U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 03 October 2006

CASE NO.: 2006-LCA-31

IN THE MATTER OF

MARK J. WATSON,
Prosecuting Party

vs.

INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION,
Respondent.

DECISION AND ORDER
MOTION TO DISMISS

Background

This matter arises under the Immigration and Nationality Act, as amended (the Act),[1] and its implementing regulations.[2] Mark J. Watson (Complainant) filed a complaint with the Administrator of the Wage and Hour Division (WHD) of the Employment Standards Administration of the United States Department of Labor (the Administrator) against International Business Machines Corporation (Respondent). On 17 Aug 06, the Administrator declined to investigate the complaint because Respondent is not an H-1B dependent employer or a willful violator; and therefore not subject to the requirements that Complainant alleged Respondent violated. The Administrator invited Complainant to submit additional information that might warrant an investigation. Nothing in the record reflects that Complainant submitted additional information to the Administrator. Complainant filed a request for a hearing on 29 Aug 06. On 7 Sep 06, an order was issued setting the hearing for 11 Oct 06.

[1] 8 U.S.C. §§ 1101-1537.
[2] 20 C.F.R. Part 655, Subparts H and I.

On 19 Sep 06, a telephone conference was held with Respondent's counsel and Complainant to discuss motions and discovery. Respondent indicated it intended to file a motion to dismiss in the next few days. I informed Complainant that he would need to respond to the motion and his failure to do so could result in the case being dismissed. I also informed him he could not rely on his pleadings or complaints and would need to submit affidavits or other documents to support his argument that a genuine issue of fact exists. I indicated the Court may send a show cause order upon receipt of Respondent's motion to dismiss, but time was of the essence since the required short hearing deadline gave little time for discovery and motions. Complainant emphasized that he would not agree to any continuance.

That led to a discussion regarding discovery, since a summary decision cannot fairly be considered if there are outstanding discovery issues. Complainant indicated he had submitted requests for admissions to Respondent, Respondent had failed to answer them, and he considered the matter deemed admitted. Respondent stated it had not received Complainant's request for admissions. I informed Complainant he needed to file a motion requesting the matter be deemed admitted. Complainant also stated he believed he was entitled to summary decision under the law. I informed him he should file any and all motions he thought had merit. Throughout the conference, Complainant assured the Court that although he was proceeding pro se, he did not require any accommodation. He indicated he was very well versed in the law.

On 22 Sep 06, Respondent filed a motion to dismiss on two grounds. First, the Court has no jurisdiction to hear the case in the absence of an investigation by the Administrator. Second, there is no genuine issue of material fact that would lead to a finding that Respondent is an H-1B dependent employee or willful violator and required to take the actions Complainant alleged it failed to take.

On 29 Sep 06, Complainant filed his opposition to Respondent's motion to dismiss, his own motion for summary decision, his previous request for admissions, and a request for a pre-hearing conference.

Law

A motion to dismiss may be appropriate where there is no genuine issue as to any material fact and the moving party is entitled to summary decision.[3] If the moving party demonstrates an absence of evidence supporting the non-moving party's position, that party then bears the burden of establishing the existence of an issue of fact that could affect the outcome of the litigation.[4] The non-moving party may not rest upon mere

[3] 29 C.F.R. § 18.40(d); Fed. R. Civ. P. Rule 56.
[4] *Anderson v.Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

allegations, speculation, or denials in his pleadings, but must set forth specific facts through affidavits, material obtained by discovery or otherwise, on each issue upon which he would bear the ultimate burden of proof.[5] If the non-moving party fails to demonstrate an element essential to his case, there can be "no genuine issue as to any material fact" because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[6]

The Act categorizes aliens who may enter the United States.[7] One category, H-1B, allows employers to temporarily hire aliens in specialty occupations.[8] Those employers must file a Labor Condition Application (LCA) and guarantee specified wages and working conditions.[9] Employers whose workforce is 15 percent foreign (H-1B dependent) or have previously been found to be in willful violation of the regulation (willful violators) must meet additional requirements.[10] They must attest that: they will not displace any U.S. workers; they will not place an H-1B worker at another employer's worksite without ensuring that a U.S. worker will not be displaced; they will recruit U.S. workers; and they will offer the job to any U.S. worker who is equally or better qualified than the H-1B worker.[11]

