U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 March 2011

CASE NO.: 2010-LCA-00024

In the Matter of

ARVIND GUPTA
Prosecuting Party

v.

WIPRO LIMITED (trading as WIPRO TECHNOLOGIES)
Respondent

DECISION AND ORDER GRANTING SUMMARY DECISION; AND DISMISSING CASE

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (the "Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.

Procedural History

The Prosecuting Party is an individual who is a resident of India. He is not represented by counsel. The Respondent, Wipro Technologies, is a company that had an office located in Mountain View, California.[1]

The record before me indicates that the Prosecuting Party made a complaint under the Act against the Respondent in May 2009. ("WHISARD Complaint Information Form," dated May 7, 2010 (05/07/2010)). The complaint was initially rejected as untimely; however, in June 2009 the Prosecuting Party provided additional information regarding "unauthorized deductions" and the complaint was accepted for investigation, with the Prosecuting Party considered as an aggrieved party based on status as a business competitor of the Respondent. See 20 C.F.R. § 655.715; see also WHISARD Complaint Information Form. By letter dated January 7, 2010, the H-1B Regional Enforcement Coordinator, Wage and Hour Division, U.S. Department of Labor, based in San Francisco, California, informed the Prosecuting Party that "there is reasonable

[1] By fax dated June 24, 2010 to Administrative Law Judge (ALJ) Russell D. Pulver, of the San Francisco District Office, Office of Administrative Law Judges, to whom this matter was then assigned, the Prosecuting Party requested that his identity remain confidential "to the extent possible." In a previous order, dated November 3, 2010, I found it was not yet necessary to provide notice of this matter to the Respondent. To date, the Respondent has not been served with notice of these proceedings.

cause to conduct an investigation based on the information you have provided as per 20 C.F.R. § 655.806(a)(5)."

Subsequently, by letter dated May 7, 2010, the District Director, Wage and Hour Division, in Lawrenceville, New Jersey (hereinafter, District Director), informed the Prosecuting Party as follows: "Based on the original information received an investigation was assigned. However, after a review of all the information that has been provided, it has been determined that there is no reasonable cause."[2] This letter also invited the Prosecuting Party to submit additional information, which he did.

By letter dated May 21, 2010, the Prosecuting Party submitted a request for hearing to the Office of Administrative Law Judges.[3] By order dated June 30, 2010, based on a communication from the Prosecuting Party indicating a preference for a hearing in New York City, ALJ Pulver transferred the matter to the Cherry Hill (New Jersey) District Office, and it was assigned to me in due course.

By letter dated August 16, 2010, the District Director informed the Prosecuting Party that: "[u]pon review, we have determined that there is no reasonable cause to conduct an investigation based on the new information you have provided. You have not provided any new allegations." Thereupon, the Prosecuting Party filed a "Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and Prehearing Order," received in my office on September 1, 2010, in which he renewed his request for a hearing and provided copies of documents that, in his view, are relevant to this matter. He denominated the documents as "Exhibits" 1 through 12.

On November 3, 2010, I issued an Order directing the Administrator to show cause why the Administrator should not be required to follow the regulatory requirements set forth in 20 C.F.R. § 655.806(b) and 20 C.F.R. § 655.815, and provide the Prosecuting Party the opportunity to request a hearing.

By "letter-brief" dated December 2, 2010, the Administrator responded to the Order, stating that the Prosecuting Party does not have the requisite standing as an "aggrieved party" under the Act, and therefore this matter should be dismissed. The Administrator conceded that a "reasonable cause" letter had been issued but stated that afterward it was determined that the Prosecuting Party did not have "aggrieved party" status, and therefore an investigation was "legally insupportable." Letter-brief at 5. The Administrator submitted two "Exhibits" to its Response, denominated as Exhibits A and B.

By "Reply Brief" received December 20, 2010, Prosecuting Party responded that he is indeed an "aggrieved party" within the meaning of the Act and that the Office of Administrative Law Judges has jurisdiction to conduct a hearing pursuant to 20 C.F.R. §§ 6555.806(a) and

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[2] It appears, from the record, that the Prosecuting Party's complaint was transferred to Lawrenceville, New Jersey, for action. However, the record is silent as to the reason(s) for any transfer.

[3] At that time, he also requested that his hearing request be held in abeyance, pending a final determination based on additional evidence he had provided to the District Director.

655.820(b)(1). The Prosecuting Party also asserted that the principle of equitable tolling should apply to his complaint, to excuse any untimeliness.

I construed the Administrator's Response as a Motion for Summary Decision, based on the assertion that as a matter of law the Prosecuting Party is not an "aggrieved party." By Order dated December 23, 2010, I invited the Administrator to supplement the Motion. I also authorized the Prosecuting Party to submit a response to the Administrator's submission.

By letter-brief dated January 28, 2011, the Administrator submitted a response, and attached several exhibits.[4] The Prosecuting Party's response (titled "Supplemental Brief," and including Exhibits 13-16) was received in my office on February 11, 2011.

Discussion

I have reviewed the entire record before me. The record before me consists of the following items:

- Administrative Record Prior to Referral to the Office of Administrative Law Judges, containing the following items:
    - "WHISARD Complaint Information Form," printed May 7, 2010 (05/07/2010), reflecting initiation of complaint on May 5, 2009 (05/20/2009);
    - Wage and Hour Division (San Francisco) letter to Prosecuting Party, dated January 7, 2010, informing him investigation had been initiated;
    - Wage and Hour Division (Lawrenceville, NJ) letters to Prosecuting Party and to the Respondent (Employer), dated May 7, 2010, informing them "no reasonable cause" had been found;
    - Prosecuting Party's letters to Chief Administrative Law Judge, dated May 21, 2010; and to ALJ Pulver, dated June 24, 2010, requesting a hearing.

- Prosecuting Party's "Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and PreHearing Order," received on September 1, 2010, with Exhibits 1 through 12. In pertinent part, these items are summarized as follows:
    - In general, the complaint alleged that the Respondent employer was taking unauthorized deductions from employee pay. The Prosecuting Party alleged that this practice occurred during his employment (which ended in 2006) and was continuing, with regard to other employees, as late as June 2009. Exhibit ("EX") 10 is a handwritten complaint on WH-31, a Department of Labor form, dated April 7, 2010. In this document the Prosecuting Party stated: "I am a self-employed Recruiter in India" and indicated he received the information about the deductions from one other employee's pay in the course of his "placement activities." The form reflects the complaint was taken over the telephone.[5] In a

[4] The Administrator did not denominate the Exhibits. I denominate them now as Exhibits C through E.
[5] It is not entirely clear, from the record, how Exhibit 10, which does not appear to be in the Prosecuting Party's handwriting, came into the possession of the Prosecuting Party.

printed addendum to the form, the Prosecuting Party stated he abandoned his efforts to set up the recruitment business "to pursue other opportunities. EX 10

- Administrator's Letters dated December 2, 2010 and January 28, 2011, with Exhibits A through E.[6] In pertinent part, these items are summarized as follows:

  - Exhibit B is a copy of an exchange of e-mails between the Prosecuting Party and a Wage-Hour employee, dated April 22, 2010. In the exchange, the Prosecuting Party clarified that he did not actually set up a recruiting business, but was in the initial stage of setting up the business after returning from the United States in May 2009 when he received the information pertaining to the Respondent's employee. He stated he later abandoned the business, in May or June 2009.

- Prosecuting Party's "Reply-Brief in Response to Deputy Administrator's Letter-Brief," received on December 20, 2010.

- Prosecuting Party's "Supplemental Brief," received on February 11, 2011, with Exhibits 13 through 16. These items are summarized as follows:

  - In the Prosecuting Party's declaration, he stated that he arrived in India on May 1, 2009, upon his return from the United States, and that he submitted the pay stub of the Respondent's employee to "DOL, San Francisco District Office" in June 2009. The Prosecuting Party stated he received the pay stub as part of an initial recruitment and placement-related activities "as part of my efforts to create a database of possible candidates for my business." The Prosecuting Party also stated that he "postponed the business idea later due to considerations of running a financially uncompetitive business" and he intended to revive his business plans at a "more opportune time in the future." EX 15.

<u>The Governing Regulations</u>

This matter is governed by regulations at 20 C.F.R. Part 655, Subpart I, "Enforcement of H-1B Labor Condition Applications and H1-B1 Labor Attestations." In particular, 20 C.F.R. §§ 655.805-655.807 apply in this matter. These provisions provide the following:

- 20 C.F.R. § 655.805 lists the types of violations under the H-1B program the Administrator may investigate. These include the failure to pay wages as required under 20 C.F.R. § 655.731 (which addresses the requirements to pay prevailing wages and limits authorized deductions, among other things).
- 20 C.F.R. § 655.806 states that any aggrieved party, as defined in 20 C.F.R. § 655.715, may file a complaint.[7] This section also states that no hearing or appeal shall be available

[6] As noted above, Exhibits A and B are attached to the Administrator's letter of December 2, 2010; Exhibits C through E are attached to the Administrator's letter of January 28, 2011.
[7] An aggrieved party, as defined in 20 C.F.R. § 655.715, is "a person or entity whose operations or interests are adversely affected by the employer's alleged noncompliance" and includes, but is not limited

where the Administrator determines that an investigation of a complaint is not warranted (20 C.F.R. § 655.806(a)(2)). Moreover, this provision also requires that a complaint must be filed not later than 12 months after the latest date on which the alleged violations were committed (20 C.F.R. § 655.806(a)(5)).

- 20 C.F.R. § 655.807 states that persons who are not aggrieved parties may also submit information about possible violations of the H-1B program. Under such facts, however, the Administrator must refer allegations to the Secretary of Labor, prior to commencing an investigation. 20 C.F.R. § 655.807(g). The Secretary of Labor, the Deputy Secretary, or an Acting Secretary must personally authorize an investigation, and may do so only upon certifying, among other things, that there is "reasonable cause to believe the alleged violations are willful, that the employer has engaged in a pattern or practice of such violations, or that the employer has committed substantial violations, affecting multiple employees." 20 C.F.R. § 655.807(h). As with allegations by aggrieved parties, allegations by others must allege violations within 12 months after the latest date of violation. 20 C.F.R. § 655.807(h)(iii). No hearing shall be available from a decision from the Administrator declining to refer allegations to the Secretary, or from a decision from the Secretary declining to certify an investigation is warranted. § 655.807(h)(2).

The Parties' Positions

I have reviewed the parties' positions, as contained in their submissions, listed above.

In sum, the Prosecuting Party's position is that he is an "aggrieved party" under the Act and the applicable regulations, either as a former employee of the Respondent; or a competitor of the Respondent; or a "future or potential competitor" of the Respondent. Reply Brief at 5-6; Supplemental Brief at 12-14. The Prosecuting Party also asserts that the principle of equitable tolling should be applied, to remedy any issues stemming from the untimeliness of the complaint he made as a former employee. Reply Brief at 7-8; Supplemental Brief at 14-18. Additionally, the Prosecuting Party has noted, he should be considered a "credible source" for information about the Respondent's activities. Supplemental brief at 11-12. The Prosecuting Party also suggested that, to the extent the Administrator exercises discretion over which matters to investigate, the Administrator's discretion is inapplicable to cases that have been referred to an administrative law judge because a hearing has been requested. Reply brief at 21-27.

The Administrator's position can be summarized quite succinctly. The Administrator asserts the following:

- The Prosecuting Party's complaint as a former employee is untimely, and the circumstances under which equitable tolling would be appropriate do not apply under the facts of his complaint. Letter-brief of Jan. 28, 2011, at 2-3.

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to any the following: a worker whose job, wages, or working conditions are adversely affected by the employer's alleged noncompliance; a bargaining representative for workers; a competitor adversely affected by the employer's alleged non-compliance; a government agency that has a program impacted by the employer's alleged non-compliance.

- The Prosecuting Party is not an "aggrieved party" as a competitor of the Respondent because he did not in fact operate a competing business. Letter-brief of Dec. 2, 2010, at 3-4.
- The Administrator declined to exercise discretion to investigate the allegations against the Respondent under the regulatory provisions permitting investigation based on information from a "credible source," and this decision is not reviewable by an administrative law judge. Letter-brief of Dec. 2, 2010, at 2-3.

Additionally, the Administrator conceded that the Prosecuting Party was initially informed that an investigation would be opened with regard to his allegations. The Administrator also stated: "However, after the letter had been issued, the Wage and Hour Division realized that Mr. Gupta did not have aggrieved party status, and that an investigation based on that status was legally insupportable. As a result, the Wage and Hour Division issued the determination letter and the second reasonable cause letter." Letter-brief of Dec. 2, 2010, at 5.

I find that, in the event that the regulations do not authorize the Prosecuting Party to request a hearing under the factual circumstances of this case, then it is appropriate that I dismiss this matter in its entirety. 20 C.F.R. § 655.820; 29 C.F.R. § 18.41(a). However, in the event that I conclude that the Prosecuting Party is entitled to request a hearing, but the facts establish that there are no material facts in dispute and the Administrator is entitled to Summary Decision, then it is also appropriate that I issue a final decision that dismisses this matter in its entirety. See 29 C.F.R. § 18.41(a). If, however, I find that the Prosecuting Party is entitled to request a hearing and there are material facts in dispute, then summary decision is not appropriate and this matter should be scheduled for hearing.

