DATE: November 4, 1994

CASE NO. 94-LCA-00010

In the Matter of

EVA KOLBUSZ-KIJNE

Complainant

v.

TECHNICAL CAREER INSTITUTE, INC.

Respondent

and

ADMINISTRATOR, WAGE AND HOUR DIVISION,
EMPLOYMENT STANDARDS ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

Intervenor

Appearances:

Dr. Hugo Kijne, Lay Representative
For Complainant

Janet A. Savrin, Esquire
For Respondent

Marc Sheris, Esquire
Diane Wade, Esquire
For the Administrator

Before: Robert D. Kaplan
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Immigration and Nationality Act, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1182(n), and 1184 (the Act) and the regulations promulgated thereunder which are found at 29 C.F.R. §507. Under the Act, an employer may hire workers from "specialty occupations" to work in the United States as a non-immigrant. These workers are issued a H-1B visa by the Department of State. §507.700(b). Respondent, Technical Career Institute, employed H-1B visa holders to teach English as a second language at its New York, New York facility. Complainant, Eva Kolbusz-Kijne, alleges that Respondent, who is her employer, failed to properly notify its teachers' collective bargaining representative (trade union) of the filing of certain Labor Condition Applications (LCA) prior to renewing the H-1B visas of its employees. See §507.730(h)(1)(i). Complainant further alleges that since filing her complaint against Respondent she has been the object of improper intimidation by Respondent. See §507.800.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FACTUAL AND PROCEDURAL HISTORY

This case involves Complainant's second complaint against Respondent under the Act. The first complaint was filed with the Wage and Hour Division of the Employment Standards Administration on April 29, 1993. After investigation by the Administrator, on August 10, 1993, a formal hearing was held before Administrative Law Judge Charles P. Rippey (Case No. 93-LCA-00004). On October 14, 1993, Judge Rippey found that Respondent had failed to properly notify the union of two LCAs filed on January 12, 1993 and February 19, 1993. Judge Rippey also found that no violation occurred with respect to an LCA dated January 9, 1992 because the LCA was filed prior to the effective date of the Regulations which govern the LCA application process. Considering the factors set forth in §507.810(c)(1)-(7), Judge Rippey concluded that a civil money penalty of $500.00 should be imposed for each violation for a total civil money penalty of $1,000.00.

Complainant, Respondent, and the Administrator all sought review by the Secretary of Judge Rippey's Decision and Order.

On February 23, 1994, while the case heard by Judge Rippey was being reviewed by the Secretary, Complainant filed the second complaint. (A 1)[1] In the instant complaint, Complainant attached a list obtained from the Department of Labor which seemed to indicate that 35 LCAs had been issued covering a total of 47 employees. Complainant referenced Judge Rippey's Decision and Order and requested a full investigation and an accounting for the remaining LCAs for which no notice had been provided to the union.

On June 10, 1994 the Administrator issued a determination letter which found that Respondent had failed to properly post several LCAs. (C 1) However, it is impossible to determine from the determination

[1] The following references will be used herein: "A" for Administrator's exhibits; "C" for Complainant's exhibits; "R" for Respondent's exhibits; and "TR" for references to the hearing transcript.

letter which LCAs were considered. As a remedy for Respondent's failure to properly post the LCAs, the Administrator ordered Respondent to repost the LCAs at issue. The Administrator further determined that since these violations were neither "substantial" nor "willful" no notification to the Attorney General under §507.855 was warranted.

On June 24, 1994, Complainant requested a formal hearing before the Office of Administrative Law Judges and on July 8, 1994, I issued a notice scheduling a hearing.

On July 18, 1994, the Secretary affirmed Judge Rippey's decision but determined that a lesser civil money penalty of $250.00 per violation was warranted, for a total civil money penalty of $500.00. Applying the criteria at §507.810(c)(1)-(7), the Secretary found that the following factors warranted a lesser civil money penalty:

> Respondent has no history of violations, a minimal number of workers were potentially affected by the violation, there was no financial gain to Respondent and no demonstrated financial loss or injury to any other party as a result of the failure to notify of the union of the labor condition applications, and Respondent has committed to future compliance.

(Secretary, D & O, p. 16).

A formal hearing in the instant case was held before me on September 20, 1994 in New York, New York. After the hearing, the record remained open for submission of the affidavit of Mary Pat Dodds and the parties' briefs. Dodds' affidavit has been filed and is received into evidence as A 5. The parties have filed briefs.

II. THE INSTANT CASE

A. Failure to notify of filing of labor condition applications

Under §507.730(h)(1)(i), where there is a collective bargaining representative in the occupational classification in which H-1B visa holders will be employed, an employer is required to provide written notice to the bargaining representative "on or before the date the labor condition application is filed." In the instant case, Complainant alleges that such notice was not provided to the bargaining representative in a timely fashion. The Administrator and Respondent state that while notice may have been given later than prescribed in the Regulations, no additional action is required to bring Respondent into compliance and there is no need to assess additional penalties against it.

At the outset of the hearing Complainant listed LCAs that she alleged should have been considered by the Administrator. These LCAs are dated October 19, 1993, April 26, 1993, May 20, 1993, June 23, 1993, and January 11, 1994. (TR 12) In addition, Complainant stated she believed, based on her reading of other documents obtained from the Department of Labor, that additional LCAs were filed on or before May 20, 1993, May 26, 1993, and July 16, 1993. (TR 19-20)

Complainant withdrew from consideration the LCAs of October 19, 1993 and January 11, 1994 because they related to non-union positions. (TR 19) After considering the witnesses' testimony at the hearing, Complainant also withdrew from her complaint the LCAs filed on or before May 20, 1993, May 26, 1993 and July 16, 1993, whose existence has not been established. (TR 232) Although initially contested, Complainant also acquiesced in the Administrator's determination that another LCA dated May 20, 1993 was a forgery which had been filed without Respondent's consent, and she withdrew it from consideration. (TR 227)[2]

Therefore, the remaining LCAs to be considered are those of April 26, 1993 and June 23, 1993. Complainant contends that the Act was violated because Respondent failed to notify the union about these LCAs until Respondent sent the union a letter dated August 5, 1993. (C 1)[3]

Mary Pat Dodds, an investigator with the Wage and Hour Division, testified that she conducted the investigations in both the case that was heard by Judge Rippey and the instant case. (TR 65) Dodds testified that the Administrator felt that additional remedial action for the LCAs in question in the instant case would be "redundant" to the fines already imposed by Judge Rippey in the prior case. (TR 102) Dodds reiterated the Administrator's opinion that the additional violations found by Dodds were neither willful nor substantial.

Dodds testified at the hearing that she met with representatives of Respondent on two occasions in 1993 and at those times explained the requirements of the Act and Regulations to Respondent's representatives. (TR 112, 141) In her post-hearing affidavit Dodds revised her testimony and stated that she met with representatives of Respondent in connection with her investigation in the prior case on only one occasion, June 15, 1993. (A 5)

Despite Dodds' face-to-face meeting with Respondent to explain the requirements of the Act and Regulations on June 15, 1993, the only document evidencing notice to the union is Respondent's letter to the union dated August 5, 1993. (C 1) Dr. Henry Moss, Respondent's president during the time in question

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[2] Based upon my review of the record as a whole, except for the October 19, 1993 and January 11, 1994 LCAs, I agree that no chargeable violations occurred with respect to the withdrawn LCAs. With respect to the October 19, 1993 and January 11, 1994 applications, insufficient evidence was submitted to determine whether proper notice was or was not given. Therefore no determination is made regarding these two applications.

[3] Complainant also posits that Respondent's employment of H-1B visa holders is an attempt by Respondent to gain control over the union. According to Complainant, those members of the union that are H-1B visa holders are obligated to their employer for providing the opportunity to work in the United States. (TR 10, 186-187, 190-191) However the deposition testimony of Susan Lyons, secretary of the affected union, indicates that in her estimation only 10 of 280-300 union members are non-immigrant visa holders. (C 2, p. 12) Therefore, I conclude that there is insufficient evidence to support Complainant's theory. Furthermore, I fail to see how the Act is applicable to these allegations.

and currently vice president for academic affairs, testified that he recalled giving notice to the bargaining representative with respect to the June 23, 1993 LCA -- apparently prior to the letter of August 5, 1993 -- but he was unable to find a copy of the notice. (TR 168-173) Dr. Moss further testified that after meeting with Dodds, Respondent took steps to improve its control over the LCA process. (TR 169) Dr. Moss stated that the August 5, 1993 letter was sent to the bargaining representative to "clean up our files" and bring Respondent into compliance. (C 1)

As Ms. Dodds correctly testified, "[t]he burden falls to the firm to maintain a record of the notification that they've given and there was no such record. The earliest record I have is of the August notification." (TR 98); See also §507.705(c)(5). I agree, and find that the union was not sent notice of the filing of the April 26, 1993 and June 23, 1993 LCAs until August 5, 1993.

During her testimony, Dodds continually characterized the August 5, 1993 notice to the bargaining representative as "untimely" but "proper," thereby -- Dodds stated -- extinguishing the need for any further action against Respondent by the Administrator. (TR 134-135)

Dodds testified that she spoke to the bargaining representative, Sue Lyons, and that Lyons "indicated to me that she had no objection at all to the filings of the LCAs and indicated that there were no ramifications of their not having been timely or properly notified." (TR 144) Lyons' deposition testimony is consistent with that of Dodds on this subject. (C 2, pp. 20, 22-23) Dodds further stated that Lyons' representations were a "major factor" in the determination reached by the Administrator. However, I find no provision in the Act or Regulations which permits a union's waiver of the requirement to be notified to be considered in determining whether a violation has occurred.

The facts presented in this case are more clear than those decided by Judge Rippey. In Judge Rippey's case, notice of the January 12, 1993 and February 19, 1993 LCAs was provided in a letter dated March 11, 1993. In the instant case, proper notice of the April 26, 1993 and June 23, 1993 LCAs was not provided until August 5, 1993. Furthermore, the June 23, 1993 LCA was filed just eight days after Dodds had explained the LCA filing and notification process to Respondent. Yet it was not until almost six weeks later, on August 5, 1993, that Respondent gave proper notice to the union.

Based upon my reading of the Secretary's decision in the previous case, I find that the failure to properly notify the bargaining representative is a "substantial" failure under the Regulations. See Secretary D & O, p. 16.

Section 507.810 provides that upon determination that the employer has committed any violation described in §507.805(a), the Administrator may assess a civil money penalty not to exceed $1,000.00 per violation. In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to:

1. Previous history of violation, or violations by the employer under the INA and subparts H or I;

2. The number of workers affected by the violation or violations;

3. The gravity of the violation or violations;

4. Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1182(n) and subparts H and I;

5. The violator's explanation of the violation or viola-tions;

6. The violator's commitment to future compliance; and

7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss, potential injury of adverse effect with respect to the other parties.

§507.810(c).

In his decision, the Secretary assessed a civil money penalty of $250.00 for each of the two violations adjudicated before Judge Rippey. In the instant case, an increased penalty is warranted for several reasons. First, these two additional violations increase the total violations committed by Respondent to four. Second, as I have already found, Respondent ignored the advice and guidance provided by the Wage and Hour Division's investigator and failed to provide notice to the bargaining representative for an LCA filed eight days after being apprised of the proper filing procedure. Finally, although Respondent has stated that it is committed to future compliance, it has failed to demonstrate that its attempts at compliance have been effective. Based upon the following factors, as well as those that have not changed since the final decision of the Secretary, I assess a civil money penalty of $500.00 for each of the two violations, for a total civil money penalty of $1,000.00.[4]

B. Intimidation

During the pendency of the appeal of Judge Rippey's Decision and Order, Complainant submitted a letter brief to the Secretary which argued, inter alia, that Respondent's Vice President, Edward Leff, committed perjury in his testimony before Judge Rippey.

In a letter dated December 15, 1993, Mr. Leff responded to Complainant's allegation by stating:

> Your appeal letter to the Secretary of Labor (case # 93-LCA-0004) dated November 10, 1993 contains untrue and libelous statements meant to defame me personally. To wit, in paragraph 2A you state that if the information you received from Dr. Moss is correct "Mr.

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[4] Contrary to the Administrator's assertion, these violations are separate and distinct from those adjudicated by Judge Rippey and ultimately the Secretary. Therefore the imposition of additional civil money penalties for these violations is not "redundant."

> Leff committed perjury". Before you use a term such as perjury, I suggest you consult a dictionary.
>
> We have tried to maintain a level of professionalism in dealing with you, but you are resorting to personal attacks which are undignified.
>
> Unless you retract these statements, in writing, to the Secretary of Labor and issue a written apology to me within 30 days, I will take the appropriate legal action against you.
>
> Very truly yours,
> /s/ Edward Leff

(A 1)

In a reply letter dated December 20, 1993, Complainant responded to Leff's demand for a written apology by stating that her statement was "conditional" and therefore not libelous. Complainant also reiterated the basis for her original statement. (A 6)

By letter dated January 5, 1994,[5] Complainant filed a complaint with the Administrator stating that Leff's letter was an attempt to intimidate her. (A 1)

In a letter dated January 6, 1994, Respondent's counsel sent Complainant a letter which states in part:

> As Mr. Leff correctly stated, your accusation that Mr. Ed Leff committed perjury during the August 10th hearing is a libelous statement. I wish to inform you that perjury is a "willful and corrupt sworn statement made without sincere belief in its truth." Even if, as you say in your letter, that your accusation is "conditional", it is libelous. You will have to prove that Mr. Leff did not believe his statement to be the truth at the time that he said it in order to have a defense against your libelous statement. I suggest that you retract this accusation in writing to Mr. Leff, with a copy to the Labor Department, and refrain from any further libelous statement against my client.
>
> The Administrative Law Judge has rendered a decision, and Petition for Review has been filed. I strongly recommend that you discontinue any personal correspondence to Mr. Leff or [Respondent] asking for clarification or additional information to satisfy your curiosity in regard to any LCAs. This matter is appropriately before the Secretary of Labor, who will review the record and render a decision.

(C 1)

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[5] The parties stipulated that the 1993 date which appears on the letter is a typographical error. (TR 53)

Section 507.800(d), states that "No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person" because that person has engaged in certain protected activities. The Act itself contains no specific "whistleblower" protection.

As this is a case of first impression with respect to the "whistleblowing" provision of the Regulations, I must borrow from other statutes in order to define the elements which Complainant must establish.

In Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 365 (8th Cir. 1994), the United States Court of Appeals set forth a "three-pronged framework for analysis" of adverse action claims under the Occupational Safety and Health Act, 29 U.S.C. §651, et seq.; See also Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 876 (2nd Cir. 1988)(employing same test in Fair Labor Standards Act cases); Passaic Valley Sewerage Com'rs v. Department of Labor, 992 F.2d 474, 480 (3d Cir. 1993)(Clean Water Act); Lockert v. Department of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(Energy Reorganization Act and National Labor Relations Act).

Under the three-pronged test, Complainant must first set forth a prima facie case by "showing participation in a protected activity, a subsequent adverse action by the employer, and some evidence of a casual connection between the protected activity...and the adverse action." Id. (quoting Schweiss v. Chrysler Motors Corp., 987 F.2d 548, 549 (8th Cir. 1993)). Once Complainant has established her prima facie case, the burden then shifts to Respondent to "articulate an appropriate non-discriminatory reason for its action." Id. Finally, if Respondent overcomes this burden, Complainant must then demonstrate that the proffered reason is pretextual. Id. This general framework has been applied by the Secretary to cases adjudicated under 29 C.F.R. Part 24. Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y, April 25, 1983); See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

While Complainant herself did not testify about the alleged intimidation, Dodds testified that in addition to investigating the second complaint regarding LCAs, she investigated Complainant's allegations of intimidation. Dodds testified that during the course of her investigation she discussed the letters with Complainant. Dodds recalled, "I should say she said that she was upset, she was upset, physically upset by the [Respondent's] letters." (TR 126)

Dodds stated that based on her discussion with Complainant, "I determined that there was no harm to [Complainant] and she suffered no adverse affect at her work or no adverse affect on either her pay, her performance evaluations, or in any way that had anything to do with her work situation." (TR 77) Dodds further testified that "I didn't feel that it [the threat of a law suit] was something that fell within our jurisdiction under this law or within that section of the Regulations." (TR 77) Dodds later suggested that the letters were not related to any protected activity. (TR 120-121)

While the Administrator stipulated that Complainant's allegations of intimidation were incorporated into the Administrator's determination letter of June 10, 1994, the letter is silent on this issue. (TR 54)

Other than the letters themselves and the brief testimony by Dodds, Complainant introduced no evidence with respect to the intimidation claim.