The Act requires the Secretary of Labor to establish a process for the receipt, investigation, and disposition of complaints regarding an employer's statements in, or compliance with, an LCA.[12] The Secretary shall conduct an investigation of a complaint if there is reasonable cause to believe that such failure or misrepresentation by an employer who filed an LCA has occurred.[13] If the investigation results in a determination as to whether or not a reasonable basis exists to find either a failure or a misrepresentation on the part of an employer, she shall provide notice to the parties and an opportunity for a hearing.[14]

The Secretary has promulgated regulations which require a complainant under the Act to allege sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation has been committed and an investigation is warranted. If the Administrator determines that the complaint fails to present reasonable

---

[5] *Anderson*, 477 U.S. at 256; Fed. R. Civ. P. 56(e).
[6] *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 02-CAA-21, slip op. at 3 (ARB May 28, 2004), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).
[7] 8 U.S.C. §1101(a)(15).
[8] 8 U.S.C. § 1101(1)(15)(H)(i)(B).
[9] 8 U.S.C. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.
[10] 8 U.S.C. § 1182(n)(1)(E).
[11] 8 U.S.C. §1183(n)(1)(F)-(G).
[12] 8 U.S.C. § 1182(n)(2)(A). However, the Act also provides in Section (n)(5) that the Attorney General must establish a process for accepting complaints concerning the requirement in Section G(i)(II) that an employer has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant is sought.
[13] 8 U.S.C. § 1182(n)(2)(A).
[14] 8 U.S.C. §1182(n)(2)(B).

cause for an investigation, he shall notify the complainant, who may submit a new complaint with such additional information as may be necessary to warrant an investigation.[15] The Administrator's determination that an investigation is not warranted is not subject to review by an administrative law judge (ALJ). "No hearing or appeal . . . shall be available where the Administrator determines that an investigation on a complaint is not warranted."[16] ALJ review of a determination issued by the Administrator is authorized only "where the Administrator determines, after investigation," that either there is no basis for finding that an employer has or has not committed a violation.[17] "Thus, the prerequisite for requesting a hearing is that the WHD Administrator has conducted an investigation and made a determination."[18]

Discussion

Since Complainant's initial complaint to the Administrator is not part of the record, it is not clear what the specific parameters of that original complaint were. The Administrator's letter indicated that since Respondent was not H-1B dependent or a willful violator, there was insufficient information to warrant an investigation into whether Respondent violated the supplemental requirements that apply to such employers. The Administrator invited Complainant to submit additional information that might warrant an investigation, but there is no indication that he did so. His current complaint appears to allege violations that go beyond the supplemental requirements applicable to dependent employers or willful violators.

Nonetheless, there is no genuine issue of fact that on 17 Aug 06, the Administrator determined, based on the information provided by Complainant in his complaint, that an investigation was not warranted and that none was conducted. Indeed, Complainant concedes in his argument that no investigation was conducted. Although not entirely clear, Complainant's argument appears to be that the regulations, which limit the authority of the ALJ to conduct a hearing only in those cases where the Administrator has conducted an investigation, frustrates clear Congressional intent and should be disregarded.

Setting aside the merits of Complainant's constitutional argument aside, I find this case clearly falls within the ruling of the Administrative Review Board in two previous cases in which Complainant was also a party, *Watson v. Electronic Data Systems Corporation* and *Watson v. Bank of America.*[19] I am bound to follow that precedent. Without an investigation by the Administrator, I have no jurisdiction to hear the case or review the decision of the Administrator that an investigation was not warranted.

---

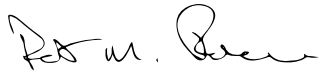
[15] 20 C.F.R.§ 655.806(a).
[16] 20 C.F.R.§655.806(a)(2).
[17] 20 C.F.R. § 655.820(b)(1)-(2) (emphasis added).
[18] *Watson v. Electronic Data Systems Corporation*, ARB No. 04-023 (May 31, 2005).
[19] ARB Nos. 04-023, 029, 050, 099 (May 31, 2005).

DECISION AND ORDER

The motion is granted and the complaint is **DISMISSED**.[20]

The hearing scheduled on **Monday, October 16, 2006** at **9:00 a.m.** in **Memphis, Tennessee** is **CANCELED**.

So ORDERED.



PATRICK M. ROSENOW
Administrative Law Judge

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-4309, 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).

[20] The jurisdictional finding renders the motions filed by Complainant moot.