



In the Matter of:

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

ARB CASE NO. 00-071

ALJ CASE NO. 97-OFC-6

PLAINTIFF,

DATE: August 11, 2000

v.

INTERSTATE BRANDS CORPORATION,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

ORDER TO SHOW CAUSE

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, finding that the defendant, Interstate Brands Corp. (Interstate), discriminated in entry-level laborer hiring in violation of the Executive Order and regulations. The ALJ issued his Recommended Decision only on the question of liability, 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.

Both parties responded promptly to the ALJ’s Recommended Decision, but they did so in different forums.

On July 31, 2000, Interstate asked the Administrative Review Board (ARB) for an extension of time to file exceptions to the ALJ’s Recommended Decision, as provided in 41 C.F.R. §60-30.28. Interstate stated in its request that the plaintiff in this case, the United States Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), did not oppose the enlargement of time. We issued an order granting Interstate’s motion.

^{1/} This appeal was assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Also on July 31, 2000, OFCCP filed with the ALJ a “Motion to Amend Decision and Order” requesting that the ALJ rescind the bifurcation order and retain “this matter for discovery and hearing of the remedy phase of this proceeding.” Motion [before the ALJ] to Amend Recommended Decision and Order at 3.

Our order granting Interstate’s request for an enlargement of time to file exceptions apparently “crossed in the mail” with a filing from OFCCP to this Board, asking that the ARB refrain from ruling on Interstate’s motion until the ALJ first had an opportunity to rule on OFCCP’s “Motion to Amend Recommended Decision and Order.” Plaintiff’s Response to Defendant’s Motion for Extension of Time to File Exceptions at 2. Attached to this filing was a copy of OFCCP’s earlier motion to the ALJ.

OFCCP, in support of both its Motion to Amend Recommended Decision and Order (pending before the ALJ) and its Response to Defendant’s Motion for Extension of Time, relies on the Secretary’s Order in *OFCCP v. The Cleveland Clinic Foundation*, 91-OFC-20 (Apr. 18, 1995). In that case, the ALJ similarly had bifurcated the liability and remedy stages of the proceeding. The Cleveland Clinic Foundation filed exceptions with the Secretary challenging the ALJ’s liability recommendation. OFCCP filed a motion with the Secretary requesting that he remand the case to the ALJ for “further proceedings on remedy.” *Id.*, slip op. at 3. The Secretary granted OFCCP’s motion to remand, stating:

there is no provision in the OFCCP Rules of Practice, 41 C.F.R. Part 60-30 (1994), for filing exceptions to an ALJ’s rulings on selected issues in a case. The regulations provide that an ALJ shall “recommend findings, conclusions and a *decision*,” 41 C.F.R. § 60-3-.27, and “any party may submit exceptions to said recommendation.” 41 C.F.R. § 60-30.28. (Emphasis added.) Interlocutory appeals generally are disfavored, *see Porter v. Brown & Root, Inc.*, Case No. 91-ERA-4, Sec’y Dec. Apr. 29, 1993, and cases discussed therein, slip op. at 3-4, and I have only rarely accepted an interlocutory appeal.

Id. (footnote omitted).

OFCCP’s filing of a motion before the ALJ, simultaneous with Interstate’s noticing its appeal before the ARB, potentially places this litigation before two tribunals at the same time. In this regard, we note that once a party has invoked the ARB’s jurisdiction to review a matter, the determination whether the ARB will in fact consider the appeal rests with the ARB and not with the ALJ.

The parties are ordered to **SHOW CAUSE** no later than **FOURTEEN DAYS** from the date of this order why the ARB, consistent with the Secretary’s decision in *The Cleveland Clinic Foundation*, should not remand this case to the ALJ for further proceedings and issuance of a recommended decision on both liability and remedial relief.

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1¼ inch top and bottom margins, and printed on 8½ by 11 inch paper.

An original and five copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C. 20210.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member