



Issue Date: 10 September 2004

Case No. 2004-LCA-36

SEYANABOU A. NDIAYE,
Complainant

v.

CVS STORE NO. 6081,
Respondent

ORDER GRANTING MOTION FOR SUMMARY DECISION

On September 1, 2004, Respondent, CVS Store No. 6081, filed a motion for summary judgment, or summary decision under the provisions of 29 C.F.R. § 18.40, governing this proceeding.¹ The motion is premised upon Seyanabou A. Ndiaye's failure to timely file her complaint with the Wage and Hour, Employment Standards Division of the Department of Labor within 12 months of the action alleged to have constituted a violation of H-1B provisions of the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101 et seq. On September 3, 2004, Complainant filed a reply brief to the motion for summary judgment.²

Complainant filed her initial complaint on April 1, 2004. In it she claimed that her H-1 petition says she was hired as a Pharmacy Intern. Accordingly, her duties were to be that of a pharmacist in training, working directly under the supervision of a Registered Pharmacist. Instead, Complainant contends that she was classified as a Pharmacy Service Associate as evidenced by a CVS certificate of achievement and the fact that her duties were not those of a Pharmacy Intern. She states that she was suspended when she complained about this discrepancy. Furthermore, she states that raising a complaint concerning Respondent's alleged failure to abide by the H-1 filing constitutes a protected activity. Finally, she claims that the August 2, 2002 action was an indefinite suspension and not a termination of employment.

Respondent's summary decision motion states that Ms. Ndiaye was terminated on August 2, 2002, and that she filed her complaint with the Wage and Hour Division of the Department of Labor on April 1, 2004. Therefore, since the filing date is well beyond the one year statute of limitations set forth in 8 U.S.C § 1101 et. seq., and 20 C.F.R. § 655.806(a), Respondent contends that it is entitled to summary decision because there is no genuine issue of material fact as to the date of filing.

¹ The summary decision provisions set forth in 29 C.F.R. § 18.40 (a)-(d) parallel the summary judgment provisions of Rule 56 of the Federal Rules of Civil Procedure.

² Both parties have attached documents in support of their motions.

Complainant's reply to Respondent's motion included, as an attachment, an August 20, 2002 letter from Attorney Richard I. Fleischer to CVS Pharmacy Human Resources Manager, Michael E. Calli, R. Ph., which argued that her alternate job duties violated the H-1 program. Attorney Fleischer also stated that there were other actions which could have been taken concerning Ms. Ndiaye's firing, and that CVS should look into the situation immediately. From this letter, Ms. Ndiaye appears to be inferring that there is some sort of continuing violation based on her termination or indefinite suspension.

Now Ms. Ndiaye contends that as of September 8, 2004, the date of her reply brief, no response had been received to the August 20, 2002 letter. She appears to be claiming that this failure to reply constitutes a continuing violation, entitling her to go back beyond the 12 month statute of limitations to maintain her claim. In support of this position she states, "[O]n 03/30/2004, discovery before the Employment and Training Administration led to reporting those facts [facts concerning her complaints about job duties and her suspension/firing] via filing of the WH-4 form as authorized by the 8 U.S.C 1182 (n)(2)(g) of the American Competitiveness and Workforce Improvement Act of 1998." In addition, she attached a December 30, 2002 Unemployment Compensation transcript of her supervisor's testimony confirming that she had complained about these circumstances in the past. (Attachment to Complainant's brief, p. 12). No further support is advanced for going back two years to either file her complaint or to conduct an investigation in light of its late filing.

A review of the attachments to Respondent's motion and Complainant's reply reveals that no additional action was taken with regard to the attorney's request in the last paragraph of his August 20, 2002 letter to the Human Resources Director of CVS requesting that he "look into ... [the matter of her August 2, 2002 firing] ... immediately so that the situation can be corrected."³ That letter, however, was never filed with the Wage and Hour Division. As a result, the first official action taken by Complainant concerning her suspension or termination was the filing on April 1, 2004, which is almost one year beyond the statute of limitations deadline. In addition, on July 2, 2004, the Wage and Hour Investigator, Mark Stewart-Lamb, issued a determination that Ms. Ndiaye's claim had been investigated and that all of the events mentioned were found "to have occurred on or before August 2002, therefore falling outside of the 12 month period ... when allegations may be investigated."

Under § 18.40 (d), the moving party must show by "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed ... that there is no genuine issue as to any material fact and that the party is entitled to summary decision." The Administrative Law Judge may then enter summary decision.

There being no issue of material fact as to whether Complainant's complaint was filed beyond the one year statute of limitations set forth in 8 U.S.C § 1101 et. seq, 20 C.F.R. § 655.806(a), Respondent is entitled to a decision dismissing the complaint as a matter of law.

³ Ms. Ndiaye also filed a charge of discrimination with the Equal Employment Opportunity Commission on October 28, 2002. No mention of the H-1 violations is mentioned in that charge, and it is not relevant to the current proceeding.

Therefore,

IT IS ORDERED that Respondent CVS Store 6081's motion for summary decision is granted and the complaint is dismissed.

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THOMAS F. PHALEN, JR.
Administrative Law Judge