In my Order dated December 23, 2010, I construed the Administrator's letter-brief of December 2, 2010 as a Motion for Summary Decision because portions of the letter-brief suggested that, in the event the Prosecuting Party was entitled to request a hearing (which the Administrator did not concede), under the specific facts of the case the Prosecuting Party is unable to prevail. Letter-brief of Dec. 2, 2010, at 5.

Findings of Fact

Based upon my review of the record, consisting of the items listed above, I make the following findings of fact:

1. The Prosecuting Party is a former employee of the Respondent and was employed under the H-1B program, pursuant to an approved LCA application. EX 1; EX 3.

2. The Prosecuting Party left the Respondent's employ in March 2006. EX 7; EX 14.

3. At the end of April 2009, the Prosecuting Party left the United States, and returned to India, his country of residence. EX 14.

4. In May 2009, the Prosecuting Party made a complaint to the Administrator, asserting that the Respondent's practice of taking certain deductions from employee pay violated the Act. Administrative Record (WHISARD Complaint Information Form).

5. Initially, the Prosecuting Party's complaint pertained to his own employment. EX 7; EX 10; Administrative Record (WHISARD Complaint Information Form).

6. By letter dated May 27, 2009, the Administrator's representative rejected the Prosecuting Party's complaint because it was untimely, not having been filed within 12 months of the Respondent's most recent alleged violation. EX 13.

7. At some unknown date, and for unknown reasons, the responsibility for the Prosecuting Party's complaint about the Respondent was transferred from the Administrator's San Francisco office to the Lawrenceville office. Administrative Record

8. The Prosecuting Party also complained about the Respondent's practice (taking deductions from pay) with regard to one current employee of the Respondent. EX 10.

9. The Prosecuting Party received the information regarding the Respondent's deductions of pay from the current employee because he obtained a copy of the employee's pay stub, dated June 1, 2009, covering the time period of May 2009. EX 10; EX 6.

10. The Prosecuting Party informed the Administrator that this was the only paystub of the employee that he had. EX 14.

11. The Prosecuting Party informed the Administrator's representative that he obtained the employee's pay stub in the course of his actions as a business recruiter. EX 14.

12. Because the Prosecuting Party represented that he was a business recruiter, the Administrator decided to open an investigation, based on the Prosecuting Party's status as a business competitor. Administrative Record (WHISARD Complaint Information Form).

13. By letter dated January 7, 2010, the Administrator informed the Prosecuting Party by letter that an investigation had been opened. Administrative Record; EX 8.

14. By e-mail dated April 22, 2010, the Prosecuting Party informed the Administrator's investigator that he decided not to start a recruiting business. EX B.

15. On May 7, 2010, by letter the Administrator informed the Prosecuting Party there was "no reasonable cause." This letter did not explain to the Prosecuting Party the basis for the Administrator's determination. Administrative Record.

16. Based on the dates of the Prosecuting Party's statement that he did not have a business and the Administrator's letter to the Prosecuting Party, I infer that a basis for the Administrator's determination was the Prosecuting Party's statement.

17. On May 21, 2010, the Prosecuting Party requested a hearing before the Office of Administrative Law Judges. Administrative Record.

Discussion

The first issue to address is whether, under the facts of this case, the Prosecuting Party is entitled to request a hearing. If the Prosecuting Party is not entitled to request a hearing, then this matter must be dismissed, as I have no jurisdiction over matters for which a hearing is not authorized. See Watson v. Elec. Data Sys. Corp, ARB Case Nos. 04-023, 04-029, 04-050 (ARB: May 31, 2001), slip. op. at 6. As the facts in the instant case indicate, the Prosecuting Party was initially informed that an investigation would be initiated, but then later he was informed that there was no "reasonable cause" to conduct an investigation. Although the Administrator's representative informed the Prosecuting Party there was no "reasonable cause" to conduct an investigation, the Administrator's representative did not explain why an investigation was not to be conducted. In subsequent submissions to me, the Administrator explained that, after initially accepting the Prosecuting Party's allegations for investigation, the Administrator later determined that the Prosecuting Party could not be a business competitor of the Respondent, because the Prosecuting Party admitted that he had never set up a business. Letter-brief of Dec. 2, 2010, at 4-5.

I find that the Administrator's actions, while not unreasonable upon review of the materials the Prosecuting Party submitted, are inconsistent with the regulation, which mandates that, once a complaint is accepted for investigation, an investigation shall be conducted and a determination letter issued by the Administrator. 20 C.F.R. §§ 655.806(a)(3), 655.806(b). A determination letter, under the regulation, a fortiori triggers a right to request a hearing. 20 C.F.R. §§ 655.815(a)(2), 655.820.

