

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**LINDSEY GULDEN,**

**ARB CASE NO. 2023-0050**

**and**

**ALJ CASE NO. 2023-SOX-00021  
2023-SOX-00022**

**DAMIAN BURCH,**

**ALJ PATRICK M. ROSENOW**

**COMPLAINANTS,**

**DATE: February 29, 2024**

**v.**

**EXXON MOBIL CORPORATION,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Neil L. Henrichsen, Esq., and Ronald P. Angerer, II, Esq.; *Henrichsen Law Group, P.L.L.C.*; Washington, District of Columbia**

***For the Respondent:***

**Richard J. Cino, Esq., and Bianca M. Olivadoti, Esq.; *Jackson Lewis, P.C.*; Berkeley Heights, New Jersey**

**Before HARTHILL, Chief Administrative Appeals Judge, and WARREN and ROLFE, Administrative Appeals Judges**

**DECISION AND ORDER DENYING INTERLOCUTORY APPEAL**

**HARTHILL, Administrative Appeals Judge:**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the

Sarbanes-Oxley Act (SOX), as amended, and its implementing regulations.<sup>1</sup> On September 11, 2023, Lindsey Gulden (Gulden) and Damian Burch (Burch) (collectively, Complainants) filed a petition for interlocutory review requesting that the Administrative Review Board (Board) review an Administrative Law Judge's (ALJ) order denying Complainants' motion to enforce a preliminary reinstatement order. For the following reasons, we deny Complainants' petition for interlocutory review.

## BACKGROUND

Complainants are former scientists for Exxon Mobil Corporation (Respondent).<sup>2</sup> On February 10, 2021, Complainants filed a joint whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent retaliated against them in violation of the SOX by terminating their employment.<sup>3</sup>

On October 6, 2022, OSHA found reasonable cause to believe that Respondent violated the SOX. OSHA ordered Respondent to "immediately reinstate both Complainants to their former position. Such reinstatement shall include all salary, benefits, rights and seniority that Complainants would have enjoyed had they never been illegally discharged. Such reinstatement is not stayed by an objection to this order."<sup>4</sup> This language is consistent with the SOX's implementing regulations, which provide, "[i]f a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed."<sup>5</sup>

On November 2, 2022, Respondent requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ).<sup>6</sup> Respondent has neither reinstated Complainants nor filed a motion to stay the order of reinstatement.

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<sup>1</sup> 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2023).

<sup>2</sup> Complainants' Response to Order to Show Cause at 2.

<sup>3</sup> Ruling on Complainants' Motion to Enforce Reinstatement (Ruling) at 1.

<sup>4</sup> *Id.*; Complainants' Response to Order to Show Cause, EX B OSHA's Preliminary Order at 8.

<sup>5</sup> 29 C.F.R. § 1980.106(b).

<sup>6</sup> Ruling at 1.

On December 20, 2022, Complainants filed a complaint and emergency motion to show cause in the United States District Court of New Jersey, seeking an order to enforce Respondent’s compliance with OSHA’s preliminary reinstatement order.<sup>7</sup> Respondent filed a motion to dismiss.<sup>8</sup> On April 19, 2023, the District Court granted Respondent’s motion to dismiss, finding that the court did not have subject matter jurisdiction because the order of reinstatement was not a final order of the Department of Labor.<sup>9</sup> Complainants appealed the dismissal to the Third Circuit.<sup>10</sup> The Solicitor of Labor filed an amicus brief in support of Complainants.<sup>11</sup> As of the date of this order, that appeal is still pending, and oral argument is scheduled for March 6, 2024.<sup>12</sup>

After the District Court granted Respondent’s motion to dismiss, Complainants filed a motion to enforce OSHA’s reinstatement order with OALJ.<sup>13</sup> On August 28, 2023, the ALJ issued a Ruling on Complainants’ Motion to Enforce Reinstatement (Ruling), finding that “the Agency has no independent executable enforcement authority.”<sup>14</sup> The ALJ stated that “OALJ’s role is to conduct a *de novo* review and ALJs cannot even consider the substantive aspects of an OSHA decision, much less enforce them.”<sup>15</sup> The ALJ concluded that, “whether OSHA’s order is enforceable is a question properly before the Article 3 courts,” and denied Complainants’ motion.<sup>16</sup>

On September 11, 2023, Complainants filed a Petition for Review with the Board, seeking review of the Ruling. On September 29, 2023, the Board issued an

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* (citing *Gulden v. Exxon Mobil Corp.*, Case No. 3:22-cv-7418-MAS-TJB, 2023 WL 3004854 (D.N.J. Apr. 2023) (Respondent argued that the District Court of New Jersey lacked subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1))).

<sup>9</sup> Ruling at 2; *Gulden*, 2023 WL 3004854, at \*3.

<sup>10</sup> Ruling at 2.

<sup>11</sup> Acting Secretary of Labor’s Brief as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal of the District Court’s Decision at 1.

<sup>12</sup> Notification Letter for Oral Argument on March 6, 2024, No. 23-1859 (3d Cir. Feb. 14, 2024).

<sup>13</sup> Ruling at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Order to Show Cause, finding that Complainants' Petition constituted an interlocutory appeal because the ALJ had not yet issued a final decision fully disposing of the Complainants' complaint.<sup>17</sup> The Board ordered Complainants to show cause no later than October 13, 2023, as to why the Board should not dismiss this interlocutory appeal.<sup>18</sup> Complainants and Respondent filed timely responses to the Board's Order to Show Cause.

## JURISDICTION AND STANDARD OF REVIEW

The Board's delegated authority includes the consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."<sup>19</sup> Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.<sup>20</sup> When a party seeks interlocutory review of an ALJ's non-final order, the Board has elected to look to the interlocutory review procedures used by federal courts, including providing for review under the collateral order doctrine.<sup>21</sup>

## DISCUSSION

### 1. Complainants' Interlocutory Appeal Is Timely

Citing 28 U.S.C. § 1292(b), Respondent contends interlocutory appeals must be filed within ten days after entry of the order being appealed.<sup>22</sup> Because Complainants filed their interlocutory appeal fourteen days after the ALJ issued the Ruling, Respondent contends Complainants' interlocutory appeal is untimely.<sup>23</sup> However, that ten-day deadline only applies in instances where the interlocutory

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<sup>17</sup> Order to Show Cause at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020)).

<sup>20</sup> *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec'y Sept. 28, 1994)) (citations omitted).

<sup>21</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005).

<sup>22</sup> Respondent's Response to Order to Show Cause at 8.

<sup>23</sup> *Id.* (citing 28 U.S.C. § 1292(b)).

appeal has been certified by the trial court. Here, instead, Complainants seek review under the collateral order doctrine.<sup>24</sup> In *Priddle v. United Airlines, Inc.*, the Board held that “collateral orders will be treated as final orders for appeal purposes” and, consequently, the deadline for appeals of ordinary final orders under the applicable statute will be applied to collateral order appeals.<sup>25</sup>

The SOX regulations state that a party seeking review of an ALJ’s decision must file a petition for review with the Board “within 14 days of the date of the decision of the ALJ.”<sup>26</sup> The ALJ issued the Ruling on August 28, 2023,<sup>27</sup> and Complainants filed their appeal with the Board on September 11, 2023, fourteen days later. Thus, Complainants filed a timely collateral order appeal.

## **2. The Board Declines to Exercise Its Discretion to Accept Complainants’ Petition for Interlocutory Review**

The Board may consider reviewing an interlocutory order that meets the “collateral order” exception, which applies if the appealed decision belongs to that “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.”<sup>28</sup> To fall within the narrow “collateral order” exception to the traditional finality rule, the moving party must establish that the order being appealed: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment.<sup>29</sup> This exception is “strictly construe[d]” to avoid “unnecessarily protracte[d] litigation.”<sup>30</sup>

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<sup>24</sup> 28 U.S.C. § 1292(b). Complainants did not ask the ALJ to certify this issue for appellate review.

<sup>25</sup> *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 6 (ARB Jan. 26, 2022).

<sup>26</sup> 29 C.F.R. § 1980.110(a).

<sup>27</sup> Ruling at 1.

<sup>28</sup> *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

<sup>29</sup> *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Goldstar Amusements, Inc.*, ARB No. 2022-0027, ALJ Nos. 2021-TNE-00027, -00028, slip op. at 5 (ARB Sept. 30, 2022).

<sup>30</sup> *Id.* (quoting *Johnson v. Siemens Building Tech., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 5 (ARB Jan. 19, 2007)).

