



In the Matter of:

VINCENTE D. DeDIOS,

ARB CASE NO. 16-072

PROSECUTING PARTY,

ALJ CASE NO. 2013-LCA-009

v.

DATE: March 30, 2018

MEDICAL DYNAMIC SYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Olivia P. Pedere-Branch, Esq.; East Northport, New York

For the Respondent:

Arvin G. Amatorio, Esq.; MDSI Counsel; New York, New York

Before: Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act (INA), 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2018), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2017). Medical Dynamic Systems, Inc. (MDSI) appealed to the Administrative Review Board (ARB or Board) from a Department of Labor Administrative Law Judge (ALJ) Decision and Order (D. & O.) issued May 17, 2016. The ALJ concluded in the D. & O. that MDSI violated the H-1B program's obligations when it required DeDios to pay for his H-1B filing fees and failed to pay DeDios the required wage rate while he worked for MDSI on an H-1B visa until it terminated his employment. The ALJ also ruled that DeDios' complaint was timely filed. The Board affirms the ALJ's D. & O.

BACKGROUND

1. Legal background

An employer who wants to hire an H-1B nonimmigrant must first seek the approval of the United States Department of Labor (DOL) by filing with the Secretary of Labor a Labor Condition Application (LCA).¹ An employer may not receive or allow an employee to pay the filing fee for an H-1B visa or for the employer's business expenses, such as attorney's fees and other costs associated with the performance of the H-1B program.²

In the LCA, an employer attests that it will pay its H-1B nonimmigrant employee's wages for the duration of the LCA,³ unless the employer can show that one of two exceptions applies.⁴ Under the first exception, the employer is excused from its wage obligation if the reason the employee is not working is "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant)."⁵ Under the second exception, the employer may discharge the H-1B nonimmigrant employee (effect a "bona fide termination") and then stop paying the employee altogether.⁶ To effect a bona fide termination, an employer must: 1) notify the employee that the employment relationship is terminated, 2) notify the Department of Homeland Security [USCIS] that the

¹ 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700(b)(1).

² 20 C.F.R. §§ 655.731(c)(10)(ii), 655.731(c)(9)(ii).

³ 20 C.F.R. § 655.731(a).

⁴ 20 C.F.R. § 655.731(c)(7) ("If the H-1B nonimmigrant is not performing work and is in a nonproductive status *due to* a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or *any other reason except as specified in paragraph (c)(7)(ii) of this section*, the employer is required to pay the salaried employee . . . at the required rate for the occupation listed on the [Labor Condition Application]" (emphasis added)).

⁵ 20 C.F.R. § 655.731(c)(7)(ii); see *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 16 (ARB May 29, 2014).

⁶ *Id.* ("Payment need not be made if there has been a *bona fide* termination of the employment relationship.").

employment relationship was terminated, and 3) provide the employee with payment for transportation home under certain circumstances.⁷

Any party aggrieved by a violation of the H-1B laws may file a complaint alleging a violation that “must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA.”⁸ This limitations period is not jurisdictional and can be waived.⁹

2. Factual and procedural background

MDSI filed an LCA in October 2009 on DeDios’ behalf for the position of nurse manager that identified a prevailing wage of \$37.06 per hour.¹⁰ DOL approved the LCA for the time period from October 19, 2009, to October 18, 2012.¹¹ USCIS received the H-1B petition on November 3, 2009, and approved it for the period from January 28, 2010, to October 18, 2012.¹² In 2009, DeDios gave MDSI three checks totaling \$3,600.00 for H-1B application processing and program functions.¹³

⁷ 20 C.F.R. § 655.731(c)(7); *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 7, n.27 (ARB June 6, 2013) (citing *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 (ARB Mar. 30, 2007)).

⁸ 20 C.F.R. § 655.806(a), (a)(5). Similarly the statute at 8 U.S.C.A. § 1182(n)(2)(A) states “No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.”

⁹ *Gupta v. Headstrong, Inc.*, ARB Nos. 11-065, 11-008; ALJ No. 2011-LCA-038, slip op. at 8, n.14 (ARB June 29, 2012) (noting that (1) the INA does not refer to the 12-month limitation period as a jurisdictional limitation and (2) DOL used the term “jurisdictional” in the regulations at 20 C.F.R. § 655.806(a)(5) to refer to the time limitation but not to impose a “jurisdictional” limitation); see also Fed. Reg. Vol. 59, No. 243, 65,657 (Dec. 20, 1994) (referring to the 12-month limitation period as a time bar with no reference or discussion about a jurisdictional limitation).

¹⁰ D. & O. at 3.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.* at 13.

DeDios was in the United States when his H-1B petition was approved. He became available to work on February 15, 2010, when he went on an interview MDSI arranged for him.¹⁴ During the LCA's validity period, MDSI paid a total of \$584.52 in wages to DeDios.¹⁵

On May 21, 2010, MDSI informed DeDios that it was unable to find him a job due to "lack of openings" and offered to purchase him a one way ticket to the Philippines.¹⁶ DeDios responded that he would accept the offer if MDSI would compensate him for the period he had worked for MDSI.¹⁷

On June 1, 2010, MDSI sent a letter to USCIS requesting immediate revocation of its H-1B petition for DeDios.¹⁸ On July 19, 2010, USCIS notified MDSI that it automatically revoked the H-1B petition when it received the motion to revoke on June 8, 2010.¹⁹

On June 8, 2010, MDSI again offered to purchase DeDios a one way ticket to the Philippines.²⁰ On this date, MDSI also told DeDios that it was trying to set him up for an interview at two job locations.²¹ On July 22, 2010, MDSI told DeDios that he had an interview the next day.²²

On October 20, 2010, DeDios requested a release document from MDSI so that he could look for a new employer, and on October 27, 2010, MDSI sent him a release.²³ At this point, MDSI informed DeDios that it no longer employed him.²⁴

¹⁴ *Id.* at 14-15.

¹⁵ *Id.* at 4, 13.

¹⁶ *Id.* at 16, 17.

¹⁷ *Id.*

¹⁸ *Id.* at 15; JX 2.

¹⁹ *Id.*; JX 3.

²⁰ *Id.* at 17.

²¹ *Id.* at 16.

²² *Id.*

²³ *Id.*; JX 1 at 18.

²⁴ *Id.*

DeDios filed a complaint with the DOL Wage and Hour Division alleging that MDSI failed to pay him bench time pay and unlawfully collected H-1B filing fees.²⁵ Wage and Hour conducted an investigation, and the Administrator found that MDSI violated the H-1B rules.²⁶ A Wage and Hour Division Summary of Unpaid Wages shows that on November 13, 2012, Marissa Beck signed for MDSI that it agreed to pay DeDios unpaid wages as assessed by Wage & Hour.²⁷ On February 15, 2013, the Administrator issued a Determination Letter notifying MDSI that it owed DeDios \$26,956.80 in back wages for the period from February 6, 2010, to May 29, 2010, attaching the Summary of Unpaid Wages and DeDios' complaint.²⁸

DeDios filed a request for hearing because he alleged that there was no bona fide termination and that he was owed back wages for the entire LCA period. The case was assigned to an ALJ, who scheduled a hearing. The ALJ held a hearing on July 22, 2013, at which the ALJ admitted exhibits and granted the parties leave to submit more evidence.²⁹ DeDios did not appear at the hearing because the U.S. government denied him a visa to enter the country.³⁰ The ALJ scheduled a second hearing for September 16, 2013. DeDios could not attend this hearing because he had suffered a stroke, so another hearing was scheduled for December 10, 2013. In November, DeDios' counsel informed the ALJ that DeDios was in poor health and would be unable to attend the December hearing. DeDios' counsel moved for a decision on the record, which MDSI opposed. After allowing MDSI an opportunity to submit witness deposition testimony in lieu of trial testimony and DeDios to submit rebuttal evidence, the ALJ granted DeDios' request for a decision on the record and closed the record.³¹

The ALJ found that MDSI failed to pay DeDios wages from February 15, 2010, to October 27, 2010, and that MDSI violated the Act by requiring DeDios to pay his H-1B filing fees.³² For the first time in its closing brief, MDSI argued to the ALJ that DeDios had not timely filed his complaint.³³ The ALJ found that the complaint was undated, but that it was timely filed

²⁵ *Id.* at 1.

²⁶ *Id.* at 2; Administrator's Determination (Feb. 15, 2013) (Admin. Det.).

²⁷ Admin. Det. at 8.

²⁸ D. & O. at 2, 7; Admin. Det. at 8-12.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 2-3.

³² *Id.* at 11-12, 13, 17.

³³ *Id.* at 11.

because 1) as there was a dispute about whether MDSI effected a bona fide termination, the entire LCA period must be considered such that DeDios's complaint was timely, 2) MDSI waived the timeliness argument by not addressing it before or at any of the hearings (such that DeDios did not have the opportunity to respond to or present evidence about the issue), and 3) MDSI could not establish that the complaint was untimely.³⁴

MDSI filed a timely petition for review of the ALJ's D. & O. solely on the timeliness issue. Both parties submitted briefs.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases under the H-1B provisions of the Immigration and Nationality Act.³⁵ The Board has authority to review an ALJ's legal conclusions de novo.³⁶

DISCUSSION

An employer is required to pay its H-1B nonimmigrant employees wages for the duration of the LCA, unless the employer can show that one of the two exceptions to the benching provision applies.³⁷ MDSI failed to pay DeDios the required wage for certain periods during the duration of his LCA. The ALJ found that MDSI was not relieved of its obligation to pay because of nonproductive time, but was relieved of its obligation to pay because it effected a bona fide termination of DeDios on October 27, 2010. DeDios argued to the ALJ that he was entitled to back wages from October 19, 2009, to October 18, 2012, the full duration of his LCA period, because MDSI never effected a bona fide termination of his employment.³⁸ While MDSI has not appealed the merits, the underlying facts have import for the issue of timeliness that is at issue before us.

³⁴ *Id.* at 11-12.

³⁵ *See* 20 C.F.R. § 655.845; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

³⁶ *Limanseto*, ARB No. 11-068, slip op. at 3.

³⁷ 20 C.F.R. § 655.731(b)(7)(ii).

³⁸ D. & O. at 13-14,

We affirm the ALJ's finding that DeDios timely filed his complaint; the complaint having been filed within 12 months after his last allegation of a failure to pay wages (the last date of the LCA period) and that MDSI waived the argument that the complaint was untimely by not moving to dismiss for untimeliness at any of the hearings or before.³⁹

1. Waiver

The ALJ found that MDSI waived any objection to timeliness by not raising it until after the hearing when the record had closed and consequently, the complainant did not have an opportunity to address it or submit evidence to support his timely complaint. As noted above in the Legal Background, the limitations period for the INA is not jurisdictional.⁴⁰ Thus, an objection to timeliness may be waived if not raised.⁴¹ The defense that a complaint is untimely falls into the category of defenses that must be raised in a motion to dismiss for failure to state a claim.⁴² According to the ALJ rules, such a motion should be filed before a hearing has occurred.⁴³ The Federal Rules of Civil Procedure, which apply in situations not provided for or controlled by the ALJ rules, require that a party file a motion asserting this defense no later than the conclusion of the trial on the merits.⁴⁴ Under either of these rules, MDSI failed to file a

³⁹ We do not affirm based on the ALJ's rationale that MDSI did not prove that the complaint was untimely, as the burden is always on the complainant to prove his or her case.

⁴⁰ 8 U.S.C.A. § 1182(n)(2)(A); *Gupta v. Headstrong, Inc.*, ARB Nos. 11-065, 11-008, slip op. at 8, n.14.

⁴¹ *Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1990); *Paetz v. United States*, 795 F.2d 1533, 1536 (11th Cir. 1986) (statute of limitations defense is waived when not raised in pleadings); see also 5C Fed. Prac. & Proc. Civ. § 1394 (3d ed.) (Thomson Reuters 2017) ("all affirmative defenses and denials must be pleaded by the defendant or, when appropriate, raised by motion under Rule 12(b), or they will be waived").

⁴² 29 C.F.R. Part 18.70 (c) (2017) (the ALJ Rules of Practice and Procedure state: "Motion to Dismiss. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness."); see 20 C.F.R. § 655.825 (a) (Except as provided and to the extent they do not conflict with this subpart, the ALJ rules at 29 § C.F.R. Part 18 shall apply to administrative proceedings under this subpart.).

⁴³ *Id.* (the regulation is listed under the heading, "Disposition Without Hearing,").

⁴⁴ Federal Rule of Civil Procedure (FRCP) 12(h)(2); 29 C.F.R. § 18.10; see *Daingerfield Protective Soc'y v. Babbitt*, 40 F.3d 442, 449 (D.C. Cir. 1994) (Defenses not consolidated in a pre-pleading motion are generally waived).

motion to dismiss for untimeliness (or object in any way) at or before the hearing, and the argument is waived.⁴⁵

MDSI has argued on appeal that it did not waive the timeliness issue because it did not “deliberately relinquish its right” as it did not know until February 15, 2013, that the investigation had begun with a complaint.⁴⁶ But MDSI still does not explain why, upon learning on February 15, 2013, that an apparently undated complaint had been filed,⁴⁷ it did not move to dismiss for untimeliness (or object regarding timeliness) until March 31, 2014. It is clear that it had the opportunity to do so prior to the closing brief. Yet at no time before or at the July 22, 2013 hearing, or the September 16, 2013 hearing, did MDSI raise the issue, let alone file a motion to dismiss. MDSI waited until March 31, 2014, to first dispute the complaint’s timeliness in its post-hearing brief. We affirm the ALJ that MDSI waived objections to timeliness.

2. Limitations Period

Even though we affirm the ALJ that MDSI waived any objection to the complaint’s timeliness in this case, we also address the limitations period itself. The language of the INA makes clear that a complaint must be filed “not later than 12 months after the date of the failure” in an LCA and the regulations clarify that this means “not later than 12 months after the *latest date* on which the *alleged violations* were committed.”⁴⁸ DeDios alleged that MDSI benched him, failed to pay him for his entire LCA period, and never effected a bona fide termination of his employment. Thus, the 12-month limitations period did not begin to run until the end of his

⁴⁵ Indeed, MDSI never filed a motion to dismiss for untimeliness. The only objection to untimeliness MDSI made to the ALJ appeared in its closing brief, praying the claim be dismissed, “it being time-barred.” MDSI’s Proposed Findings and Conclusion at 9 (Mar. 31, 2014). See also *Hobby v. Georgia Power Co.*, No. 1990-ERA-030, slip op. at 3-5 (Sec’y Aug. 4, 1995) (in which the Secretary held that an ALJ did not err in holding that the respondent waived its argument that the complaint was untimely filed when it raised the issue for the first time in its post-hearing brief).

⁴⁶ Respondent’s Brief at 9-10.

⁴⁷ The ALJ found that the complaint was not dated (possibly because there is no typewritten date on the document). D. & O. at 11. But in examining the complaint, we see that on all three of the complaint’s pages (attached to the Administrator’s Determination, as sent by Wage & Hour to OALJ with a date received stamp of February 20, 2013), the complaint is signed by DeDios and dated May 21, 2010. We can find no other explanation for this than that DeDios dated and signed the complaint before he mailed it to Wage & Hour, who then included it as an attachment to the Determination and sent it to OALJ. It is unclear to us why this is not considered evidence about the date of the complaint, but neither of the parties nor the ALJ addressed it, so it appears this question must remain unresolved.

⁴⁸ (emphasis added).

LCA period.⁴⁹ Although the ALJ found that MDSI did effect a bona fide termination of DeDios' employment before the end of the LCA, the relevant regulatory language explicitly allows a complaint to be filed within 12 months "after the latest date on which the *alleged* violations were committed." Thus a complaint's timeliness is based in part on the content and allegations contained in the complaint. In this case, the limitation period did not begin running until the last day of the LCA period since DeDios alleged benching violations (that are considered continuing violations) and that MDSI never effected a no bona fide termination.⁵⁰

Moreover, there would have been a strong argument that there was no bona fide termination in this case for at least two reasons. First, notice to USCIS is notice "that the employment relationship has been terminated . . .".⁵¹ MDSI did not notify USCIS that the employment relationship had been terminated but instead simply moved that the petition be withdrawn or revoked. Arguably, without properly informing a nonimmigrant of his termination, the requirement of notice to USCIS would not be effective. But not only did MDSI fail to notify USCIS that it had terminated DeDios' employment, it apparently failed even to notify DeDios that he was fired, before moving to revoke his H-1B status. Second, although we have never had the occasion to so hold, it would be reasonable to assume that any offer of transportation home (and again, notice to USCIS of termination) would necessarily have to occur *after* notice of termination to the employee to be effective. Here, neither occurred after termination. Had it been argued and/or appealed, it may have been found that there was no bona fide termination for the reason that notice to the employee of termination must necessarily come before a notice to USCIS of termination or an offer of return fare home. One final argument calls into question the legitimacy of the termination in this case. MDSI continued to offer DeDios interviews for jobs after it offered him a return trip home and after it moved for USCIS to revoke the H-1B petition—evidence of an ongoing employment relationship after the satisfaction of the three requirements (notice to employee, notice to USCIS, and payment home) could "belie a bona fide termination" and negate their effectivity.⁵² To continue to offer an H-1B nonimmigrant worker interviews for work would at least confuse the question of whether he was still employed if not convince him that he was, regardless of any past offers of airfare home.

⁴⁹ See *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, slip. op. at 5 ("The express terms of the regulation make a benching violation a 'continuing violation' that remains actionable for the duration of the employment relationship as stipulated in the LCA.").

⁵⁰ It would be poor practice to invalidate a timely complaint based upon a post facto finding that certain of the complainant's allegations were not substantiated or only partially substantiated later at a hearing.

⁵¹ 20 C.F.R. § 655.731(7)(ii).

⁵² *Mao v. Nasser*, ARB No. 06-021, ALJ No. 2005-LCA-036, slip op. at 8 (ARB Nov. 26, 2008).

DeDios must have filed his complaint before the Administrator's September 28, 2012 Summary of Unpaid Wages. Based on the statutory and regulatory language, as the ALJ found, De Dios timely filed his complaint before 12 months after the end of his LCA period (October 18, 2013).

CONCLUSION

In sum, MDSI failed to pay Vincente DeDios, an H-1B nonimmigrant employee, the required wage until it effected a bona fide termination of his employment. It also required him to pay H-1B filing fees. MDSI thus owes DeDios \$55,587.20 in back pay, \$3,600.00 for the filing fee, and pre- and post-judgment interest on the back pay award.⁵³

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

⁵³ 20 C.F.R. § 655.810(a).