Based on the record before me, it appears that the Administrator's rationale for not issuing a determination letter under 20 C.F.R. §655.806(b) is the conclusion that the Prosecuting Party did not have a colorable claim, because he was not an aggrieved party within the meaning of the regulation. I find the Administrator's assertion that the Administrator should not be compelled to proceed with a hearing where the Prosecuting Party's position is "legally insupportable" is misplaced. See Letter-brief of Dec. 2, 2010, at 5. Under 20 C.F.R. § 655.805, a determination letter contains the Administrator's findings as to whether a violation of the Act and its regulations occurred. Thus, the determination letter is the Department's mechanism whereby a party whose complaint has been accepted for investigation is informed of the outcome. Notably, as 20 C.F.R. § 655.815(c)(1) indicates, a determination letter is issued whether or not the complaining party's allegations result in a finding that a violation occurred. In addition, if no party requests a hearing, the Administrator's determination becomes final, and is not appealable. Thus, the issuance of a determination letter serves multiple purposes: it constitutes the means for notifying parties of the outcome of an investigation; provides a forum for a party to be heard, if the party requests a hearing; and serves as a record of the Administrator's action, in the event that no party requests a hearing.

The proper procedure for the Administrator to follow, when a complaining party's allegations do not establish a violation, appears to be that used in Ndiaye v. CVS Store No. 6081, No. 2004-LCA-00036, a case with facts very similar to the facts in the instant case. In Ndiaye, the Administrator determined that the Prosecuting Party's complaint was untimely, and the Prosecuting Party requested a hearing. Prior to the hearing, the Respondent filed a Motion for Summary Decision under 29 C.F.R. § 18.40, which the administrative law judge granted. Ndiaye v. CVS Store No. 6081, No. 2004-LCA-00036 (ALJ: Sept. 10, 2004). The Administrative Review Board affirmed. Ndiaye v. CVS Store No. 6081, ARB No. 05-024 (ARB: Nov. 29, 2006).[8]

In its submissions in the instant matter, the Administrator emphasized that the governing regulations vest the Administrator with considerable discretion, including the discretion to determine what allegations to investigate. Letter-brief of Dec. 2, 2010, at 2-3. Indeed, the Administrator asserts:

> Requiring the Deputy Administrator to investigate and prosecute a case pursuant to 20 C.F.R. § 655.806 on these facts would entail mischievous consequences. [The Respondent] would be entitled to a dismissal of any case launched under subpart 806 on the grounds that [the Prosecuting Party], by his own admissions of fact, is clearly not an aggrieved party. In the meantime, the Deputy Administrator would be obliged to expend investigative and prosecutorial resources on a case that would have to be dismissed by this Court (sic) on [the Respondent's] motion.

Letter-brief of Jan 28, 2011, at 4. In a footnote, the Administrator also asserted: "As outlined in the letter-brief, it was Congress's intent that investigative power be exercised under clearly and carefully defined circumstances, and that investigations that did not fit those circumstances could not be continued." Letter-brief of Jan. 28, 2011, at 4 n. 2.

I agree that the Act and the regulation vest a significant degree of discretion with the Administrator. However, in my review of the regulation, I find that the discretion vested with the Administrator is whether, upon receipt of a complaint, to initiate an investigation at all. 20 C.F.R. § 655.806(a)(3). Indeed, the regulation specifically states that no hearing or appeal shall be available where the Administrator "determines that an investigation on a complaint is not warranted." 20 C.F.R. § 655.806(a)(2)(emphasis added). Notably, the very next subsection of the regulation clarifies that "if the Administrator determines that an investigation on a complaint is warranted," the complaint shall be accepted for filing. 20 C.F.R. § 655.806(a)(3)(emphasis added). The regulation goes on to state that "when an investigation has been conducted the Administrator shall issue a written determination." 20 C.F.R. § 655.806(b)(emphasis added). The Administrator concedes an investigation was opened based on the Prosecuting Party's complaints. Letter-brief of Jan. 28, 2011 at 2. Thus, I find, based on the record before me, that the Administrator also was required to issue a determination letter, which provides the Prosecuting Party the opportunity to request a hearing.

[8] The Board specifically noted that the Complainant's claim was accepted for investigation, and only later was determined to be untimely. Ndiaye, slip op. at 7.

As the Prosecuting Party has indeed requested a hearing, I find that he has not suffered any prejudice, due to the Administrator's failure to follow the regulatory procedures in 20 C.F.R. § 655.806. I then turn to the issue of whether Summary Decision should be granted. As noted above, in my Order dated December 23, 2010, I informed the parties that I would construe the Administrator's letter-brief of Dec. 2, 2010 as a Motion for Summary Decision, and I invited the parties to supplement the record. This they have done. See Administrator's letter-brief of Jan. 28, 2011 (with Exhibits); prosecuting party's supplemental brief (with Exhibits).

Standard for Summary Decision

In pertinent part, the governing procedural regulation states, "Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions." 29 C.F.R. § 18.41(a). This provision recognizes that an administrative law judge may, sua sponte, issue a summary decision, even in the absence of a motion from a party. See In the Matter of the Qualifications of Edward A. Slavin, Jr., ARB Case No. 04-088 (ARB: Apr. 29, 2005), slip op. at 18; Walters v. Dir., OWCP, 2005-BLA-05174 (ALJ: Mar. 28, 2005), slip op. at 5; aff'd, BRB No. 05-0610 BLA (Feb. 16, 2006)(unpub). In such circumstance, the administrative law judge must provide notice and an opportunity to be heard to the parties. Id.; see also In the Matter of the Qualifications of Carolyn S. Davis, Case No. 2005-MIS-00002 (ALJ: Nov. 2, 2005).

The Administrative Review Board has recognized that a summary decision by an administrative law judge is the equivalent of a summary judgment issued, under the Federal Rules of Civil Procedure, by a District Court. F. R. Civ. P. 56; see also Seetherman v. Gen. Elec. Co., ARB No. 03-029 (ARB: May 28, 2004), slip op. at 4-5. An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Furthermore, the fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. Id.

A moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In this matter, as the Administrator's position is that the Prosecuting Party is not entitled to request a hearing, I will consider the Administrator as the "moving party" with regard to the issue of summary decision. In adjudicating the issue of summary decision, I must view all facts and inferences in the light most favorable to the non-moving party. Celotex, 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986). This includes factual ambiguities and inferences related to credibility. See Petrosino v. Bell Atlantic, 385 F.3d 210, 219 (2d Cir. 2004). A party opposing summary decision may not rest upon the mere allegations or denials of the pleading. "Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Discussion

As set forth above, my Order of December 23, 2010 informed the parties that I construed the Administrator's response to my earlier Order as a "Motion for Summary Decision" and I provided the Prosecuting Party and the Administrator with the opportunity to supplement the record, including the opportunity to submit affidavits and additional documents, if applicable. I am satisfied, upon my review of the record, that the parties were adequately informed that I was considering summary decision, and also were provided an adequate opportunity to be heard regarding the issue.

Based on the record before me, I find that the Prosecuting Party's allegation against the Respondent, initially, was that the Respondent violated the Act by taking unauthorized deductions from him when he was employed by the Respondent. The record before me is not entirely clear regarding when the Prosecuting Party first contacted the Administrator with this allegation; however, the earliest date of record is May 2009. WHISARD Complaint Information Form. As noted above, the record establishes that the Prosecuting Party left the Respondent's employ in March 2006. I assume, for the purposes of this discussion, that the Prosecuting Party's allegations constitute a complaint under 20 C.F.R. § 655.805(a)(2), that the Respondent failed to pay him wages as required. Under the regulation, a complaint must be filed not later than 12 months after the latest date on which the violation was committed. 20 C.F.R. § 655.806(a)(5). It is uncontroverted that the Prosecuting Party's complaint was untimely, as it was made more than three years after his employment with the Respondent ended.

Thus, the Prosecuting Party's complaint on his own behalf may be dismissed, based on untimeliness. However, the Department of Labor has recognized three situations in which an untimely complaint may be accepted. Ndiaye, slip. op. at 7, citing Hemingway w. Northeast Utilities, ARB No. 00-074 (ARB: Aug. 31, 2000), slip op. at 4; Gutierrez v. Regents of the Univ. of Cal., ARB No. 99-116 (ARB: Nov. 8, 1999)(ERA cases). These are as follows: 1) when a respondent has actively misled the complainant respecting his right to file a petition; 2) the complainant has in some extraordinary way been prevented from asserting his rights; or 3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. The complainant bears the burden of justifying the application of "equitable tolling" of the limitations period. Ndiaye, slip. op. at 7. See also Higgins v. Glen Raven Mills, Inc., ARB No. 05-143 (ARB: Sept. 29, 2006), slip op. at 8 (SDW case).

