U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

GEORGE J. WAKILEH,	**ARB CASE NO. 04-013**
PROSECUTING PARTY,	**ALJ CASE NO. 2003-LCA-0023**
v.	
WESTERN KENTUCKY UNIVERSITY,	**DATE: October 20, 2004**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
George J. Wakileh, ***pro se, Bakersfield, California***

For the Respondent:
Deborah T. Wilkins, Esq., ***General Counsel, Office of the President, Western Kentucky University, Bowling Green, Kentucky***

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655, Subparts H and I (2004). The Administrator, Wage and Hour Division, Employment Standards Administration, investigated George J. Wakileh's complaints that his employer, Western Kentucky University (WKU), failed to comply with INA wage requirements and had discriminated against him. The Administrator mailed her determination about the complaints' validity to Wakileh's last known address. Wakileh did not receive the Administrator's determination until after the deadline to timely request a hearing to review the Administrator's determination. But because Wakileh had not notified the Administrator that his address had changed, the fact that Wakileh did not receive the Administrator's determination until after the deadline does not constitute an extraordinary circumstance that prevented him from timely requesting a hearing. Therefore, we dismiss Wakileh's complaints.

BACKGROUND

The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must obtain certification from the United States Department of Labor after filing a Labor Condition Application. 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. The LCA states that the employer must pay the alien the greater of either the actual wage level paid to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II). After it secures the LCA, the employer petitions for and nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(b).[1]

WKU hired Wakileh as an associate professor of electrical engineering on an H-1B nonimmigrant visa in August 2001. Wakileh filed a complaint with the United States Department of Labor in August 2002 alleging that WKU had violated the INA by failing to pay him the greater of either the actual wage level it paid to other individuals with similar experience and qualifications for his occupation or the prevailing wage level for his occupation. *See* 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II). Later, Wakileh filed another complaint alleging that WKU had discriminated against him for filing his initial complaint.

The Administrator of the Labor Department's Wage and Hour Division investigated Wakileh's complaints pursuant to 20 C.F.R. § 655.805. On March 26, 2003, the Administrator determined that WKU had violated only that portion of the INA which requires employers to make LCAs available for public examination. The Administrator did not assess any civil monetary penalty for this violation. *See* 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.705(c)(2). As required by 20 C.F.R. § 655.815(3), the Administrator's determination letter notified the parties that the decision would become final unless the Chief Administrative Law Judge received a request for a hearing from one of the parties within 15 calendar days in accordance with 20 C.F.R. § 655.820.

On May 4, 2003, Wakileh faxed a letter to the Chief Administrative Law Judge stating that "he was unable to meet the 15 day calendar deadline mentioned in [the Administrator's] letter due to moving from Kentucky to California." Wakileh's letter

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[1] The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

also listed incidents that he believed showed that WKU had discriminated against him. Although Wakileh's letter did not specifically request a hearing, the Chief Administrative Law Judge construed his letter as a request for a hearing pursuant to 20 C.F.R. § 655.820(c) and assigned the case to the ALJ for a hearing.

WKU filed a motion to dismiss on the grounds that Wakileh had failed to timely request a hearing. The ALJ granted WKU's motion and dismissed the case. The ALJ found no circumstances that would warrant equitable tolling of the deadline to request a hearing. Therefore, he held that because Wakileh failed to timely request a hearing pursuant to 20 C.F.R. § 655.820(d)-(e), the Administrator's determination was final. Wakileh filed a timely petition for review of the ALJ's Order of Dismissal with the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review an Administrative Law Judge's (ALJ) decision under 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(B) (West 1996), quoted in *Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board engages in de novo review of the ALJ's decision. *Yano Enterprises, Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). *See generally Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

DISCUSSION

On March 26, 2003, the Administrator sent the determination letter by certified mail to Wakileh's Kentucky address. Wakileh contends that he was unable to meet the deadline for requesting a hearing to review the Administrator's determination because he had changed addresses from Kentucky to California and, therefore, did not receive the Administrator's determination letter until after the deadline had passed. Wakileh asserts that he notified the United States Postal Service of his change of address, *see* Prosecuting Party's Rebuttal Brief to Respondent's Response Brief at 5 n.12, but the resultant delay forwarding the determination letter to his new California address caused him to miss the deadline. Though Wakileh notified the Postal Service about moving to California, he did

not apprise the Administrator of his change in address, even though the Administrator's determination was pending at the time of his move.

Pursuant to 20 C.F.R. § 655.820(a), any interested party desiring review of the Administrator's determination "shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge." The request "shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination." 20 C.F.R. § 655.820(d). The Administrator issued the determination on March 26, 2003, but Wakileh did not respond until he faxed a letter to the Chief Administrative Law Judge on May 4, 2003. Thus, Wakileh did not timely request a hearing to review the Administrator's determination pursuant to section 655.820(d).

We agree with the ALJ that grounds for equitable tolling do not exist here. When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines. *Hemingway v. Northeast Utilities,* ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.,* ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2 (ARB Nov. 8, 1999). In *School Dist. of the City of Allentown v. Marshall*, the Third Circuit recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d 16, 18 (1981) (citation omitted).

Wakileh bears the burden of justifying the application of equitable tolling principles. *Accord Wilson v. Secretary, Dep't of Veterans Affairs,* 65 F.3d 402,404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Though Wakileh's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'" *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at 4-5 (ARB May 14, 2003), *citing Wilson,* 65 F.3d at 404, quoting *Irvin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, an absence of prejudice to the other party "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr.,* 446 U.S. at 152.

Wakileh does not argue that WKU actively misled him or that he filed the request for hearing in the wrong forum. Instead, Wakileh argues, in effect, that the delay in receiving the determination letter constitutes an extraordinary circumstance that prevented him from timely filing his request for hearing. We disagree because Walikeh did not exercise due diligence.

The Administrator's determination "shall be served on the complainant . . . by personal service or by certified mail at the parties' *last known addresses*. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail." 20 C.F.R. § 655.815(a) (emphasis added). Here, the record demonstrates that though Wakileh informed the Postal Service about his move from Kentucky to California, he did not inform the Administrator about his change of address, even though the Administrator's determination was pending at the time of his move. We find that Wakileh's failure to keep the Administrator informed about the change of his address constitutes a lack of due diligence.

Consequently, this lack of diligence precludes Wakileh from asserting that his change of address constitutes an extraordinary circumstance that would warrant equitable tolling of the deadline. *Herchak*, slip op. at 4-5 (lack of due diligence precludes equitable tolling of the limitations period). *Cf. Banks v. Rockwell Int'l Corp.*, 855 F.2d 324, 326-327 (6th Cir. 1988) ("[W]hen a complainant does not receive notice of right to sue promptly because he did not notify the [Equal Employment Opportunity Commission (EEOC)] of a change in address, he may not claim that the [deadline] is equitably tolled."); *St. Louis v. Alveno Coll.*, 744 F.2d 1314, 1316-1317 (7th Cir. 1984) (plaintiff's failure to tell the EEOC that he had moved was not an event beyond his control, therefore, deadline began running on the date the notice of right to sue was delivered to the most recent address plaintiff provided the EEOC).

CONCLUSION

Accordingly, because Wakileh did not timely request a hearing and because there are no grounds justifying equitable tolling of the deadline, we **AFFIRM** the ALJ's Order of Dismissal and **DISMISS** Wakileh's petition for review.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge