

U.S. Department of Labor

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



IN THE MATTER OF:

DARREN KOSSEN,

ARB CASE NO. 2023-0041

COMPLAINANT,

ALJ CASE NO. 2023-AIR-00001

ALJ CHRISTOPHER LARSON

v.

DATE: August 22, 2023

ASIA PACIFIC AIRLINES,

RESPONDENT.

Before PUST and WARREN, Administrative Appeals Judges

**ORDER OF NON-ACCEPTANCE
OF UNTIMELY INTERLOCUTORY APPEAL**

PUST, Administrative Appeals Judge:

This case arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ On July 24, 2023, Complainant Darren Kossen (Complainant or Kossen) filed an 839-page interlocutory appeal² of the Administrative Law Judge's (ALJ) July 3, 2023 Order Denying Reconsideration; Order Striking Motion for Disqualification (Order). In the Order, the ALJ denied Complainant's motion for reconsideration of the ALJ's March 28, 2023 order denying Complainant's motion for recusal.

¹ 49 U.S.C. § 42121. AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2023).

² Complainant's filing is titled "Interlocutory Appeal for Recusal of Administrative Law Judge Christopher Larsen in Kossen v Asia Pacific Airlines Case Number 2023-AIR-00001 and Motion to for [sic] transfer of case out of the office of OALJ San Francisco to another OALJ district and ALJ."

1. Non-Acceptance of Case for Review

Complainant's interlocutory appeal is untimely. AIR 21's implementing regulations provide that "a petition [for review] must be filed within ten business days of the date of the decision of the Administrative Law Judge."³ The Board applies the ten business-day appeal deadline to interlocutory appeals.⁴ The ALJ denied Complainant's second motion for recusal on July 3, 2023, and Complainant filed his appeal with the Board on July 24, 2023. As the filing date is well outside the ten business-day deadline, the Board does not accept the case for review.⁵

2. Insufficient Collateral Order

In the alternative, the Board notes that even had Complainant's filing been timely and the case accepted for review, the Board would have denied the requested relief on the grounds that Complainant has failed to meet the requirements for collateral review of the subject Order.

The Board's delegated authority includes the discretionary consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."⁶ Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.⁷ 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 certification of issues involving a controlling question of law as set forth in 28

³ 29 C.F.R. § 1979.110(a).

⁴ *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 5-6 (ARB Jan. 26, 2022) (Decision and Order Denying Interlocutory Appeal).

⁵ See 29 CFR § 1979.110(b) ("If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review.").

⁶ 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).

⁷ *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (Order Dismissing Interlocutory Appeals) (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec'y Sept. 28, 1994) (other citations omitted)).

U.S.C. § 1292(b).⁸ In this case, Complainant did not seek or obtain certification for interlocutory appeal from the ALJ.

Even when a party has failed to obtain interlocutory certification, the ARB may consider interlocutory appeals if they meet the requirements of the “collateral order” exception.⁹ To fall within the collateral order exception, the order 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.¹⁰ This exception is “strictly construe[d]” to avoid “unnecessarily protract[ed] litigation.”¹¹ If the ALJ’s Order “fails to satisfy any one of these requirements, it is not appealable”¹²

Had we accepted this matter for review, which we do not for the reasons stated above, no matter the results of an examination of the first two prongs of the test we would have denied the appeal for its lack of establishing the third. Complainant has not demonstrated that the Order denying a motion to recuse would be “effectively unreviewable on appeal” of a final judgment.¹³ Courts have

⁸ *Fagan v. Dep’t of Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 5-6 (ARB Apr. 6, 2023) (Order Granting Interlocutory Review); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005) (Final Decision and Order Dismissing Interlocutory Appeal).

⁹ *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 4-5 (ARB Sept. 30, 2022) (Decision and Order Denying Interlocutory Appeal); *see, e.g., Jordan v. Sprint Nextel Corp.*, ARB No. 2006-0105, ALJ No. 2006-SOX-00041, slip op. at 3-4 (ARB June 19, 2008) (Order Granting Petition for Interlocutory Review) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (other citations omitted)).

¹⁰ *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 5 (ARB Jan. 19, 2007) (Final Decision and Order Denying Interlocutory Appeal) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

¹¹ *Id.* (quoting *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 (5th Cir. 1977) (internal quotation omitted)).

¹² *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *see Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022, slip op. at 2 (ARB Feb. 25, 2021) (Order Denying Interlocutory Appeal) (“The appeal must meet all of [the collateral order exception] criteria”).

¹³ *Priddle*, ARB No. 2021-0064, slip op. at 8 (“To be effectively unreviewable, the right sought to be protected by the interlocutory appeal must be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment.”) (internal quotations omitted).

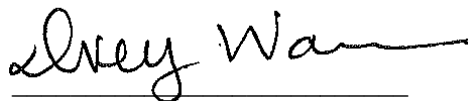
routinely denied interlocutory appeals regarding motions to recuse.¹⁴ Accordingly, Complainant's interlocutory appeal would have been denied on substantive legal grounds had it been timely filed.

Accordingly, Complainant's request for interlocutory appeal is **NOT ACCEPTED FOR REVIEW.**

SO ORDERED.



TAMMY L. PUST
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge

¹⁴ “We have held that a judge’s decision not to disqualify his or her self cannot be appealed until a direct appeal is taken from a final decision adverse to the moving party.” *Thompson v. Comm’r of Internal Revenue*, 742 F. App’x 316, 317 (9th Cir. 2018) (internal quotations omitted) (citing *In re Horton*, 621 F.2d 968, 970 (9th Cir. 1980)).