



In the Matter of:

ARVIND GUPTA,

ARB CASE NO. 12-050

PROSECUTING PARTY,

ALJ CASE NO. 2010-LCA-024

v.

DATE: February 27, 2014

ADMINISTRATOR, WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT
OF LABOR,

and

WIPRO LIMITED (trading as WIPRO
TECHNOLOGIES),

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Arvind Gupta, pro se, Mumbai, India.

For the Administrator, Wage and Hour Division:

M. Patricia Smith, Esq., Jennifer S. Brand, Esq., William C. Lesser, Esq., Paul L. Frieden, Esq., Benjamin R. Botts, Esq., *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia.

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB or Board) on appeal from the dismissal of this matter after the Board's remand.¹ Arvind Gupta filed complaints in May and June 2009 under the H-1B nonimmigrant worker provisions of the Immigration and Nationality Act, as amended (INA or the Act), and its implementing regulations.² Gupta alleged that Wipro Limited (Wipro) violated the Act by making illegal deductions from his wages and the wages of other H-1B Wipro workers. The Wage and Hour Division ("Administrator" or "Wage and Hour") ultimately found no reasonable cause to investigate either complaint. Gupta requested a hearing before an Administrative Law Judge (ALJ). The assigned ALJ dismissed Gupta's claims by summary decision through the combination of an initial order dated March 28, 2011 (the "ALJ's 2011 Order") and, following appeal to the ARB and subsequent remand, by a second order dated January 25, 2012, reaffirming the ALJ's prior ruling (the "ALJ's 2012 Order").³ We affirm.

BACKGROUND⁴

May 2009 Complaint

In May 2009, Gupta alleged in writing that Wipro "made illegal deductions from H-1B worker's wages" and that the dates of the alleged violations were "current (for all H-1B workers)."⁵ Gupta also indicated that he was a "former" employee (from "7/4/2002 – 03/31/2006").⁶ In an addendum attached to the May 2009 complaint, Gupta explained that "[t]he employer (Wipro Technologies) deducts the base salary paid in [the] home country from the wages paid to the H-1B employees in USA." By letter to Gupta dated May 27, 2009, Wage and Hour found no reasonable cause to investigate the May complaint "based on the information

¹ *Gupta v. Wipro Ltd.*, ARB No. 11-041, ALJ No. 2010-LCA-024 (ARB Aug. 11, 2011). On February 29, 2012, the ARB gave notice of its intention to review this case. By Order dated May 22, 2012, the ARB identified the issues under consideration. Our decision renders moot several of these issues. Further, all pending motions are denied.

² 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (Thomson Reuters 2014); 20 C.F.R. Part 655, Subparts H and I (2013).

³ The title of ALJ's 2011 Order is: Administrative Law Judge's (ALJ) Decision and Order Granting Summary Judgment Decision; aand Dismissing Case (Mar. 28, 2011). The title of the ALJ's 2012 Order is: Order Admitting Post-Remand Exhibit; Denying Motions; and Decision aand Order on Remand from the Administrative Review Board (Jan. 25, 2012).

⁴ For purposes of reviewing the ALJ's summary decision, we rely only on undisputed facts and view the facts in the light most favorable to Gupta, the party opposing summary decision.

⁵ See "H-1B Nonimmigrant Information Form" (May 2009 Complaint).

⁶ *Id.*

[Gupta] . . . provided” because it was untimely under 20 C.F.R. § 655.806(a)(5). Wage and Hour indicated that if Gupta had additional information or questions, he could contact Wage and Hour again.⁷

June 2009 Complaint

Gupta filed a second complaint in June 2009, reiterating the same violations alleged in his May 2009 complaint. He again explained that “[t]he employer has illegally deducted the base salary paid in the home country from the required wages paid to all present and past H-1B worker(s) in USA.” Gupta submitted documents regarding a Wipro worker’s wages.⁸ Gupta claimed that Wipro made illegal deductions from H-1B wages “06/01/2009 (latest date); past several years.” Gupta added that the basis of his knowledge was, “Credible information for violation of 06/01/2009; aggrieved party for period of H-1B employment.” Gupta again indicated that his employment ended March 31, 2006.⁹

By letter to Gupta dated January 7, 2010, Wage and Hour found “reasonable cause to conduct an investigation based on the information [Gupta] provided as per 20 C.F.R. § 655.806(a)(5).”¹⁰

Gupta subsequently informed Wage and Hour in April 2010, “Last year, around May and June 2009, I wanted to set-up a recruitment business in India and received a copy of Mr. Das’s resume and pay slip as part of my initial recruitment activities. I abandoned my efforts to set-up the recruitment business later to pursue other opportunities.”¹¹ In an April 22, 2010 e-mail response to Wage and Hour’s investigator, Gupta wrote, “I did not actually set up the business but was in the initial stage of setting up the business after returning from USA in May 2009. As part of creating a database of possible candidates I contacted Mr. Das who had published his details online seeking job in free listing site. I abandoned the business idea later as discussed.”¹²

⁷ Letter from Ramon Huaracha, Jr., Wage and Hour Division, to Arvind Gupta (May 27, 2009).

