U.S. Department of Labor

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

In the Matter of:

COLEEN L. POWERS, **ARB CASE NO. 05-138**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-65**

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

PINNACLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Coleen L. Powers, pro se, ***Memphis, Tennessee***

For the Respondent:
Timothy S. Bland, Esq., ***Ford & Harrison LLP*****,** ***Memphis, Tennessee***

FINAL DECISION AND ORDER DISMISSING INTERLOCUTORY APPEAL

The Petitioner, Coleen L. Powers, has filed a complaint against the Respondent, Pinnacle Airlines, Inc., alleging that the Respondent retaliated against her in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)[1] and

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[1] 18 U.S.C.A. § 1514A (West Supp. 2003). 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

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the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[2] On August 6, 2005, Powers filed a "Petition & Application for Extraordinary Appeal/Writ of ALJ's Actions *Exceeding* Her Authority, ALJ Improper & Prejudicial Judgments & Resultant Unfavorable Prejudice to Complainants' Due Process Rights to Discovery as Evidenced in ALJ Orders Filed June 6, June 9, June 20, June 30, & July 19, 2005; Complainants' Motion for Reassignment of ALJ {and Change in Venue}." The issue before the Administrative Review Board is whether the Board should accept Powers's interlocutory appeal even though she failed to follow the Board's well-established certification procedure for obtaining interlocutory review and, in any event, failed to establish that the issues are not fully reviewable on appeal from the ALJ's final recommended decision. As discussed below, we find that because Powers failed to follow the certification procedure and has failed to demonstrate a compelling reason to depart from our well-established policy disfavoring interlocutory appeals, we must dismiss her interlocutory appeal.

BACKGROUND

Coleen Powers has requested interlocutory review of five orders issued by a Department of Labor Administrative Law Judge (ALJ) in June and July 2005. On June 6, the ALJ issued a Notice of Hearing and Pre-Hearing Order. The order scheduled a hearing for July 19-20, 2005 in Memphis, Tennessee. The Order also provided for an exchange of pre-hearing statements, stipulation to agreed documents to be entered into the record, a schedule for preliminary motions and instructions concerning post-hearing briefs. On June 9, the ALJ issued a Status Order informing the parties that she would consider both Powers's AIR 21 and SOX claims at the July 19-20 hearing. She also cautioned Powers to refrain from serving the court by e-mail because, as she had previously advised Powers, she would not consider pleadings submitted by e-mail.

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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] 49 U.S.C.A. § 42121 (West 1997). AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. 29 C.F.R. § 1979.101 (2005). Air carriers, contractors and their subcontractors are prohibited from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)," engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a).

On June 20, the ALJ issued an Order Regarding Response to Respondent's Motion. The ALJ directed Powers to file a response, no later than July 1, 2005, to the Respondent's Motion for Partial Dismissal, requesting the ALJ to dismiss Powers's SOX allegations. The ALJ acknowledged that Powers had filed a "Notice of Intent" to file a SOX claim in federal district court but stated that "until such time as this Court issues an Order dismissing this claim or holding it in abeyance, the claim remains before this Court for resolution."[3]

On June 30, the ALJ issued an Order Cancelling Hearing and Directing Responses to Motions. The ALJ directed Pinnacle to respond to Powers's Motion for Summary Decision by July 15, 2005, and permitted it to respond to Powers's "Concerns & Objections" by the same date. The ALJ ordered Powers to respond to Pinnacle's Motion to Stay and Limit Discovery, for Entry of a Protective Order, and for the Imposition of Sanctions. The ALJ concluded that "in light of the outstanding motions, it is unrealistic to maintain the scheduled hearing dates of July 19 and 20, 2005." Accordingly she cancelled the scheduled hearing and stayed discovery until the outstanding motions were resolved.

Finally, on July 19, 2005, the ALJ issued a Status Order and Order Dismissing SOX Complaint. The ALJ dismissed Powers's SOX complaint on the grounds that she had failed to state a claim upon which relief could be granted, citing FRCP 12(b)(6). The ALJ denied Powers's Motion for Summary Judgment, citing 29 C.F.R. § 18.40 and FRCP 56(c), on the grounds that Powers had failed to establish that there are no genuine issues of material fact and that she was entitled to judgment as a matter of law.

