



**IN THE MATTER OF:**

**KENNON MARA,**

**ARB CASE NO. 12-090**

**COMPLAINANT,**

**ALJ CASE NO. 2009-SOX-018**

**v.**

**DATE: February 22, 2013**

**SEMPRA ENERGY TRADING, LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Kennon Mara, *pro se*, Northport, New York**

*For the Respondent:*

**Kathleen M. McKenna, Esq., and Nathaniel M. Glaser, Esq., *Proskauer Rose, LLP*,  
New York, New York**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.  
Judge Edwards *concurring*.**

**FINAL DECISION AND ORDER**

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 of 2002, 18 U.S.C.A. § 1514A (Thomson/West 2011)(SOX), and its implementing regulations found at 29 C.F.R. Part 1980 (2012). In the course of the administrative proceeding on the action brought by Complainant Kennon Mara (Mara), against Respondent Sempra Energy

Trading, LLC (SET), the Administrative Law Judge (ALJ) issued an Order of Dismissal and Cancelling Hearing on July 11, 2012. Mara petitioned for review. We affirm.

## BACKGROUND

This case arose when Mara filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that SET retaliated against her and SET employees harassed her in violation of SOX. The proceedings in this case are set out in our prior orders.<sup>1</sup>

On May 9, 2012, while the case was pending before the ALJ, Mara moved to withdraw her claim under 29 C.F.R. § 1980.114, which permits a SOX complainant to bring an action in federal district court when the Secretary has not issued a final decision within 180 days after the complaint is filed.<sup>2</sup> After further briefing by the parties, the ALJ held a telephone conference on June 6, 2012, and denied Mara's motion to withdraw under 29 C.F.R. § 1980.114 on the grounds that her prior counsel waived her right to proceed in federal court under this provision. Transcript (Tr.) at 7-8 (June 6, 2012).<sup>3</sup> During the conference, Mara stated to the ALJ that she would no longer litigate her administrative case before the ALJ. Tr. at 9-10 (June 6, 2012).

On June 8, 2012, the ALJ entered an Order To Show Cause whether Mara's complaint should be dismissed with prejudice due to abandonment and failure to prosecute. Order To Show Cause at 3. In the Order to Show Cause, the ALJ acknowledged Mara's statements in pleadings and the June 6, 2012 telephone conference that she would no longer litigate her administrative SOX case. *Id.* In Mara's Response to the Order, she stated her intent to "not move forward . . . before [the] ALJ" due to "dire economic circumstances and [her] inability to navigate through this litigation as a pro se litigant." Mara Response at 4.

On July 11, 2012, the ALJ entered an Order of Dismissal and Cancelling Hearing. The ALJ stated in the order that during the June 6, 2012, telephone conference, "Mara firmly stated numerous times on the record that she does not intend on proceeding with her claim in this forum [and] . . . clearly stated in her filings and on the record that she will not attend the scheduled

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<sup>1</sup> See e.g., *Mara v. Sempra Energy Trading, LLC*, ARB No. 12-084, ALJ No. 2009-SOX-018 (ARB July 16, 2012); *Mara v. Sempra Energy Trading, LLC*, ARB No. 12-021, ALJ No. 2009-SOX-018 (ARB Mar. 20, 2012); *Mara v. Sempra Energy Trading, LLC*, ARB No. 12-021, ALJ No. 2009-SOX-018 (ARB Jan. 31, 2012); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-018 (ARB June 28, 2011).

<sup>2</sup> Mara filed a clarification to her motion on May 24, 2012, stating again that her motion to withdraw stems from 29 C.F.R. § 1980.114, so that she can prosecute her SOX claim in federal district court. Mara Clarification/Correction To My Motion To Withdraw My Sox Claim Pursuant To 29 C.F.R. § 1980.114 (filed with ALJ May 24, 2012) at 3; see also 18 U.S.C.A. § 1514A(b)(1)(B).

<sup>3</sup> See also ALJ Order Denying Motion to Invalidate Waiver (Sept. 28, 2011); ALJ Order Denying Complainant's Motion For Reconsideration (Nov. 25, 2011).

hearing in New York on July 30, 2012, conduct discovery, or otherwise prosecute her claim.” Order at 2. The ALJ held that “[b]ased on Mara’s consistent and unequivocal statements in her recent filings associated with her Motion to Withdraw, her reply to my Order to Show Cause and Respondent’s Motion to Dismiss, and during several telephonic hearings and conferences, I find that Mara has abandoned her claim and as a result, dismissal is appropriate at this time.” Order at 3. The ALJ stated that Mara has “remained firm in her decision not to proceed in this venue and, as such, the appropriate course of action at this time is dismissal of the case.” *Id.*

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the ARB. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378-69380 (Nov. 16, 2012).

The ARB reviews an ALJ’s procedural rulings for abuse of discretion, *i.e.*, whether the ALJ abused the discretion vested in him to preside over the proceedings. *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 2 (ARB June 15, 2012); *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026, slip op. at 4-5 (ARB May 31, 2012).

## DISCUSSION

The ALJ has discretion to dismiss a case for lack of prosecution.<sup>4</sup> This control is vested in ALJs’ interests in “manag[ing] their dockets in an effort to ‘achieve the orderly and expeditious disposition of cases.’” *Matthews*, ARB No. 11-136, slip op. at 5. In this case, the circumstances presented afforded the ALJ discretion to dismiss Mara’s case for failure to prosecute. At the June 6, 2012 telephone conference, Mara stated that she did not intend to proceed with her administrative case. Tr. at 9 (June 6, 2012) (“I am definitively waiving my right to a hearing in the ALJ venue.”). Mara further informed the ALJ that she would not attend a later hearing in the case:

Judge Calianos: You may end up with a final order at the end of the day, but it may not be the kind of order you’re looking for. Do you understand what I’m saying?

Ms. Mara: Yes

Judge Calianos: Okay. So, I understand ---

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<sup>4</sup> *Matthews*, ARB No. 11-136, slip op. at 5; 29 C.F.R. § 18.6(d)(2)(v) (2012) (permitting an ALJ to dismiss a case when a party fails to comply with ALJ’s orders); *see also Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999) (“Our review of a district court’s decision to dismiss an action for failure to prosecute is limited to whether the court abused its discretion.”).

Ms. Mara: But I won't be showing up and I want everybody to understand that. This is obviously – I don't want you to travel to New York and have me not show up.

Tr. at 10 (June 6, 2012). Based on those representations by Mara, the ALJ entered an Order to Show Cause whether her case should be dismissed for failure to prosecute. The ALJ stated that the Order to Show Cause was based on the following observations:

[Mara] clearly stated that she will not attend the scheduled hearing in New York on July 30, 2012. She also stated that she does not wish to waste resources by having me or the parties appear in New York for a hearing that she will not be attending. Mara further indicated that she will not conduct discovery in this matter, or otherwise prosecute her claim. These statements are echoed in Mara's filings submitted in conjunction with her motion to withdraw. For example, in her original motion to withdraw, she wrote: "I had made it quite clear that I would not be continuing through the discovery process and that I would be waiving my right to pursue my SOX claim in a hearing before the ALJ."

Order to Show Cause at 3 (footnote omitted).

Mara's Response to the Order to Show Cause did nothing to dispel the ALJ's concern that she would no longer litigate her administrative case. In her Response, Mara stated that her "past, difficult decision to discontinue the proceedings before an ALJ remains [her] decision today." Mara Response at 1. She also stated that her "decision to not move forward at this time before an ALJ was motivated primarily by my dire economic circumstances and my inability to navigate through this litigation as a pro se litigant." *Id.* at 4. *See also id.* at 5 ("It is my dire economic situation and my lack of representation that had led to the determination that I could no longer proceed before Your Honor.").

Based on Mara's statements in the record, the ALJ was well within his discretion to dismiss Mara's case on July 11, 2012, for failure to prosecute. *See, e.g., Hughley v. Eaton Corp.*, 572 F.2d 556 (6th Cir. 1978). By electing not to proceed with her administrative proceeding, we find that Mara has waived her right to appeal other issues in her case.<sup>5</sup>

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<sup>5</sup> In her brief supporting her petition for review, Mara moves the ARB to withdraw her case under 18 U.S.C.A. § 1514A(b)(1)(B). Mara Br. at 19. The statute, which permits a person to bring an action for de novo review in federal district court where an administrative SOX complaint has been pending for more than 180 days, does not require agency authority for such an action. 18 U.S.C.A. § 1514A(b)(1)(B). The agency requires only the filing of a "notice of . . . intention to file such a complaint." 29 C.F.R. § 1980.114(b). Mara requests the ARB's approval to file in district court. Having no ability to grant or deny a motion under § 1514A(b)(1)(B), we thus decline to act on that issue.

## CONCLUSION

For the foregoing reasons, the ALJ's July 11, 2012 order dismissing the case and cancelling the hearing for failure to prosecute is **AFFIRMED**.

**SO ORDERED.**

**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge

**LUIS A. CORCHADO**  
Administrative Appeals Judge

### **Judge Edwards, concurring.**

I concur with the majority that the ALJ was well within his discretion to dismiss Mara's complaint. In her petition, Mara seeks reversal of the ALJ's order dismissing her case for failure to prosecute, and in her brief advances arguments challenging the ALJ's September 28, 2011 Order denying her motion to invalidate the waiver, and the November 11, 2011 Order denying reconsideration. Because her case was dismissed for failure to prosecute, we are well within our discretion to decline to review the ALJ's interlocutory orders.

Interlocutory orders typically merge with final judgments for purposes of appellate review. *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 192 (2d Cir. 1999). However, when, such as here, a case is dismissed for failure to prosecute or abandonment, the final judgment and merger rules may not apply. *Id.*; see also *John's Insulation, Inc. v. L. Addison & Assoc.'s, Inc.*, 156 F.3d 101, 105-107 (1st Cir. 1998) (favoring "majority rule" that "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute"); *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1240 (9th Cir. 1979) ("[w]here the record shows that the denial of class certification caused the failure to prosecute, that ruling does not merge in the final judgment for purposes of appellate review, at least where \* \* \* the resulting dismissal was proper"); *Hughley*, 572 F.2d at 557 (holding that "the sufferance of a dismissal of a cause without prejudice is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right").

Courts reason that the normal rules of attachment on appeal do not apply when a case is dismissed for failure to prosecute because "[i]f a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal [for failure to prosecute], and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened." *Shannon*, 186 F.3d at 192 (quoting *Palmieri v. Defaria*, 88 F.3d 136, 139 (2d Cir. 1996)). "This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291." *Id.* There are limited exceptions to this principle. See, e.g., *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 179 (2d Cir. 1990) (court of appeals holds, as an exception to the general rule, that "an order

denying a motion for class certification merges into a final judgment, which results from the class representative's failure to prosecute its individual claim.”), cert. denied, 498 U.S. 1025 (1991). Absent the general rule, a party that disagreed “with an interlocutory ruling could obtain an appeal of that ruling by simply refusing to prosecute his or her lawsuit, [and] ‘adherence [to the merger rule] would reward [that] party for dilatory and bad faith tactics.’” *Id.*, quoting *John’s Insulation*, 156 F.3d at 105; see also *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 140-142 (2d Cir. 2011).

There is no reason to depart from the general rule here. Mara expressly stated to the ALJ at a hearing and in her pleadings that she would no longer prosecute her administrative case. At the June 6, 2012 telephone conference, she stated to the ALJ that she would not prosecute her administrative case, and that she would not appear at the next hearing. Tr. at 9-10 (June 6, 2012). Mara also stated in her Response to the ALJ’s Order to Show Cause that she would not further prosecute her case. Mara Response at 1, 4-5. Based on these statements in the record, the ALJ was well within his discretion to cancel the hearing and dismiss her case. Mara argues that her financial hardship forced her to abandon her administrative claim. However, Mara cannot refuse to prosecute her case before the ALJ – *e.g.*, refuse to attend a scheduled hearing, conduct discovery, and file responsive pleadings – and at the same time argue her appeal of interlocutory issues to the ARB. The administrative procedures for SOX cases before the Department of Labor provide for a hearing, an ALJ order on the merits, and rights to petition the ARB for review. 29 C.F.R. §§ 1980.109-110. Mara was given full opportunity to litigate her SOX case before the agency, but for reasons unrelated to administrative procedures, she voluntarily determined that she was unable to prosecute her case. Given these circumstances, there is no reason for us to depart from the general rule and review any interlocutory order in conjunction with this petition for review of the ALJ’s order dismissing Mara’s case for failure to prosecute.

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**