⁸ Akash Das’s June 1, 2009 pay slip is found at Gupta Exhibit 6 attached to Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and Prehearing Order (Aug. 26, 2010). *See* Gupta’s E-Mail packet 2 of 6 at 59.

⁹ Gupta Exhibit 7 attached to Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and Prehearing Order (Aug. 26, 2010).

¹⁰ Letter from Ramon Huaracha, Jr. to Arvind Gupta (Jan. 7, 2010).

¹¹ Exhibit 10 attached to Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and Prehearing Order (Aug. 26, 2010).

¹² Attachment, Wage and Hour Letter-Brief to ALJ (Dec. 2, 2010).

Ultimately, Wage and Hour found no reasonable cause to investigate Gupta's second complaint. Specifically, in a *letter to Gupta* dated May 7, 2010, Wage and Hour stated:

We reviewed your information pertaining to the alleged violations of the H-1B program. Initially, it was determined that there was reasonable cause to conduct an investigation based on the information you provided. However, after a review of all the information that has been received, it has been determined that there is no reasonable cause. Accordingly, no investigation will be conducted.

There is no appeal of a determination of "no reasonable cause." The Department of Labor regulation at 20 C.F.R. § 655.806(a)(2) specifies that additional information may be submitted, as it was here. This provision also specifies that no hearing or appeal shall be available where the Administrator determines that the evidence fails to warrant an investigation on a complaint.^[13]

On May 21, 2010, Gupta objected to the Administrator's determination and filed a request for hearing. Following several written submissions from Gupta and the Administrator, the ALJ dismissed Gupta's case by summary decision by order dated March 28, 2011. *See* ALJ's 2011 Order. Gupta appealed to the Board. Because Wipro was never notified of the proceedings before the ALJ, the Board remanded the case to allow Wipro to participate in the proceedings before the ALJ if it so desired. *Gupta v. Wipro Ltd.*, ARB No. 11-041, slip op. at 5-7. By order dated January 25, 2012, the ALJ reaffirmed her previous summary decision. *See* ALJ's 2012 Order. Gupta again appealed to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n) (2); 20 C.F.R. § 655.845.¹⁴ The Board has plenary power to review an ALJ's legal conclusions de novo, including summary decisions issued pursuant to 29 C.F.R. §§ 18.40 and 18.41 (2013).¹⁵

¹³ Gupta's E-mail Packet 4 of 6 at 126. Similarly, in a letter to Wipro's president, dated May 7, 2010, Wage and Hour indicated, "Based on the original information received an investigation was assigned. However, after review of all the information that has been provided, it has been determined that there is no reasonable cause." Letter from Patrick Reilly, Wage and Hour Division, to Azim Premji (May 7, 2010).

¹⁴ *See* Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012)(delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

¹⁵ *Adm'r, Wage & Hour Div. v. The Lambents Grp.*, ARB No. 10-066, ALJ No. 2008-LCA-036 (ARB Nov. 30, 2011) (quoting 5 U.S.C.A. § 557(b) (Thomson Reuters 2013)).

DISCUSSION

Despite the complex maze of facts and issues presented in this matter, the undisputed facts establish that Gupta's May and June 2009 complaints advance the same, single type of violation: illegal deductions connected to the base salary earned in Gupta's home country. It is also undisputed that Wage and Hour issued a letter finding reasonable cause to investigate the June 2009 complaint as a complaint filed pursuant to 20 C.F.R. § 655.806(a)(5), the section specifically pertaining to "aggrieved party" complaints. These undisputed facts are critical to the disposition of this appeal. Given this factual backdrop and the record before us, the ALJ dismissed Gupta's claims for a combination of reasons, but three are dispositive of this matter: (1) Gupta's claims concerning his wages were untimely; (2) he was not a "competitor," as he initially asserted, and therefore could not prove he was an "aggrieved party" for the alleged violations related to the wages of other H-1B workers, and (3) he had no basis to appeal the fact that the Administrator for Wage and Hour had not taken any action on the claims under 20 C.F.R. § 655.807. We briefly discuss "aggrieved party" complaints and then address each of the ALJ's three dispositive grounds.

