In the Matter of:

CARRI S. JOHNSON, **ARB CASE NO. 07-010**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-15**

v. **DATE: January 19, 2007**

SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jacqueline Williams, Esq., Minneapolis, Minnesota

For the Respondents:
Gregg F. LoCascio, Esq., Julie Brennan Jacobs, Esq., Kathryn Holwill Albrecht, Esq., *Kirkland & Ellis LLP,* Washington, DC

FINAL DECISION AND ORDER DENYING INTERLOCUTORY APPEAL

The Complainant, Carri S. Johnson, has filed a complaint against the Respondents, Siemens Building Technologies, Inc., and Siemens AG, alleging that the Respondents retaliated against her in violation of the whistleblower protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX).[1] The complaint was referred to a Department of Labor Administrative Law Judge (ALJ) for hearing and initial administrative adjudication. On October 11, 2006, the ALJ issued an Order Granting Respondents' Request to Deny Further Extensions of Time for the Complainant to File a Response to

[1] 18 U.S.C.A. § 1514A (West 2002).

their Motion for Judgment as a Matter of Law. Johnson, through an interlocutory appeal, seeks relief from the ALJ's order.[2]

On November 8, 2006, the Administrative Review Board (ARB or Board) issued an order requiring Johnson to show cause why the Board should not dismiss the interlocutory appeal. The order allowed the Respondents to file a reply to Johnson's response. On November 22, 2006, Johnson filed her Response to United States Department of Labor Administrative Review Board Order to Show Cause (Response to Show Cause). On December 6, 2006, the Respondents filed Siemens Building Technologies, Inc.'s and Siemens AG's Opposition to Carri S. Johnson's Response to the United States Department of Labor Administrative Review Board Order to Show Cause (Respondent's Reply Brief).

JURISDICTION

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board.[3] Because the ALJ has not issued her final recommended decision and order in this matter, Johnson's request that the Board review the ALJ's order is an interlocutory appeal. 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]

DISCUSSION

The Complainant in her brief argues that the ALJ's order constitutes a "pragmatic finality."[5] In determining if a decision is final, the "distinction to be drawn is between an order that is final as to the particular issue at hand and one that concludes the litigation on the merits. The former is interlocutory and not subject to an immediate appeal; it may be reviewed only after the entire lawsuit is concluded."[6] While the ALJ's decision is final as to the issue whether the ALJ properly denied Johnson the opportunity to file a response to the Respondents' Motion for Judgment as a Matter of Law, the ALJ has not yet issued an

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[2] On October 13, 2006, the ALJ issued an Order Denying Complainant's Request for Reconsideration.

[3] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[4] *Id.* at 64,273.

[5] Response to Show Cause at 4, 5.

[6] *Cummins v. EG & G Sealol Inc.*, 697 F. Supp. 64, 67 (D.R.I. 1988).

order disposing of the merits of Johnson's complaint. Accordingly, the ALJ's order does not rise to the level of a "final judgment."[7] Instead the Complainant's appeal is interlocutory in nature.

In *Plumley v. Federal Bureau of Prisons*,[8] the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order.[9] The Secretary determined that when an administrative law judge has issued an order, of which a party seeks interlocutory review, it is appropriate for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b) (West 1993) for certifying interlocutory questions for appeal from federal district courts to appellate courts.[10] In *Plumley*, the Secretary ultimately concluded that because no Administrative Law Judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in § 1292(b), "an appeal from an interlocutory order such as this may not be taken."[11] Johnson has not requested the ALJ to certify any questions of law underlying her appeal to the Board, nor has she addressed her failure to do so. However, we need not decide whether this failure to obtain certification is fatal to Johnson's request that we consider her interlocutory appeal. Even if Johnson's failure to obtain certification was not

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[7] *Cummins*, 697 F. Supp. at 64 (citing *Catlin v. United States*, 324 U.S. 229, 33 (1945)).

[8] 86-CAA-6 (Sec'y Apr. 29, 1987).

[9] Slip op. at 2.

[10] *Id.* 28 U.S.C.A. § 1292(b) provides:

> 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. Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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

determinative, she cannot prevail because, as discussed below, she has failed to articulate any grounds warranting departure from our strong policy against interlocutory appeals.[12]

The Board's policy against interlocutory appeals incorporates 28 U.S.C.A. § 1291's final decision requirement that provides that the courts of appeals have jurisdiction "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court."[13] Pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[14] In *Firestone Tire & Rubber Co. v. Risjord*,[15] the Supreme Court explained the rationale for the requirement that a party generally must raise all claims of error in one appeal at the conclusion of litigation before the trial court:

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."[16]

Accordingly, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[17] The ALJ, who presides over the hearing phase of the litigation,

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[12] *See Greene v. EPA*, ARB No. 02-050, ALJ No. 02-SWD-1 (ARB Sept. 18, 2002); *Amato v. Assured Transp. & Delivery, Inc.*, ARB No. 98-167, ALJ. No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-97, ALJ No. 99-ERA-17 (ARB Sept. 16, 1999).