In the instant case, the Prosecuting Party asserts that equitable tolling should apply to permit his late complaint to be heard. Reply brief at 7-8. In particular, the Prosecuting Party asserts that "the Respondent has actively misled the Prosecuting Party respecting the cause of action by making him sign a misleading letter agreement prior to his deployment as [an] H-1B worker in [the] USA and he reasonably relied on Respondent's misleading or confusing representations and conduct and was thereby unable to file a timely complaint."[9] Reply brief at 8. The Prosecuting Party addressed this issue in more detail in his most recent submission.

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[9] The Prosecuting Party also asserted he provided details about the Respondent's conduct in a letter dated July 10, 2010. The Administrator submitted this item (Exhibit D). In this letter, the Prosecuting Party reiterates that his employment agreement with the Respondent violates the Act. He does not discuss any post-employment conduct by the Respondent.

Supplemental brief at 14-19. In both submissions, however, the Prosecuting Party focused on the Respondent's purportedly misleading actions in getting him to accept an employment agreement that contained the provision that, in the Prosecuting Party's view, violated the Act.

Making all presumptions in the Prosecuting Party's favor, as I must when addressing the issue of summary decision against the non-movant, I find that the Prosecuting Party misapprehends the applicability of this equitable tolling provision. The recognized exception relates to the employer's actions in actively misleading the employee regarding the employee's right to seek redress under the Act, not (as the Prosecuting Party asserts) any misleading act by an employer regarding the execution of the employment agreement. See Hyman v. KD Res., ARB No. 09-076 (ARB: Mar. 31, 2010), slip op. at 5-6 (Sarbanes-Oxley case). Thus, it is the action of the employer pertaining to the employee's ability to pursue legal action, not the action of the employer in establishing the terms of the employer-employee relationship, which is at issue. The Prosecuting Party's submissions are silent as to whether, if at all, the Respondent misled him as to his right to file a complaint with the Administrator. Moreover, the Prosecuting Party does not make any allegations about the Respondent's conduct after the employment relationship terminated, in 2006, the date that would start the 12-month limitations period for filing a complaint. Consequently, I conclude that the Prosecuting Party has not established the eligibility for equitable tolling of the limitations period based on the Respondent's actions.[10]

Based on the foregoing, I find that the Prosecuting Party has failed to establish that equitable tolling should apply to excuse the untimeliness of his complaint as a former employee of the Respondent.

However, as the regulation recognizes, an aggrieved party need not be an employee or former employee. As defined in 20 C.F.R. § 655.715, an aggrieved party may also include "a competitor adversely affected by the employer's alleged non-compliance with the labor condition application." The term "competitor" is not defined in the regulation. I presume that the term connotes a person or entity that provides a service or product similar to the service or product that an employer provides, so that an individual seeking that service or product may choose one entity over the other. Based on the Prosecuting Party's submissions of June 10, 2009, the Administrator determined that the Prosecuting Party should be considered a "business competitor" of the Respondent. WHISARD Complaint Information Form. According to the Administrator's submissions in the instant case, the Administrator later determined the Prosecuting Party could not be a "competitor," and cited an e-mail of April 22, 2010, in which the Prosecuting Party conceded that he never set up a business. Letter-brief of Dec. 2, 2010 at 4; Exhibit B.

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[10] The Prosecuting Party has not asserted any facts relating to either of the other possible rationales for equitable tolling (having been prevented in some extraordinary way from asserting his rights, or raising the precise claim in the wrong forum). See Ndiaye, slip op. at 7. I find, therefore, that these bases for equitable tolling do not apply in the instant case. Upon review, I also find that the Prosecuting Party has not alleged any facts that credibly could constitute grounds for applying equitable estoppel. This concept relates to a situation where an employee is aware of his statutory rights but does not make a timely filing due to reasonable reliance on an employer's misleading or confusing representations or conduct. See Hyman v. KD Resources, slip op. at 6, citing Kale v. Combined Ins. Co. of America, 861 F.2d 746, 752 (1st Cir. 1988).

In response, the Prosecuting Party maintains he is an aggrieved party as a "future or potential Competitor" of the Respondent, and in addition he asserts that he "was in the process of setting up a technology consulting and placement business and had to abandon his business plans when he found out evidence of serious violations of the H-1B statute and regulations by the Respondent as alleged."[11] Reply-brief at 6. I also note that the evidence the Prosecuting Party submitted to support his allegation that the Respondent violated the Act is based on one paystub of one individual named employee. Even if I were to find that the Prosecuting Party is a competitor as defined in the regulation, I find that the record before me does not suggest – let alone establish – that the Respondent's alleged violation of the Act on one occasion against a sole employee constitutes an adverse effect on a competitor.

Unfortunately for the Prosecuting Party, the regulation does not define an aggrieved party as a "potential or future competitor" but rather, quite plainly, as a competitor. § 655.715. This limitation makes sense. To expand the definition of "aggrieved party" party to permit anyone who possibly might be interested in competing with an employer is to open the door to an unlimited number of potential complainants. Rather, and most rationally, the regulation limits the universe of potential complainants by defining aggrieved parties to those individuals and entities that can assert a direct relationship between an employer's violation of the Act and their own interests.

Based on the record before me, and taking all inferences in the Prosecuting Party's favor, I find that the Prosecuting Party is not able to establish that he is an "aggrieved party" within the definition of the applicable regulation.[12]

The regulation also permits the Administrator to accept complaints from a person who is not an aggrieved party. The Prosecuting Party states that he is a "credible information source" and as such his allegations should be accepted for investigation. Supplemental brief at 11-12. Under 20 C.F.R. § 655.807(a) other interested persons may submit complaints. However, this provision provides that such complaints may be investigated only after the Administrator refers the matter to the Secretary, and the Secretary (or the Deputy Secretary or the Secretary's designee) personally authorizes investigation. 20 C.F.R. § 655.807(h).[13] The Administrator has noted this provision. Letter-brief of Dec. 2, 2010, at 2.

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[11] I note this assertion conflicts with the Prosecuting Party's signed statement, in Exhibit 10, in which he stated he abandoned the efforts to set up a recruitment business to "pursue other opportunities."

[12] The Prosecuting Party also asserts that he qualifies as an aggrieved party as a "worker" -- that is, an individual who works in a specialty occupation. Reply brief at 6; supplemental brief at 13. The term "worker" is not defined in 20 C.F.R. § 655.715; however, the term "U.S. worker" is defined as "an employee" who either is a U.S. citizen or national, or an H-1B employee. I find, therefore, that the term "worker" equates to "employee," and the Prosecuting Party's complaint as a former employee of the Respondent is encompassed in listing of "worker" as a type of aggrieved party. Notably, the 12-month limitations period in 20 C.F.R. § 655.806(a)(5) is not limited to complaints by employees, but relates to all complaints by any aggrieved party. Consequently, the Prosecuting Party's attempt to carve out a separate category of aggrieved party by claiming that he also qualifies because he is (or was) a "worker" in a specialty industry must fail.

[13] Under 20 C.F.R. § 655.715, the term "Secretary" is narrowly defined as "the Secretary of Labor or the Secretary's designee."

Whether or not the information the Prosecuting Party provided was credible, under the regulation such information – if not from an aggrieved party – can form the basis for an investigation only upon the personal authorization of the Secretary or her designee. The regulation specifically states that no hearing is available from a decision by the Administrator declining to refer allegations to the Secretary. 20 C.F.R. § 655.807(b). The Administrator's discretion in this area is plenary and nonreviewable. Consequently, I do not have the authority to address the Prosecuting Party's assertion that his allegation should be investigated, because he is a "credible source."

Conclusion

In sum, I find that the regulation requires, under the facts presented in the record before me, that the Administrator should have issued a determination letter to the Prosecuting Party. Nevertheless, because the Prosecuting Party requested a hearing, there is no prejudice to him due to the Administrator's failure.

On examining the entire record, including the parties' submissions relating to the issue of summary decision, I find that the Prosecuting Party's complaint, based on his status as a former employee of the Respondent, was untimely. I also find that the Prosecuting Party has, to date, not asserted any facts that would permit the tolling of the 12-month limitations period; further, he has not asserted any facts that would enable me to infer that either equitable tolling or equitable estoppel would or may be appropriate. I therefore find that any complaint based on the Prosecuting Party's status as a former employee of the Respondent must be dismissed as untimely.

I also find, based on the record before me, that the Prosecuting Party cannot qualify as an aggrieved party based on any status as a competitor of the Respondent, because the facts establish he was not a "competitor" within the definition of the regulation. Therefore, I find that any complaint based upon the Prosecuting Party's status as a purported competitor of the Respondent must be dismissed.

I further find that the Administrator's determination not to investigate any of the Prosecuting Party's complaints, presuming his status not to be an aggrieved party as defined in 20 C.F.R. § 655.715, is within the Administrator's sole discretion, and is nonreviewable.

ORDER

In light of the foregoing, and based on the record before me, I find that summary decision is appropriate. I therefore enter a Summary Decision against the Prosecuting Party. This matter is DISMISSED.

SO ORDERED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).