As previously stated, Wage and Hour indicated in its January 7, 2010 letter that it found reasonable cause to investigate Gupta's complaint pursuant to 20 C.F.R. § 655.806. Under that section, Wage and Hour may initiate an investigation of alleged H-1B program violations based on a complaint filed by an aggrieved person or organization, (including competitors). The INA does not define "aggrieved party" beyond stating that complaints may be filed by "any aggrieved person or organization (including bargaining representatives)." 8 U.S.C.A. § 1182(n)(2)(A). The regulations, however, define the term "aggrieved party" broadly to include employees adversely affected (both U.S. and foreign), along with bargaining representatives, *competitors*, and certain adversely affected government agencies. 20 C.F.R. § 655.715. A complaint must be filed within twelve months after the latest date upon which the alleged violation was committed. 8 U.S.C.A. § 1182(n)(2)(A); 20 C.F.R. § 655.806(a)(5).

Turning first to Gupta's claim of H-1B violations pertaining to his own wages, we agree with the ALJ's reasons for finding his claim untimely. The ALJ clearly explained, based on the undisputed facts, that the last alleged "illegal deduction" made from his wages occurred in or before March 2006. This makes Gupta's 2009 complaints late by multiple years. We agree with the ALJ that Gupta failed to present persuasive reasons to invoke equitable tolling. Nor does it help Gupta to argue, as he has, that Wipro allegedly never properly terminated his employment based his H-1B status as approved by the Department of Homeland Security through June 10, 2008.¹⁶ The fact remains that the last date of the alleged "illegal deduction" violation pertaining

¹⁶ Exhibit 3 attached to Motion for Order Setting Forth Discovery and Briefing Schedule and Motion for Hearing and Prehearing Order (Aug. 26, 2010).

We take administrative notice that Gupta has also filed claims seeking payment from two other H-1B employers for a time period during which he was allegedly authorized to work for Wipro under an H-1B visa. Gupta has filed an H-1B claim against Headstrong, Inc., for wages allegedly accruing during the period of April 2006 through November 2011. *See Gupta v. Headstrong, Inc.*,

to Gupta's wages occurred in or before March 2006. We thus affirm the ALJ's dismissal of Gupta's claim pertaining to his own wages.

Next, we also agree with the ALJ's rejection of Gupta's "aggrieved party" complaint as to alleged illegal deductions made from the wages of other H-1B workers at Wipro. The ALJ correctly explained that the undisputed evidence, particularly Gupta's own admissions, demonstrate that he was not Wipro's "competitor" and, therefore, not adversely affected by the alleged violation - neither as an employee nor as a "competitor." The record contains no other evidence suggesting how Gupta could prove he was an "aggrieved party" any other way with respect to the wages of other workers, whether co-workers or not. Consequently, we affirm the ALJ's dismissal of Gupta's "aggrieved party" complaint with respect to wages of other H-1B workers.

Lastly, we address Gupta's complaint of alleged violations pertaining to other H-1B Wipro employees as a "credible source" complaint under 20 C.F.R. § 655.807. We agree with the ALJ that the discretion to initiate such an investigation lies with the Wage and Hour Administrator and other Labor Department officials. As the ALJ noted, there is no evidence that the Administrator or other Labor Department official exercised such discretion in this case, and the regulations prohibit parties from appealing the Labor Department's exercise or refusal to exercise such discretion. *See* 20 C.F.R. § 655.807(h)(2). To clarify, we neither incorporate nor reject the ALJ's conclusion that the Administrator must refer credible source complaints to the Secretary for certification.¹⁷ Our conclusion is that parties can only appeal the Administrator's determination of a credible source complaint following an investigation performed under Section 655.807. *See* 29 C.F.R. § 655.806(k), .815(a). Such investigation did not occur in this case and, therefore, we affirm the ALJ's rejection of Gupta's request for a hearing as a credible source.

ARB Nos. 11-065 , -008, ALJ No. 2011-LCA-038 (ARB June 29, 2012). The Board dismissed the *Headstrong* case by final order of June 29, 2012. But the Administrator reopened the case for additional consideration without first seeking a withdrawal of the Board's final order. *See Gupta v. Headstrong, Inc., et al.*, 12-CV-06652-RA (S.D.N.Y.) (Stipulation and Order of Remand and Dismissal dated December 10, 2012). Gupta also filed a claim against Compunnel Software Group, Inc. for wages allegedly accruing between December 2006 and April 2009. *See Gupta v. Shah & Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, a case presently pending before the Board.

¹⁷ For further discussion on this point, see the Board's recent decision in *Adm'r, Wage & Hour Div. v. Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-026 (ARB Jan. 29, 2014).

ORDER

We **AFFIRM** the ALJ's dismissal of Gupta's complaints.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge