U.S. Department of Labor

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

In the Matter of:

KARLENE PETITT,

COMPLAINANT,

v.

DELTA AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 2022-0047

ALJ CASE NO. 2018-AIR-00041

DATE: September 26, 2022

Appearances:

For the Complainant:
Lee Seham, Esq. and Nicholas Granath, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

For the Respondent:
Ira G. Rosenstein, Esq. and Lincoln O. Bisbee, Esq.; *Morgan, Lewis & Bockius LLP*; New York, New York

Before BURRELL, GODEK and PUST, Administrative Appeal Judges; BURRELL, Administrative Appeals Judge, concurring

DECISION AND ORDER DENYING INTERLOCUTORY APPEAL

GODEK, Administrative Appeals Judge:

This case arises under the employee protection provisions of Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), and its implementing regulations.[1] On March 29, 2022, the Administrative Review Board

[1] 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R. Part 1979 (2021).

(Board) issued an Order of Remand in this case (under ARB No. 2021-0014).[2] The Board affirmed the Administrative Law Judge's (ALJ) December 21, 2020 Decision and Order Granting Relief (D. & O.) on the merits and the back pay award. However, the Board vacated the ALJ's award of front pay damages and compensatory damages and remanded the case back to the ALJ for further proceedings. The Board noted that Respondent did not challenge the ALJ's Order to publish the D. & O.[3] On June 6, 2022, the ALJ issued an Order Granting Complainant's Motion to Direct Respondent to Publish and Post the Tribunal's December 21, 2020 Decision and Order (ALJ's 2022 Order). On June 20, 2022, Delta Airlines, Inc. (Respondent) filed a Petition for Review of the ALJ's Publication Order (interlocutory appeal), and Karlene Petitt (Complainant) responded with a Motion to Dismiss. For the following reasons, we deny Respondent's interlocutory appeal.

BACKGROUND

On December 20, 2020, the ALJ issued a D. & O. granting relief under AIR 21, including front pay damages, back pay damages, compensatory damages, and publication of the decision by Respondent. Specifically, the ALJ directed Respondent to "deliver an electronic copy of the decision directly to all of its pilots and managers in its flight operations department. Respondent also will prominently post copies of the decision at every location where it posts other notices to employees related to employment law (e.g., wage and hour, civil rights in employment, age discrimination) for a period of 60 days."[4] (Hereinafter, this portion of the December 20, 2020 D. & O. is referenced as the "2020 Publication Order".) Respondent timely appealed the entire D. & O. to the Board.

On March 29, 2022, the Board affirmed the ALJ's decision on the merits and the award of back pay damages. As relevant to the 2020 Publication Order, the Board noted "Respondent did not challenge the ALJ's order to publish the D. & O. to pilots and managers in the flight operations department as well as to post copies of the decisions at various locations."[5] The Board vacated the ALJ's award of front pay as legal error and the award of compensatory damages for lack of evidentiary support and remanded the case to the ALJ for further proceedings.

Before the ALJ, on May 2, 2022, Complainant filed a Motion for an Order Compelling Respondent's Immediate Compliance with Tribunal's Standing Order to

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[2] *Petitt v. Delta Airlines, Inc.*, ARB Case No. 2021-0014, ALJ Case No. 2018-AIR-00041 (ARB Mar. 29, 2022) (Order of Remand).

[3] *Id.* at 20 n.104.

[4] *Id.* at 112.

[5] *Id.* at 20 n.104.

Deliver and Post Tribunal's Decision Dated December 21, 2020. On May 6, 2022, Respondent filed a response in opposition to Complainant's motion and also filed a Cross-Motion to Stay Enforcement of the Tribunal's Decision Dated December 21, 2020, in light of the Board's partial reversal of the decision and Respondent's then pending appeal to the Eleventh Circuit Court of Appeals.[6]

In the ALJ's 2022 Order dated June 6, 2022, the ALJ rejected Respondent's request to stay publication. The ALJ directed Respondent to:

> [P]ublish the Tribunal's December 21, 2020 decision consistent with guidance contained in that Decision and Order, and shall do so within 30 days of the date of this Order. Respondent is free to simultaneously or subsequently publish, to the same extent as required in the December 21, 2020 Decision and Order, the Board's Order of Remand.[7]

The ALJ denied Respondent's request for a stay, concluding that the appeal to the Eleventh Circuit was interlocutory because the Board's Order of Remand was not a final decision and noting that Respondent would not be harmed absent a stay of publication as the D. & O. is already a matter of public record.

On June 20, 2022, Respondent filed a petition for review of the ALJ's 2022 Order. On June 23, 2022, Complainant filed a Motion to Dismiss, arguing that Respondent's petition constitutes an interlocutory appeal over which the Board should not exercise jurisdiction.

On June 30, 2020, the Board accepted Respondent's petition for review and directed the parties to submit briefing in response to Complainant's Motion to Dismiss. The parties each filed timely briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review appeals of ALJ decisions under AIR 21.[8] This includes the discretion to consider interlocutory appeals "in exceptional circumstances, provided such review is not

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[6] On May 6, 2022, Respondent filed a petition review of the Board's Order of Remand with the Eleventh Circuit Court of Appeals. On August 29, 2022, the Eleventh Circuit dismissed the Respondent's petition for review for lack of jurisdiction. *Delta Air Lines, Inc. v. U.S. Dep't of Labor Admin. Review Bd.*, No. 22-11539-A (11th Cir. Aug. 29, 2022).

[7] ALJ's 2022 Order at 6.

[8] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

prohibited by statute."[9] Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.[10]

DISCUSSION

Respondent contends that the Board has jurisdiction in the present matter because the ALJ's 2022 Order is immediately appealable: (1) as an order granting an injunction under 28 U.S.C § 1292(a)(1); (2) as a partial final order appealable under Rule 54(b), Fed. R. Civ. P.; and/or (3) under the collateral order doctrine recognized under 28 U.S.C § 1291. For the reasons explained below, we conclude that the ALJ's 2022 Order does not qualify as an order for injunctive relief under 28 U.S.C. § 1292(a)(1), is not an appealable partial final order, and is not a collateral order that the Board may, or should in its discretion, review at this stage of the proceedings.

1. Interlocutory Appeal of an Injunction

Under 28 U.S.C. § 1292(a)(1), federal appellate courts have jurisdiction over direct appeals of "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." Section 1292(a)(1) is to be construed narrowly to directly limit interlocutory appeals of orders for injunctive relief.[11] On matters concerning interlocutory appeals, the Board follows the practice of federal courts.[12]

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[9] *Id.*

[10] *See Turin v. AmTrust Fin. Servs., Inc.*, ARB No. 2017-0004, ALJ No. 2010-SOX-00018, slip op. at 4 (ARB Apr. 20, 2017) (Decision and Order Dismissing Interlocutory Appeal).

[11] *See Birmingham Fire Fighters Ass'n 117 v. Jefferson Cnty.*, 280 F.3d 1289, 1293 (11th Cir. 2002) ("The Supreme Court, this Court, and our sister circuits all have warned of the dangers of piecemeal appeals and have emphasized that, to guard against this danger, § 1292(a)(1) must be construed narrowly so as to limit the availability of interlocutory appeals in cases involving injunctions.") (citing *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.,* 385 U.S. 23, 24 (1966) ("[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders.")).

[12] *See 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) (the Board follows the Federal Rules of Appellate Procedure for treatment of interlocutory appeals pursued under the collateral order doctrine).

"When a court 'enjoins' conduct, it issues an 'injunction,' which is a judicial order that 'tells someone what to do or not to do.'"[13] An order for injunctive relief "must be: (1) a clearly defined and understandable directive by the court to act or to refrain from a particular action; and (2) enforceable through contempt, if disobeyed."[14] In contrast, a court order that regulates the conduct of the litigation "is not considered an injunction for purposes of appellate jurisdiction, even though punishable by contempt."[15]

Orders that specifically grant or deny injunctions are immediately appealable under Section 1292(a)(1).[16] Orders that do not specifically grant or deny injunctive relief, but have the practical effect of doing so, may also be immediately appealable via Section 1292(a)(1) under the "practical effects test," which was first enunciated in *Carson v. American Brands, Inc.*[17] *Carson*'s practical effects test allows Section 1292(a)(1) appeals of orders that both: (1) have the practical effect of an injunction; and (2) can be "'effectually challenged only by immediate appeal'" because the interlocutory order "'might have a 'serious, perhaps irreparable, consequence.'"[18]

The ALJ's 2022 Order denied Respondent's motion for a stay and directed Respondent to "publish the Tribunal's December 21, 2020 decision **consistent with guidance contained in that Decision and Order** . . . within 30 days of the date of this Order."[19] Although Respondent now asserts that the ALJ's 2022 Order specifically requires it to take action and thus constitutes an injunction, that conclusion ignores both the continued existence and effect of the 2020 Publication Order and the specific terms of the ALJ's 2022 Order.

By its terms, the ALJ's 2022 Order simply enforces its existing 2020 Publication Order.[20] In and of itself, the ALJ's 2022 Order does not "grant, continue,

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[13] *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2064 (2022) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)).

[14] *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005); *see also Tims Hortons USA, Inc. v. Tims Milner LLC*, 2020 WL 4577498, at *1 (11th Cir. 2020).

[15] *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988).

[16] *See Edwards v. Prime, Inc.,* 602 F.3d 1276, 1290 (11th Cir. 2010).

[17] 450 U.S. 79, 83-84 (1981).

[18] *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) (quoting *Carson*, 450 U.S. at 84).

[19] ALJ's 2022 Order at 6 (emphasis added).

[20] The Board makes no determination regarding whether the initial 2020 Publication Order constitutes an order for injunctive relief because the 2020 Publication Order is not the subject of Respondent's current appeal.

modify, refuse, or dissolve" any new or different injunctive relief; it merely directs Respondent to do what it had already been told to do over a year earlier. The 2020 Publication Order was issued as part of the D. & O., and following the Board's Order of Remand, the Complainant brought a motion to enforce pre-existing relief as ordered in the D. & O. The ALJ's 2022 Order did not reissue an injunction, otherwise continue an expiring injunction[21] or modify an existing injunction,[22] as Respondent has yet, to the Board's knowledge, to publish the D. & O. in accordance with the ALJ's original directive to do so.

Orders denying relief from existing court directives are unappealable under Section 1292(a)(1) unless the appealed order has altered the legal relationship between the parties by "chang[ing] the command of [an] earlier injunction, relax[ing] its prohibitions, or releas[ing] any respondent from its grip."[23] The ALJ's 2022 Order granting Complainant's motion did not alter the terms of the 2020 Publication Order in any manner adverse to Respondent. Therefore, the ALJ's 2022 Order is not automatically appealable under the statutory terms of Section 1292(a)(1).

Courts have consistently held that rulings related to a motion to stay do not qualify as injunctions under Section 1292(a)(1).[24] A motion to stay "operates upon the judicial proceeding itself," . . . "either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability,"[25] and so resulting orders typically do not constitute injunctions giving rise to interlocutory appeal.

Nor is the ALJ's 2022 Order properly the subject of an interlocutory appeal under *Carson's* practical effects test applicable to Section 1292(a)(1) analysis. As set

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[21] *Pub. Serv. Co. of Colorado v. Batt*, 67 F.3d 234, 236-38 (9th Cir. 1995) (finding that an order continues an injunction only if, without the subject order, the existing injunction would dissolve on its own terms); *see also In re Fugazy Express, Inc.,* 982 F.2d 769, 777-78 (2d Cir. 1992).

[22] The ALJ's 2022 Order allowed, but did not require, Respondent to also publish the Board's Order of Remand with the D. & O., assumedly to provide the recipients with more complete information.

[23] *Sierra Club v. Marsh,* 907 F.2d 210, 213 (1st Cir. 1990), *quoted in Birmingham Fire Fighters Ass'n 117*, 280 F.3d at 1292; *see also United States v. Philip Morris USA Inc.,* 686 F.3d 839, 843-45 (D.C. Cir. 2012).

[24] *See e.g.*, *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 541 (5th Cir. 2001) ("A denial of a discretionary stay is not a final decision under the final judgment rule."); *Emiabata v. Specialized Loan Servicing*, 2018 WL 2984809 at *2 (W.D. Wash. June 14, 2018) ("Orders granting or denying stays of legal proceedings are not automatically appealable under 28 U.S.C. § 1291[sic](a)(1).").

[25] *Nken*, 556 U.S. at 428.

forth above, the ALJ's directive to publish already existed in the 2020 Publication Order. Therefore, we find the 2022 Order did not have the "practical effect" of requiring Respondent to do, or not to do, anything it was not already required to do. Neither did the ALJ's refusal to stay publication cause Respondent to suffer any "serious, irreparable, consequences" given that the D. & O. is a public court order currently available on the Department of Labor's website.[26]

Thus, we also find the ALJ's 2022 Order did not "grant, continue, modify, refuse, or dissolve" an injunction nor have the practical effect of doing so. For these reasons, we conclude the 2022 Order is not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1).

2. Partial Final Order Under Rule 54(b)

Respondent next argues that the ALJ's 2022 Order is a "partial final order" and thus appealable under Rule 54(b) of the Federal Rules of Civil Procedure. This argument fails for two sufficient reasons: (1) the 2022 Order does not conclusively resolve a claim for relief; and (2) the ALJ has not certified the 2022 Order as deserving of interlocutory review under the rule.

Rule 54 provides as follows:

> When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The Board has consistently cited to and followed the dictates of Rule 54(b) when ruling upon appeals from orders which terminate less than all claims in a pending matter.[27]

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[26] Available at https://www.oalj.dol.gov/DECISIONS/ALJ/AIR/2018/PETITT_KARLENE_v_DELTA_AIR_LINES_INC_2018AIR00041_(JUN_06_2022)_152859_ORDER_PD.PDF (last visited September 22, 2022).

[27] *See, e.g., Johnson v. FedEx Ground Package Sys., Inc.*, ARB No. 2019-0024, ALJ No. 2018-STA-00028, slip op. at 2 n.3 (ARB July 22, 2020) (Decision and Order Dismissing Interlocutory Appeal); *Turin*, ARB No. 2017-0004, slip op. at 4 n.16.

Those dictates are clear and establish only "a modest exception to the general definition of finality."[28] First, the rule is only applicable to judgments that conclusively extinguish one or more claims for relief but leave others unresolved. "[A] final judgment resolves conclusively the substance of all claims, rights, and liabilities of all parties to an action . . . it 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'"[29] This matter includes only one claim for relief: violation of AIR 21. Therefore, we hold the Rule's requirement of multiple claims is not met.

Respondent glosses over this jurisdictional requirement by focusing on the fact that the ALJ's 2022 Order addresses one of many remedies requested: publication of the D. & O. Contrary to Respondent's apparent interpretation, the term "claim for relief" is not synonymous with the term "remedy." As "Rule 54(b) requires multiple 'claims for relief,' the rule does not apply when a complaint seeks multiple *remedies* for the violation of a single cause of action or theory of liability, as those various forms of relief are not 'claims' within the meaning of Rule 54(b)."[30]

Likewise, Respondent ignores the fact that the ALJ did not certify the 2022 Order as deserving of interlocutory review. Rule 54(b) does not allow for the appeal of "an otherwise non-final order" unless the court below "specifically: (1) enters judgment *and* (2) finds there is no just reason for delay. . . ."[31] Therefore, we conclude Respondent's attempt to obtain review of the ALJ's 2022 Order under the authority of Rule 54(b) is without merit.

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[28] *Peden v. Stephens*, 2022 WL 3714962, at *4 (11th Cir. Aug. 29, 2022) (internal citations omitted).

[29] *Collar v. Abalux, Inc.*, 895 F.3d 1278, 1283 (11th Cir. 2018) (internal citations omitted) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000)).

[30] *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 2015 WL 13680780, at *3 n.4 (D.D.C. Apr. 2, 2015) (emphasis in original) (citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n.4 (1976)); *see also Ariz. State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990)); *Sonoma Cnty. Law Enforcement Ass'n v. Cnty. of Sonoma*, 2009 WL 10700475, at *9 (N.D. Cal. May 18, 2009), *aff'd* 379 F. Appx. 658 (9th Cir. 2010).

[31] *Mwani v. Al-Qaeda*, 2022 WL 1165911, at *8 (D.D.C. Apr. 20, 2022) (emphasis in original).

3. Collateral Order Doctrine

Under the authority of 28 U.S.C. § 1291, the Board has jurisdiction to review "all final decisions." Generally, a "final decision" terminates all claims pending in an action.[32] Clearly, the ALJ's 2022 Order does not meet that test.

Even so, the ALJ's 2022 Order may be reviewable under the collateral order doctrine,[33] a doorway through which the Board has jurisdiction to review "a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final'" and thus reviewable.[34] The doorway is slim: "we must strictly construe the collateral order exception to avoid the serious 'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'"[35] The collateral order doctrine "accommodates a 'small class' of rulings, not concluding litigation" but resolving claims separable from the action.[36] "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."[37] If the ALJ's 2022 Order "fails to

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[32] *Turin*, ARB No. 2017-0004, slip op. at 2 n.5 (citing *Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012)).

[33] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The collateral order doctrine "is best understood not as exception to the final decision rule laid down by Congress in § 1291, but as a practical construction of it." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted).

[34] *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal citations omitted).

[35] *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) (quoting *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 960 n.2 (5th Cir. 1980)); *accord Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (stressing that *Cohen's* collateral order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'") (quoting *Digital Equip. Corp.*, 511 U.S. at 868).

[36] *Will*, 546 U.S. at 349.

[37] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *overruled on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *see also Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993); *Digital Equip. Corp.*, 511 U.S. at 868 ("we have also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule"); *Will*, 546 U.S. at 3450 ("we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope"); *Mohawk Indus., Inc.*, 558 U.S. at 106-07.

satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291."[38]

Without making an ultimate determination, we acknowledge it is plausible that the ALJ's 2022 Order satisfies two of the three requirements for review under the collateral order doctrine. The 2022 Order appears to conclusively determine that Respondent should abide by the D. & O.'s 2020 Publication Order, though this same determination was made in the 2020 Publication Order itself. Perhaps more persuasive is Respondent's attempt to establish the third element by asserting that publication of the D. & O. as directed may be effectively unreviewable on appeal because it is unlikely that any order post-publication could ultimately "cure" any legal issue raised on appeal relevant to the directive.[39] For purposes of this order, the Board will assume, without finding, that elements one and three could be established.

We do not need to resolve this issue here because we specifically find that the ALJ's 2022 Order does not satisfy the second requirement: "resolv[ing] an important issue completely separate from the merits." First, Respondent has failed to establish that the ALJ's 2022 Order addresses "an important issue" at all. The D. & O. is already a matter of public record, and, as such, requiring the Respondent to republish it to certain individuals lacks the gravitas of most matters raised through the collateral order doctrine. In addition, the ALJ's 2022 Order simply enforces a standing directive that has existed since the ALJ's publication of the D. & O. in December of 2020. The 2022 Order is redundant of the ALJ's earlier D. & O.'s ordering the remedy of publication; it is in no way "completely separate from the merits of the action." Publication of the D. & O. is identical to publicizing the ALJ's determination already affirmed by the Board: that Respondent violated required employee protections under AIR 21. The ALJ's 2022 Order does not address or settle any other pending issue. Accordingly, we find that the ALJ's 2022 Order does not resolve an "important issue completely separate from the merits of the action"[40]

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[38] *Gulfstream Aerospace Corp.*, 485 U.S. at 276; *see also 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).

[39] As the concurrence suggests, this element may also be unmet. *See Managed Care Advisory Grp., LLC v. United Healthcare of N. Carolina*, 2022 WL 792267, at *3–4 (11th Cir. Mar. 16, 2022) (the circuit court finding that an order to participate in arbitration was found to be adequately reviewable on appeal, thus not qualifying as an appealable collateral order).

[40] With respect, we question the basis by which the concurrence relies on an argument not raised by Respondent to the ALJ in opposing Complainant's motion, which resulted in the ALJ's 2022 Order, in suggesting that this element of the collateral order doctrine has been established. While the cited *Yates* decision may have been correctly decided on the facts before the ARB, it does not contain any detailed analysis of the term "abate" as used

and is not appealable under the collateral order doctrine recognized under 28 U.S.C. § 1291.

CONCLUSION

The Board concludes that this matter does not warrant the Board's discretionary interlocutory review. Accordingly, Respondent's request for interlocutory review is **DENIED**.

SO ORDERED.

[redacted]

STEPHEN M. GODEK
Administrative Appeals Judge

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

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within the applicable regulations. Generally, the term "abate" can be defined as "[t]he act of eliminating or nullifying" or "[t]he suspension or defeat of a pending action for a reason unrelated to the merits of the claim." *Abatement*, *Black's Law Dictionary* (11th Ed. 2019); *see also Louisiana Generating LLC v. Illinois Union Ins. Co.*, 121 F. Supp.3d 588, 593 (M.D. La. 2015), *vacated*, 831 F.3d 618 (5th Cir. 2016) ("'[A]bate' is often defined using language such as 'reduce in degree' or 'moderate.'") (internal quotations omitted); *City of Huntington v. AmerisourceBergen Drug Corp.*, 531 F. Supp.3d 1132, 1140 (S.D.W. Va. 2021) ("The cases suggest that the scope of the activity sought to be abated defines the relevant conduct."). As such, a determination that publication of the D. & O. to similarly situated employees (pilots) and those with supervisory authority over others (managers) as an effort intended to lessen, reduce or stop unlawful action in the workplace similar to that for which Respondent has been determined liable in the present case is not unreasonable on its face While Respondent has asserted, in briefing to the Board, that it has "properly preserved and has never waived" the issue of whether publishing the D. & O. can constitute abatement, the legal issue of waiver is not properly before the Board for determination at present and so will not be addressed.

BURRELL, Administrative Appeals Judge, concurring:

I concur in the panel's dismissal of the interlocutory petition for review. I would resolve the collateral order doctrine as satisfying the first and second factors but not the third. I would find that the ALJ's order to publish and refusal to stay the order to publish: (1) conclusively determine the disputed question concerning the order to publish; (2) resolve an important question separate from the merits of the ARB's remand order on damages; but (3) are reviewable on appeal from a final ruling on damages.[41] I disagree with the majority on the second factor because I conclude that the matter is an important issue separate from the merits as it concerns the ALJ's powers to "abate" a violation under AIR 21. We held in *Yates v. Superior Air Charter LLC*[42] that the ALJ did not have powers to order respondent to publish an opinion not unlike the order here. The ALJ's initial order to publish maneuvered around *Yates* by clothing the order to publish as mitigation and restoring a "condition" of employment to prevent future discrimination. If the ALJ could extend the statute's "abate the violation" remedy to direct a respondent to do affirmative acts as the ALJ did, this might extend to an unlimited host of other activities clothed in the protection of the employee. For the third factor, Petitioner had the burden to prove unreviewability, and it failed to persuade me that the ARB could not review the matter on appeal if it remained unresolved and parties appealed the issue to the ARB after the ALJ resolves the Order of Remand.

[redacted]

THOMAS H. BURRELL
Administrative Appeals Judge

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41 *Mohawk Indus., Inc.*, 558 U.S. at 106.

42 ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB Sept. 26, 2019).