The ALJ noted that Powers had styled her complaint as "Coleen L. Powers, et al," but stated that because no additional parties have attempted to join Powers's action, Powers had not established that she was the authorized representative of any employee and that she could not maintain a class action, Powers must caption her pleadings accordingly. The ALJ also found that Pinnacle, Airlines, Inc., Powers's employer, was the only proper respondent.

The ALJ also denied Powers's request for punitive damages and penalties because AIR 21 does not provide for such relief. The ALJ granted Pinnacle's Request for a

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[3] 29 C.F.R. § 1980.114(a) provides:

> If the [Administrative Review] Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

Protective Order finding that Powers's interrogatories had no relevance to the issues raised in the case, were compound, argumentative, vague, premised on unproven assumptions, or confusing or call for the production of privileged information. The ALJ only found one portion of one interrogatory (#146) that requested information that was "arguably relevant to the issues raised in this claim, or reasonably calculated to lead to such information, and is worded in such a manner that it is capable of being answered." The ALJ found Powers's document requests to be "overly broad and not calculated to lead to the discovery of relevant evidence," with the exception of parts of request # 22. Finally, the ALJ concluded that Powers's requests for admissions were unintelligible, confusing, compound, argumentative and "almost without exception they concern matter that [is] not the subject of this particular claim." Accordingly the ALJ did not require Pinnacle to answer Powers's requests for admissions.

Finally, the ALJ denied Powers's motion for recusal, finding that while Powers was clearly dissatisfied with the ALJ's rulings, she had failed to allege "any facts that would support a finding of impartiality, either judicial or personal."[4]

Powers filed her Petition for Review of the ALJ's Orders on August 6, 2005. On August 18, 2005, the Board issued an Order to Show Cause requiring Powers to state why the Board should not dismiss her interlocutory appeal given her failure to follow the Board's certification procedure and given the Board's well-established policy discouraging piecemeal appeals. Powers responded to the Board's Order, Pinnacle replied to Powers's response and the Board granted Powers's request to file a rebuttal to Pinnacle's reply.

JURISDICTION

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX and AIR 21 to the Administrative Review Board.[5] Because the Administrative Law Judge (ALJ) has not issued her final recommended decision and order in this matter, Powers's request that the Board review the ALJ's orders is an interlocutory appeal. The Secretary's delegated authority to the Board

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[4] The ALJ also noted that Powers's pleadings contain numerous references to other causes of action that are not before the ALJ and that in any event the ALJ would not have jurisdiction to rule upon, including complaints against PACE for various violations of its duty to represent her and against Pinnacle for violation of the collective bargaining agreement, "'tortitiuous'" interference with her employment contract, and violations of the federal wage and hour laws. The ALJ noted that the only matter properly before her was Powers's claim of discrimination under AIR 21.

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

includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."[6]

Powers argues that the ALJ did not have jurisdiction to grant Pinnacle's Motion for Partial Dismissal on her SOX complaint after Powers had exercised her option to file suit under the SOX in federal district court. We agree that, pursuant to the SOX[7] and its interpretive regulations,[8] the district court obtained jurisdiction of Powers's SOX complaint once she filed suit in district court and thus the ALJ no longer had jurisdiction to enter any order in the case other than one dismissing it on the ground that Powers had removed the case to district court.[9] Likewise, the fact that Powers has filed her SOX complaint in district court necessarily also divests the Board of jurisdiction over her SOX complaint. Accordingly, our decision is limited to the interlocutory appeals arising under Powers's AIR 21 complaint.

DISCUSSION

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*.[10] 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.[11] 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

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[6] *Id*. at 64273.

[7] 18 U.S.C.A. § 1514A(b)(1)(B).

[8] 29 C.F.R. § 1980.114(a).

