In the Matter of:

ANTHONY F. GONZALEZ, **ARB CASE NO. 05-060**

COMPLAINANT, **ALJ CASE NO. 2004-SOX-39**

v. **DATE: May 31, 2005**

COLONIAL BANK

and

THE COLONIAL BANCGROUP, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stanford R. Solomon, Esq. and Hallie S. Evans, Esq., *The Solomon Tropp Law Group, P.A., Tampa, Florida* and Thomas M. Gonzalez, *Thompson, Sizemore & Gonzalez, P.A., Tampa, Florida*

For the Respondents:
Peter W. Zinober, Esq., Karen Meyer Buesing, Esq., Jay P. Lechner, Esq., *Zinober & McCrea, P.A., Tampa, Florida* and Ben H. Harris, III, Esq., *Miller, Hamilton, Snider, & Odom, LLC, Mobile, Alabama*

FINAL ORDER DISMISSING INTERLOCUTORY APPEAL

This case arose when the Complainant, Anthony F. Gonzalez, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Colonial Bank, terminated his employment in violation of

the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] On August 17, 2004, a Department of Labor Administrative Law Judge (ALJ) issued an order Granting Gonzalez's motion to amend his complaint to permit Gonzalez to add The Colonial BancGroup, Inc. as a respondent and to have the amendment relate back to the filing of the original complaint for purposes of determining the timeliness of Gonzalez's complaint against BankGroup.[3] The ALJ subsequently denied the Respondents' motion to reconsider the O.A.C. and their request that he certify the question to the Administrative Review Board for interlocutory appeal.

The question before the Board is whether we should consider the Respondents' petition for interlocutory review of the O.A.C. and order denying reconsideration despite the fact that the ALJ denied the Respondents' certification request. As we discuss below, we find that the ALJ did not abuse his discretion in denying the certification request and that the Respondents have failed to demonstrate a compelling reason to depart from our well-established policy disfavoring interlocutory appeals.

BACKGROUND

When Anthony Gonzalez initially filed his SOX complaint with OSHA he named Colonial Bank as the sole respondent. On July 16, 2004, he filed a motion with the ALJ to amend the complaint to add the Colonial BancGroup, Inc. as a respondent. Respondent Colonial Bank opposed Gonzalez's motion. The ALJ granted Gonzalez's motion by order dated August 17, 2004. The Respondents requested reconsideration of the ALJ's Order. The ALJ denied this request by order dated December 20, 2004.

The Respondents requested the ALJ to certify the O.A.C. and order denying reconsideration to the Board for interlocutory review. By order dated February 7, 2005,

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[1] 18 U.S.C.A. § 1514A (West 2002). Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. 68 FR 31864 (May 28, 2003

[2] 29 C.F.R. Part 1980 (2004).

[3] Order Granting Motion to Amend Complaint (O.A.C.) at 3-4.

the ALJ denied the certification request. The Respondents filed a petition for review of the ALJ's Order Denying Request for Certification of the Interlocutory Appeal on February 22, 2005.

The Board initially issued a Notice of Appeal and Order Establishing Briefing Schedule on February 24, 2005. On March 3, 2005, the Board issued an Order Suspending the Briefing Schedule and to Show Cause. The Board stated in this Order that it had issued the Notice of Appeal and briefing schedule in error and that instead, in accordance with the Board's usual practice, the Board should have ordered the Respondents to show cause why the Board should not deny its interlocutory appeal given the Board's policy disfavoring such appeals. Accordingly, the Board ordered the Respondents to show cause why the Board should not dismiss their interlocutory appeal and permitted Gonzalez to file a reply to the Respondents' response.

STATEMENT OF JURISDICTION

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board.[4] The Secretary's delegation of authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."[5]

DISCUSSION

An administrative law judge may permit a complainant to amend a complaint when the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties.[6] An amended complaint will relate back to the original complaint for purposes of determining the timeliness of the complaint when the amendment adds a party against whom a claim is asserted if the claim in the amended pleading arose out of the conduct, transaction, or occurrence described in the original pleading. Furthermore, an amended complaint relates back if, within the limitations period, the party to be added received notice of the filing of the action such that the party will not be prejudiced in maintaining a defense on the merits, and the party knew or should have known that, but for a mistake concerning

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[4] Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

[5] *Id*. at 64273.

[6] 29 C.F.R. § 18.5(e)(2004).

the identity of the proper party, the complainant would have brought an action against the proper party.[7]

Gonzalez, in support of his motion to amend the complaint, argued that BancGroup is the publicly-held parent company of the Respondent Colonial Bank and was so identified in the initial complaint that Gonzalez filed with OSHA.[8] Gonzalez also asserted that BancGroup appointed him to his position with Colonial, BancGroup's CEO approved the decision of Colonial's CEO to terminate Gonzalez's employment, and the two CEOs acted in concert to discriminate against him. He also argued that BancGroup would suffer no prejudice from the amendment because it has known of the claim since it was filed and that the complaint was served on BancGroup, its Executive Vice-President and its CEO.

The Respondents countered that the relation back provision does not apply to this case because Gonzalez knew of BancGroup's identity when he filed the complaint and relation back only applies in cases of mistaken or incorrect identification of a party, not in cases in which the complainant seeks to add a new party of whose identity the complainant was aware, but did not realize might be liable, or had simply chosen not to sue.

The ALJ, citing the Secretary's decision in *Wilson v. Bolin Assocs.*,[9] found that Gonzalez should be permitted to amend his complaint to add BancGroup as a respondent and that the amendment related back to the original complaint. The ALJ rejected the Respondents' argument that the amendment can not relate back because Gonzalez's failure to name BancGroup originally was not the result of a mistake in the identity of the named respondent. The ALJ found that *Wilson* and the cases cited in the decision stand for the proposition that a mistake encompasses not just a mistake in identity of the named respondent but also a mistake in identifying the responsible party.[10] Arguing that the question whether the amendment rendered the complaint against BancGroup timely was a controlling question of law that would immediately terminate the litigation, the Respondents requested the ALJ to certify the question to the Board for interlocutory review.

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[7] Fed. R. Civ. Pro. 15(c). *See also* 29 C.F.R. § 18.1(a) ("The rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.").

[8] O.A.C. at 1.

[9] 91-STA-4 (Dec. 30, 1991).

[10] O.A.C. at 2.

The Secretary of Labor described the procedure for obtaining review of an administrative law judge's interlocutory order in *Plumley v. Federal Bureau of Prisons*.[11] The Secretary determined that where an ALJ has issued an order of which the party seeks interlocutory review, the procedure for certifying interlocutory questions for appeal from federal district courts to appellate courts is applicable.[12] According to this procedure:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.[13]

In *Plumley*, 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."[14] Some courts have held that certification by the district court is a jurisdictional prerequisite to interlocutory review under section 1292(b).[15] In *Ford Motor Co.*, the court explained:

> The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.[16]

Nevertheless, it is unnecessary for the Board to determine if this rule, applicable to district court certifications, is also applicable in this administrative setting in which

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[11] 86-CAA-6 (Sec'y Apr. 29, 1987).

[12] *Id.*

[13] 28 U.S.C.A. § 1292(b) (West 1993):

[14] *Plumley*, slip op. at 3 (citation omitted).

[15] *See e.g., In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996).

[16] 344 F.2d at 648.

administrative law judges render recommended rather than final decisions because, in any event, we find that the ALJ did not abuse his discretion in refusing to certify the question whether the amendment to Gonzalez's complaint relates back to the date of filing of his original complaint for purposes of determining the timeliness of Gonzalez's complaint against BancGroup.[17]

The ALJ declined to certify the question because: (1) such certification would contravene the Board's well-established policy against accepting piecemeal appeals; (2) such certification would not materially advance the litigation because regardless whether the Board reversed the ALJ's recommended decision, the issue whether SOX covers employees of subsidiaries of publicly-traded companies would remain and therefore, the litigation would not be immediately terminated as the Respondents argued.

We agree that the ALJ properly refused to certify this case because, as provided in section 1292(b), the certification procedure applies only to controlling questions of law. The issue whether the amendment relates back is not a purely legal question, it is a mixed question of law and fact. To dispose of this issue the fact finder must determine 1) whether the party to be added received notice of the filing of the action such that the party would not be prejudiced in maintaining a defense on the merits and 2) whether the party knew or should have known that, but for a mistake concerning the identity of the proper party, the complainant would have brought an action against the proper party.

The ALJ also correctly found that even if the Board ruled that the amendment did not relate back, the Board's ruling would not immediately terminate the case because the issue of first impression, whether the employee of a subsidiary of a publicly-held company falls within SOX's coverage, would remain. Thus certification would not necessarily materially advance the ultimate resolution of the case.

Finally, the Respondents' argument that the relation-back issue presents a threshold jurisdictional issue is incorrect. Failure to timely file a SOX complaint is not a jurisdictional bar because SOX's limitations period for filling a timely complaint is subject to equitable modification.[18]

Finally, even if the ALJ had certified the question, it remains within the Board's discretion whether to hear the appeal.[19] We would not exercise that discretion in this case

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[17] *See White v. Nix*, 43 F.3d 374, 376-377 (8th Cir. 1994); *Jones v. St. Louis-San Franciso Ry. Co.,* 728 F.2d 257, 260 n.2 (6th Cir. 1984); *Tokio Marine & Fire Ins. Co.* , 322 F.2d 113, 115 (11th Cir. 1963).

[18] *Henrich v. Ecolab, Inc.*, ARB No. 05-036, ALJ No. 04-SOX-51, (ARB Mar. 31, 2005). *Accord Rose v. Dole*, 945 F.2d 1331, 1334-1336 (6th Cir. 1991); *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981).

[19] 28 U.S.C.A. 1292(b); *White* at 376 n.2 (*citing In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822 (Fed. Cir. 1990)).

because, as we discuss below, the Respondents have failed to articulate sufficient grounds warranting departure from our strong policy against piecemeal appeals.[20]

The purpose of the finality requirement underlying the Board's interlocutory appeal policy is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[21] Nevertheless, the Supreme Court has recognized a "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."[22] In *Coopers & Lybrand v. Livesay*,[23] the Court further refined the "collateral order" exception to technical finality.[24] The Court held that 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."[25]

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'"[26] Most obviously, the question whether the amendment to Gonzalez's complaint related back to the date of his original filing so that the complaint against Colonial BankGroup was timely filed is fully reviewable on appeal from a final judgment. Therefore, this appeal does not fall within the collateral appeal exception to the finality rule

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[20] *Accord Welch v. Cardinal Bankshares Corp.* ARB No. 04-054, ALJ No. 03-SOX-15 (ARB May 13, 2004).

[21] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

[22] *Id.*

[23] 437 U.S. 463 (1978).

[24] *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988).

[25] 437 U.S. at 468.

[26] *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2, quoting *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977).

Because the ALJ did not abuse his discretion in denying the Respondents' section 1292(b) certification request and the Respondents have failed to establish sufficient grounds to compel us to depart from our well-established policy against accepting interlocutory appeals; we **DISMISS** the Respondents' interlocutory appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge