U.S. Department of Labor

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

In the Matter of:

RUSSELL JOHN CHILDS,

PROSECUTING PARTY,

v.

DIMENSIONALMECHANICS, INC.,

RESPONDENT.

ARB CASE NO. 2021-0001

ALJ CASE NO. 2017-LCA-00008

DATE: September 30, 2021

Appearances:

For the Prosecuting Party:
Russell Childs, Ph.D.; *pro se*; London, United Kingdom

***For the Respondent*:**
Qingqing Miao, Esq.; *Lane Powell PC*; Seattle, Washington

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1101, et seq., as amended, and its implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. Prosecuting Party, Russell John Childs (Childs), alleges that Respondent DimensionalMechanics, Inc. (DimensionalMechanics) failed to pay the required wage rate, made unauthorized deductions, failed to offer some of the same benefits it offered to U.S. workers, misrepresented a material fact on its labor condition application, failed to effectuate a *bona fide* termination, and terminated him in retaliation for making complaints regarding H-1B violations. Respondent denies the allegations. The Administrative Law Judge (ALJ) found two violations and awarded damages of $1,359.12 on September 15, 2020, in a Decision and Order (Decision).

Childs timely appealed to the Administrative Review Board (ARB or Board) on October 5, 2020.

For the following reasons, we affirm the ALJ's Decision and Order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue agency decisions in this matter.[1]

BACKGROUND

Prosecuting Party, Childs, was hired by DimensionalMechanics as a Software Development Engineer. He worked for DimensionalMechanics for three months. The Company terminated his employment for performance issues. Childs is a British citizen who previously worked in the United States for other employers and, at the time he applied with DimensionalMechanics, had an H-1B visa that provided him with eligibility for transfer to another employer. Childs was living in the United Kingdom before coming to work for DimensionalMechanics.

Problems with Childs' performance and behavior began almost immediately after he began work. He argued with coworkers, was insubordinate, and refused to complete assignments. The record is replete with evidence that Childs was a difficult employee and colleague. After receiving several warnings about his behavior, attitude, and performance, Raveev Dutt (Dutt), Chief Executive Officer of DimensionalMechanics, decided to terminate Childs' employment. Childs was terminated via e-mail on November 9, 2016. In the termination e-mail, Dutt offered to pay for Childs' return fare to the United Kingdom. Dutt followed up with Childs a few minutes later in another email, and asked Childs about his plans. Dutt reiterated his offer to pay Childs' airfare if he planned to return to the United Kingdom. However, Childs denies seeing this second e-mail. Childs further claims that he sent letters to Dutt, via the postal service, asking for the Company to pay for his return airfare. On November 10, 2016, Childs contacted United States Citizen and Immigration Services (USCIS) to obtain a visitor's visa.

In April 2017, during the proceedings for this case, DimensionalMechanics learned that Childs did, in fact, intend to return to the United Kingdom and again offered to pay for his flight. Eventually, DimensionalMechanics purchased a flight for the last day Childs could legally remain in the United States, even though

---

[1] 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. 13186 (Mar. 6, 2020).

Childs requested a ticket with an open departure date. Childs never used the ticket, and spent some time in Canada before eventually returning to the United Kingdom.

Childs filed a timely complaint with the Wage and Hour division. The Administrator of the Wage and Hour division found no violation. Childs requested a hearing from the Office of Administrative Law Judges (OALJ). The hearing was held on February 21 and April 17-18, 2018. On September 15, 2020, the Administrative Law Judge (ALJ) issued a Decision & Order, finding that DimensionalMechanics committed two violations. First, it made an unauthorized wage deduction. Second, it failed to automatically enroll Childs in its 401(k) plan, as it did with other employees. The ALJ found Childs' other objections without merit. Childs timely appealed to the Board.

In an order dated October 27, 2020, the Board issued a Notice of Intent to Review and Briefing Schedule, accepting the following issues for review:

1. Did the ALJ correctly determine that Respondent correctly established the actual wage?
2. Did the ALJ correctly determine whether Respondent paid the actual wage and made unauthorized deductions?
3. Did the ALJ correctly determine that Respondent did not violate 20 C.F.R. § 655.731(c)(10)(i)(A) by including repayment language in the employment contract without collecting any payment?
4. Did the ALJ correctly determine that Respondent achieved a *bona fide* termination when it ended Prosecuting Party's employment?
5. Did the ALJ correctly determine that the Respondent did not misrepresent Prosecuting Party's job duties on the Labor Conditions Application?
6. Did the ALJ correctly determine that Respondent did not retaliate against Prosecuting Party in violation of 20 C.F.R. § 655.801?
7. Did the ALJ correctly assess damages?
8. Has Prosecuting Party established that there are grounds for a new hearing?

In its response brief, which DimensionalMechanics calls a cross-appeal, Respondent challenges the ALJ's findings that it:

- Made an unauthorized deduction
- Failed to offer the same benefits to Childs as other employees by failing to enroll him in the 401(k) program

On December 2, 2020, Childs filed a motion with the ARB requesting to introduce new evidence into the record.

DISCUSSION

At the outset, we reject two of Childs' claims. After we accepted the issues for review in this case, Childs submitted a motion to admit new evidence. The regulations governing OALJ hearings specify that "no additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed."[2] Here, Childs failed to show that any of his new evidence could not have been previously discovered with reasonable diligence and presented at the hearing. We also reject Childs' contention that there are grounds for a new hearing. There is nothing in the record to suggest that the ALJ committed procedural error, prejudiced Childs, or otherwise prevented him from presenting a thorough and complete case at the hearing.

We also decline to address the two issues DimensionalMechanics raised in its response. In order for those issues to be accepted for review, DimensionalMechanics needed to file a timely cross-appeal or petition for review. The Board adheres to the principle that "[a] party who neglects to file a cross-appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder."[3] Accordingly, we decline to address the issues DimensionalMechanics raised in its response.

As to the other issues accepted for review in this case, only one requires in-depth analysis. We find the ALJ correctly determined that: 1) Respondent properly established the actual wage; 2) the LCA application did not misrepresent Childs' role; 3) the ALJ correctly determined that the $1,245 was an unauthorized deduction; and 4) DimensionalMechanics did not violate 20 C.F.R. § 655.731(c)(10)(i)(A) by including repayment language in the employment contract without collecting any payment.

As to Childs' retaliation claims, we find that the ALJ's factual findings are supported by the record and that Childs' did not engage in protected activity. A thorough review of the record shows that the ALJ's decision is well reasoned, consistent with precedent, and supported by the record.

The remaining issue is whether Respondent effectuated a *bona fide* termination of Complainant's employment when it repeatedly offered to pay for his return transportation. DimensionalMechanics paid for return transportation when it discovered that Childs was still in the United States during preparation for this

---

[2] 29 C.F.R. § 18.90(b)(1).

[3] *Batyrbekov v. Barclays Capital*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025, slip op. at 8 (ARB July 16, 2014) (quoting *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 232 (1st Cir. 2007) (citation omitted)).

proceeding. An H-1B employer is relieved of the obligation to pay the employee's wages if there has been a *bona fide* termination of the employment relationship. To effect a *bona fide* termination, an employer must: 1) give notice of the termination to the H-1B worker; 2) give notice to the USCIS; and 3) under certain circumstances, such as when an employer dismisses an employee, provide the H-1B non-immigrant with payment for transportation home.[4] Here, there is no dispute that DimensionalMechanics notified both Childs and USCIS that his employment was terminated. The only issue is whether DimensionalMechanics satisfied its requirement to provide return transportation.

Childs alleges that DimensionalMechanics failed to effect a *bona fide* termination when it did not pay for a return ticket home for him until April 20, 2017, five months after he was terminated from his employment on November 9, 2016. Childs further claims that he attempted to have DimensionalMechanics pay his flight by contacting the company via letter, at an address in Redmond, Washington, not associated with DimensionalMechanics.

DimensionalMechanics details in its brief its attempts to contact Childs and its offers to pay for his transportation home. DimensionalMechanics also contends that Childs filed with USCIS to change to another legal status the day after he was terminated, on November 10, 2016. When DimensionalMechanics learned that Childs was still in the United States in April 2017, it then bought Childs a return ticket home. Eventually, rather than use the ticket, Childs departed to Canada when he no longer had legal status in the United States. In its brief, DimensionalMechanics argues that Childs' change to a different lawful status was sufficient to effect the *bona fide* termination and alleviate it of the duty to pay for his return transportation.

The ALJ found that DimensionalMechanics effected a *bona fide* termination, relying in part on the ARB's decision in *Puri v. Univ. of Alabama Birmingham Huntsville*.[5] In *Puri*, the employee remained in the United States to marry a United States citizen. There, the Board reaffirmed that "the facts of a case may warrant an exception to a strict application of these requirements in compliance with the H-1B visa program's statutory and regulatory scheme."[6] The Board has also held that an employer is not required to pay return transportation when an H-1B employee decides to remain in the United States to begin employment with a different

---

[4] 20 C.F.R. § 655.731(c)(7)(ii); *see Chettypally v. Premier IT Solutions, Inc.*, ARB No. 2017-0057, ALJ No. 2017-LCA-00006, slip op. at 4 (ARB Jan. 21, 2020) (stating requirements of a *bona fide* termination).

[5] ARB No. 2013-0022, ALJ Nos. 2012-LCA-00010, 2008-LCA-00038, 2008-LCA-00043, slip op. at 8 (ARB Sept. 17, 2014).

[6] *Id.* (*citing Batyrbekov*, ARB No. 2013-0013).

employer.[7] In *Batyrbekov v. Barclays Capital*, the Board explained that with Congress' statutory changes allowing an H-1B visa transfer to another employer, it no longer made sense to adhere to the three-part *bona fide* termination test in some circumstances.[8]

In his decision, the ALJ noted that the regulatory language of 20 C.F.R. § 655.731(c)(7)(ii) specifies an employer's obligation to provide reasonable return transportation costs arises "only under certain circumstances." He further recognized that the ARB has previously required payment of return transportation costs when the employee has "not otherwise obtained lawful status."[9] The ALJ also emphasized that the Department of Labor's comments in the preamble to Section 655.731(c)(7)(ii) provide support for this interpretation of the regulation where the Department makes clear that "an H-1B worker must either leave the United States or seek a change in immigration status once its employment relationship has been terminated."[10]

The ALJ recognized that generally a statement "that return flights 'will be provided'" is not sufficient to satisfy the return transportation requirement but found that, in this case, DimensionalMechanics had effectuated a *bona fide* termination.[11] The ALJ noted that in some cases, the Board has found that offers to provide for the reasonable costs of return transportation were sufficient.[12] In *Baiju v. Fifth Avenue Committee*, the employer offered to pay return transportation but the employee did not accept the offer. Applying *Baiju* explicitly, and noting that in this case the employer, repeatedly offered to pay for his airfare back to the United Kingdom, the ALJ found that DimensionalMechanics had effected a *bona fide* termination.[13] The ALJ noted that Childs was not responsive to DimensionalMechanics' attempts to contact him, and the ALJ also declined to credit Childs's dubious claims that he attempted to redeem the flight cost via letter.

---

7 *Batyrbekov*, ARB No. 2013-0013, slip op. at 10-12.

8 "We think that back wage claims against a former employer must stop accruing if it is clear that the H-1B employee changes from one H-1B employer to another and USCIS approves the subsequent H-1B petition allowing for the change." *Id*., slip op. at 10.

9 *Puri*, ARB No. 2013-0022, slip op. at 8 (citation omitted).

10 65 Fed. Reg. 80,171 (Dec. 20, 2000).

11 *See Jinna v. MPRSoft, Inc.*, ARB No. 2019-0070, ALJ No. 2018-LCA-00039, slip op. at 8 n.4 (ARB Apr. 15, 2020) (per curiam).

12 *Baiju v. Fifth Ave. Comm.*, ARB No. 2010-0094, ALJ No. 2009-LCA-00045, slip op. at 9 (ARB Apr. 4, 2012) (reissued decision), *aff'd*, No. 12–cv–5610, 2014 WL349295 (E.D.N.Y. Jan. 31, 2014); *Wage and Hour Div., U.S. Dep't of Labor v. Univ. of Miami [Wirth]*, ARB Nos. 2010-0090, -0093, ALJ No. 2009-LCA-00026, slip op. at 8-9 (ARB Dec. 20, 2011).

13 ARB No. 2010-0094.

We have previously held that changing to another lawful status alleviates the employer of its burden to provide for the reasonable costs of return transportation in some circumstances.[14] The Department's regulations contemplate such a situation by noting the return transportation requirement only applies in "certain circumstances."

The dispositive fact in this case, however, is DimensionalMechanics' good faith effort to comply with the law. The employer repeatedly offered to purchase a ticket for his return flight but never received a response. Eventually, DimensionalMechanics paid for a return ticket for Childs. DimensionalMechanics' good faith attempts to comply with the law, as demonstrated by repeated attempts to contact Childs to pay for his return transportation home, show that it intended to effectuate a *bona fide* termination when it ended Childs' employment on November 9, 2016.

Accordingly, we find that DimensionalMechanics effectuated a *bona fide* termination when it notified USCIS and Childs of the end of his employment and offered to pay for his return transportation. The ALJ's finding is affirmed.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order.

SO ORDERED.

---

[14] *See generally Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029 (ARB Feb. 14, 2017) (finding an employer effectuated a *bona fide* termination when the employee voluntarily stayed in the United States); *Baiju*, ARB No. 2010-0094 (finding that the employer's offer to pay return transportation was sufficient when the employee did not accept the offer); *Puri*, ARB No. 2013-0022 (*bona fide* termination when employee changed legal status due to marriage).