[13] *Greene*, ARB No. 02-050, slip op. at 4; *see* 28 U.S.C.A. § 1291 (West 2006).

[14] *Catlin v. United States*, 324 U.S. 229, 233 (1945).

[15] 449 U.S. 368 (1981).

[16] *Firestone*, 449 U.S. at 374 (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

is entitled to the same opportunity to issue independent decisions as a district court judge. Moreover, as the Supreme Court recognized in *Cobbledick v. United States,* permitting interlocutory appeals would not expedite the administrative adjudication process. Instead, meritorious appeals would languish while the Board was forced to adjudicate "a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."[18]

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

In determining whether to accept an interlocutory appeal, we must strictly construe the collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'"[23] Applying the collateral order test to the facts of this case, we conclude that the ALJ's order to which Johnson objects does not fall within the exception's coverage.

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

18 *Cobbledick*, 309 U.S. at 325.

19 *Id.*

20 437 U.S. 463 (1978).

21 *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988) (citing *Coopers & Lybrand*, 437 U.S. at 468).

22 *Coopers & Lybrand*, 437 U.S. at 468; *see Sell v. United States*, 539 U.S. 166 (2003); *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863 (1994); *Powers v. Pinnacle*, ARB No. 05-138, ALJ No. 2005-SOX-65 (ARB Oct. 31, 2005); *Puckett v. Tennessee Valley Auth.,* ARB No. 02-070, ALJ No. 2002-ERA-15 (ARB Sept. 26, 2002).

23 *Corrugated Container Antitrust Litigation Steering Comm. v. Mead Corp*., 614 F.2d 958, 961 (5th Cir. 1980) (quoting *Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1094 (5th Cir. 1977)).

Under the collateral appeal exception, the order appealed must be "effectively unreviewable on appeal from a final judgment."[24] But in this case, should the ALJ rule against Johnson on the merits of her complaint, the issue whether the ALJ properly denied Johnson the opportunity to respond to the Respondents' Motion for Judgment as a Matter of Law will be fully reviewable upon appeal. Furthermore, should Johnson prevail on that issue, the Board could fully remedy the ALJ's error by remanding the case to the ALJ and permitting Johnson to file her response for the ALJ's consideration. Thus the collateral order exception is inapplicable to the facts of this case.

Johnson contends that exceptional circumstances should allow the filing of an interlocutory appeal. However, none of the circumstances upon which she relies fall under the collateral appeal exception.[25] Neither the health nor the inexperience of Johnson's counsel justifies an interlocutory appeal. Moreover, if the ALJ's decision is based upon factual errors, as Johnson alleges, these errors may be challenged upon appeal of the ALJ's final decision.

Johnson also argues that the ALJ's order denying a filing of a response to the Respondents' motion for summary judgment constitutes a "death knell" to her litigation.[26] Johnson argues, "Under the 'death knell' theory of finality, an appeal is appropriate if an order has the 'practical effect of terminating the action, even though formally there is no final judgment.'"[27] But as Respondent correctly asserts, the theory of a "death knell" has historically been applied to denial of class certifications.[28] And even though it has been applied to other types of orders,[29] the treatise upon which the Complainant relies goes on to say that the "[Supreme] Court spoke with obvious disapproval of the prospect that a death knell theory might support appeal from many interlocutory orders '-rulings on discovery, venue, on summary judgment . . . . .'"[30] While Johnson may have correctly predicted the outcome of the ALJ's ruling on the merits of this case, she has not demonstrated any basis for precluding the ALJ from

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[24] *Coopers & Lybrand*, 437 U.S. at 468.

[25] *Cohen*, 337 U.S. at 546.

[26] Response to Show Cause at 4.

[27] Response to Show Cause at 4 (citing 15A Charles ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3912 (West 2006)).

[28] Respondent's Reply Brief at 5 (citing *Coopers & Lybrand*, 437 U.S. 463, 468 (1978)).

[29] 15A Charles ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3912 (West 2006).

[30] *Id.*(quoting *Coopers & Lybrand*, 437 U.S. at 470).

issuing her decision and explaining the basis for it. Once she has done so, Johnson may appeal any adverse rulings and, should she prevail, the Board can grant her adequate relief.

Finally, Johnson argues in her Response to Show Cause that the ALJ's order effectively denies her an appellate record. But all evidence and facts have been entered into the record during testimony and discovery, prior to the Respondents filing their motion for summary judgment. The ALJ's decision only precludes the filing of a response to the motion, which can be readily remedied should Johnson prevail on appeal of the ALJ's final decision.

If Johnson believes that the ALJ's orders constituted an abuse of discretion that prejudiced her case, she may so argue upon appeal, if and at such time as the ALJ issues a recommended decision and order denying her claim. Accordingly, as Johnson has not demonstrated a basis for departing from our strong policy against interlocutory appeals, we decline her invitation to do so in this case. Therefore, we **DENY** Johnson's petition for interlocutory review and **REMAND** the case to the ALJ for further adjudication.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge