Decision and Order and I ruled on certain selected issues. That case involved many threshold procedural and substantive issues of interpretation of E.O. 11,246, as well as numerous allegations of discrimination in many of the defendant's employment practices affecting hundreds of employees. In addition, neither party objected to the Secretary's review of the ALJ's order as an interlocutory appeal. [*The Cleveland Clinic Foundation*] involves only determination of remedies for two individuals.

The Cleveland Clinic Foundation, *supra*, slip op. at 2.

In accepting the *Honeywell* interlocutory appeal, the Secretary had noted that the case was one of the largest contract compliance cases ever submitted for decision and that it had been pending before a succession of Secretaries for over ten years. He was concerned that litigating every issue to a final conclusion could be extremely time consuming and costly and issued the partial decision with an invitation to the parties to engage in voluntary mediation to resolve the matter without additional litigation. *OFCCP v. Honeywell, Inc.*, *supra*, slip op. at 1.

Interstate argues that this case is more closely analogous to *Honeywell* than to *The Cleveland Clinic Foundation*. In so arguing, Interstate points to the fact that this case, like *Honeywell*, involves many job applicants. It also argues that the damages calculation would be complex and the litigation of it costly. However these factors alone do not provide a sufficient basis for deviating from the general rule that interlocutory appeals will not be considered.

When the Secretary accepted the interlocutory appeal in *Honeywell*, the case had been in litigation for more than ten years. The Secretary considered the interlocutory appeal of specific limited threshold legal issues in the hope that such decision would encourage the parties to engage

in voluntary mediation. Significantly, the Secretary specifically refused to consider the issue whether the plaintiff had carried its burden of proving that defendant had violated the Executive Order.

In this case, Interstate has identified no threshold legal issues the resolution of which would encourage the parties to engage in voluntary mediation. Instead, Interstate has requested the ARB to consider the very issue the Secretary refused to consider in *Honeywell*, *i.e.*, whether the plaintiff has carried its burden of establishing that the defendant has violated the Executive Order. Furthermore, while certainly not determinative, the OFCCP in this case (unlike in *Honeywell*) does object to the interlocutory appeal.

While we are not unsympathetic to Interstate's concerns regarding the complexity of the damages calculation and the time and cost involved in litigating the issue, these factors are inherent in all complex litigation. We do not find these considerations to be sufficiently egregious or inordinate in this case to override the strong presumption against piecemeal litigation.

Interstate, in the alternative, argues that the ALJ's R.D. on liability is not interlocutory because "the ALJ has transferred a recommended decision for a final agency decision as to liability." Defendant Interstate Brands Corporation's Response To The Administrative Review Board's August 11, 2000, Order to Show Cause at 7. "Interlocutory" is defined as "interim or temporary, not constituting a final resolution of the whole controversy." BLACK'S LAW DICTIONARY 819 (7th ed. 1999). Thus, while the ALJ may have "finally" resolved the liability issue, his ruling is by definition interlocutory because he has not issued a recommended decision resolving the entire controversy. Most obviously, Interstate's interpretation would invite the very piecemeal litigation that the general rule against interlocutory appeals was intended to proscribe.

No more persuasive is Interstate's argument that "the ARB should enforce OFCCP's agreement to bifurcation." Defendant Interstate Brands Corporation's Response To The Administrative Review Board's August 11, 2000, Order to Show Cause at 8-9. Regardless whether OFCCP understood at the time that the agreement would extend to an interlocutory appeal to the ARB, rather than just to the proceedings before the ALJ, the decision whether the ARB will accept an interlocutory appeal is not subject to agreement by the private parties. Such decision remains always within the ARB's sole discretion.

ORDER

Finding no sufficient reason to depart from the general rule against acceptance of interlocutory appeals, we **REMAND** this case to the ALJ to conduct further proceedings and to issue a recommended decision resolving the case in its entirety.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member