[9] *McIntyre v. Merrill Lynch & Co.,* ARB No. 04-055, ALJ No. 2003-SOX-23, slip op. at 2-3 (ARB July 27, 2005).

[10] 86-CAA-6 (Sec'y April 29, 1987).

[11] *Id*.

> 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.[12]

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."[13] Some courts have held that district court certification is a jurisdictional prerequisite to interlocutory review under section 1292(b).[14] 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.[15]

Powers was aware of the Board's well-established procedure for obtaining interlocutory review of an ALJ's orders. Powers requested interlocutory review in a previous case involving Pinnacle Airlines.[16] On March 9, 2004, the Board ordered Powers to show cause why the Board should not dismiss her appeal given her failure to comply with the Board's certification procedures established in *Plumley*. Nevertheless, even given her indisputable knowledge of the applicable procedure, Powers failed to comply with that procedure in this case. Furthermore when instructed to show cause why the Board should not dismiss her appeal in this case given her failure to comply with the Board's certification procedure, Powers again chose to ignore this instruction and failed to address the applicable procedure. Accordingly, "an appeal from an interlocutory order such as this may not be taken."[17]

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[12] 28 U.S.C.A. § 1292(b) (West 1993).

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

[14] *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).

[15] 344 F.2d at 648.

[16] *Powers v. Pinnacle Airlines, Inc.,* ARB No. 04-066, ALJ No. 2004-AIR-6 (ARB July 30, 2004).

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

Moreover, even if Powers had complied with the certification procedure and the ALJ had certified the questions, it remains within the Board's discretion whether to hear the appeal.[18] We would not exercise that discretion in this case because Powers has failed to articulate sufficient grounds warranting departure from our strong policy against piecemeal appeals.[19]

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."[20] 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."[21] In *Coopers & Lybrand v. Livesay*,[22] the Court further refined the "collateral order" exception to technical finality.[23] 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."[24]

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.'"[25] Most obviously, Powers has failed to establish that any of the questions of which she has requested review are not fully reviewable on appeal from the ALJ's recommended decision and order in this case. Therefore, Powers has failed to

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[18] 28 U.S.C.A. 1292(b); *White v. Nix,* 4 F.3d 374, 376 n.2 (8th Cir. 1999) (*citing In re Convertible Rowing Exerciser Patent Litig.,* 903 F.2d 822 (Fed. Cir. 1990)).

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

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

[21] *Id.*

[22] 437 U.S. 463 (1978).

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

[24] 437 U.S. at 468.

[25] *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).

carry her burden of establishing that this appeal falls within the collateral appeal exception to the finality rule.

In addition, we note that Powers has requested the Board to order the Office of Administrative Law Judges (OALJ) to reassign Powers's case to the Cincinnati or Pittsburgh ALJ offices. She contends that this is not a request for change of venue, but that she would prefer that an ALJ from one of these offices be assigned to her case so that she can save on postage and delivery time. Powers has not previously requested the Office of Administrative Law Judges to transfer her case on these grounds, so there is no decision denying her request for the Board to review. In any event, absent proof of grounds for recusal,[26] or in the rare case, change of venue,[27] the OALJ's case assignment policies are within its purview and are not subject to Board review.

Accordingly, because Powers failed to follow the Board's certification procedure for interlocutory appeals and has failed to establish sufficient grounds to compel us to depart from our well-established policy against accepting such appeals, we **DISMISS** her appeal.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[26] As we indicated in our Order to Show Cause in this case, the Board has held that denial of a recusal motion is not subject to interlocutory review because disqualification issues are fully reviewable on appeal from the final judgment. *Greene v. EPA*, ARB No. 02-050, ALJ No. 02-SWD-1, slip op. at 4 (Sept. 18, 2002).

[27] Venue challenges are not subject to interlocutory review because "[t]he Board should be particularly chary of interfering with an ALJ's control over the time, place and course of a hearing, but rather should support the sound exercise of an ALJ's broad discretion in this area." *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097, ALJ No. 99-ERA-017, slip op. at 2 (Sept. 16, 1999).