If the ALJ's Order "fails to satisfy any one of these requirements, it is not appealable under the collateral order doctrine."<sup>31</sup> And even if the order meets the requirements, the Board's decision to accept the petition remains discretionary.<sup>32</sup>

As a matter of discretion, we find not accepting the petition for interlocutory review at this time does not make the ALJ's order effectively unreviewable. Complainants' appeal of the District Court's order is currently pending before the Third Circuit. Both Complainants and the Acting Secretary of Labor have asked the Circuit Court to reverse the District Court's order and find the SOX authorizes judicial enforcement of post-investigation preliminary orders as well as final orders.<sup>33</sup> Given the Secretary's long-held position,<sup>34</sup> we find the most efficient way to direct the course of the litigation below in its current posture is to remand this matter to the OALJ to continue the remaining agency proceedings on the complaint while affording the Third Circuit the opportunity to rule on judicial enforcement of the preliminary order.

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<sup>31</sup> *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022, slip op. at 2 (ARB Feb. 25, 2021)).

<sup>32</sup> Secretary's Order No. 01-2020, ¶ 5; *Priddle v. United Airlines*, ARB No. 2022-0006, ALJ No. 2020-AIR-00013, slip op. at 4 (ARB Mar. 21, 2022).

<sup>33</sup> Brief of Appellant at 20; Acting Secretary of Labor's Brief as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal of the District Court's Decision at 29-30.

<sup>34</sup> *Id.* at 5-6 (citing Procedures for the Handling of Discrimination Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Interim final rule, 67 Fed. Reg. 15454, 15461 (Apr. 1, 2002); Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, Final rule, 69 Fed. Reg. 52104, 52111 (Aug. 24, 2004) (Sarbanes-Oxley); Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11865, 11874 (Mar. 5, 2015)).

### 3. Practical Effects Test Does Not Apply

Complainants assert the Board may also review this matter pursuant to the practical effects test.<sup>35</sup> The practical effects test allows for immediate appeal of orders that (1) have the practical effect of an injunction, and (2) can be “effectively challenged only by immediate appeal” because the interlocutory order “might have a serious, perhaps irreparable, consequence.”<sup>36</sup> Complainants contend the enforcement of a preliminary order is plainly injunctive in nature and that a lack of enforcement “will allow evasion of future review because the issue will become moot if not immediately reviewed.”<sup>37</sup> Complainants conclude that “the practical effect of the lack of review is no review.”<sup>38</sup>

As set forth in Section 2, Complainants’ appeal of the District Court’s order is currently pending before the Third Circuit and Complainants have opined that a merits decision by the ALJ does not moot the appeal “because the issue is capable of repetition, yet evading review.”<sup>39</sup> Thus, we find the practical effects test does not apply.<sup>40</sup>

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<sup>35</sup> Complainants’ Response to Order to Show Cause at 9.

<sup>36</sup> *Petitt v. Delta Airlines, Inc.*, ARB No. 2022-0047, ALJ No. 2018-AIR-00041, slip op. at 5 (ARB Sept. 26, 2022) (citation omitted).

<sup>37</sup> Complainants’ Response to Order to Show Cause at 10-11.

<sup>38</sup> *Id.* at 11.

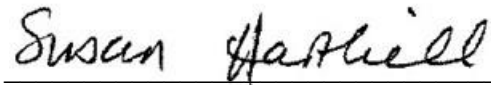
<sup>39</sup> Complainants’ Letter Brief to Third Circuit at 2 (Feb. 14, 2024).

<sup>40</sup> Respondent contends Complainants should be equitably estopped from simultaneously litigating the same issue in two different venues. Respondent’s Response to Order to Show Cause at 9. Because we decline to accept interlocutory review of the ALJ’s Ruling on Complainants’ Motion to Enforce Reinstatement under either the collateral order exception or the practical effects test, this issue is moot.

**CONCLUSION**

Accordingly, we **DENY** Complainants' Petition for Interlocutory Review and remand to the OALJ to continue the remaining agency proceedings.

**SO ORDERED.**




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**SUSAN HARTHILL**  
**Chief Administrative Appeals Judge**



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**IVEY S. WARREN**  
**Administrative Appeals Judge**



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**JONATHAN ROLFE**  
**Administrative Appeals Judge**