With respect to Complainant's prima facie case, I find that Complainant has established the first element by showing that she engaged in several protected activities including the filing of a complaint with the Administrator and by filing an appeal to the Secretary. §507.800(d)(1).

The second element for a prima facie case is that Complainant must show that she has been subjected to an adverse action by Respondent. Although not clearly articulated by Complainant, I infer from her brief the argument that the threat of a libel suit if she did not suspend her efforts had a chilling effect on her continuing to pursue this matter before the Department of Labor. However, no testimony or other evidence was introduced on this point. In fact, Moss testified that the "paperwork," (i.e., correspondence) from Complainant, "kept coming" after Respondent's letters were sent. (TR 213)

I disagree with the argument of Respondent and the Administrator that the letters did not coerce or intimidate Complainant because she continued to press forward with her actions. Such an analysis makes the violation turn on the subjective response of the "victim." Rather, I find that a threat to file a defamation lawsuit against the complaining individual unless she ceases her protected activity has an implicit chilling effect and therefore would be prohibited by §507.800(d).[6] However, I find no support in the Act for the "whistleblower" regulation. Whereas in other statutes Congress has enacted whistleblower protection, it has not done so here. This provision is solely the creation of the Secretary and, I find, as such the Secretary has usurped the authority of Congress to make legislation.

In Malpass v. General Electric Co., 85-ERA-38 and 39 (Sec'y Mar. 1, 1994), the Secretary recently recognized such a limitation on his authority to promulgate regulations empowering an administrative law judge to issue subpoenas or impose sanctions in the absence of specific legislation providing for these actions. In Malpass, the Secretary stated, "I do not believe the Secretary can assume powers not delegated to him by Congress simply by incorporating provisions, such as the Federal Rules of Civil Procedure, in departmental regulations." Slip. op. at 22. In the instant case, the Secretary has impermissibly attempted to create a whole new body of substantive rights and violations not expressly contemplated by Congress. Consequently, it would not be appropriate to find that Respondent's letters to Complainant constitute a remediable violation.

C. Debarment

Under §507.855 the Administrator is required to notify the Attorney General upon a finding of a violation by the Administrator, an Administrative Law Judge, or the Secretary even though an appeal might be pending. Upon receipt of this notification, the INS will debar the violator from the H-1B visa program for a certain period of time, even though an appeal might be pending. §507.855(c). In the instant case, Respondent is ineligible to participate in the H-1B visa program from January 26, 1994 to January 25, 1995 based on the determination by Judge Rippey. See Secretary D & O, p. 5.

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[6] The Regulation does not limit prohibited threats to those which pertain to an employment relationship between a complainant and a respondent.

Despite language in Judge Rippey's Decision and Order in which he directed the Administrator to forbear from notifying the Attorney General until his Decision and Order could be reviewed by the Secretary, the Administrator informed the Attorney General of Judge Rippey's decision and Respondent was debarred prior to review by the Secretary. As the meaning and application of the Act are still in the formative stage, I too believe it is best that debarment be stayed until the final agency action takes place.

ORDER

It is HEREBY ORDERED that:

1. Respondent, Technical Career Institute, is ordered to pay a civil money penalty of $500.00 for its failure to properly notify the bargaining representative of the filing of the labor condition application dated April 26, 1993.

2. Respondent, Technical Career Institute, is ordered to pay a civil money penalty of $500.00 for its failure to properly notify the bargaining representative of the filing of the labor condition application dated June 23, 1993.

3. Complainant's complaint against Respondent for intimidation is DISMISSED.

It is further ORDERED that application of this Decision and Order to debar Respondent pursuant to §507.855(a)(2) is stayed for thirty (30) calendar days. Further, if Respondent files a timely petition for review with the Secretary, the stay of debarment shall remain in effect until the Secretary issues a final determination.

ROBERT D. KAPLAN
Administrative Law Judge

DATED: November 4, 1994
Camden, New Jersey

NOTICE TO THE PARTIES: The Administrator of the Wage and Hour Division or any other party to this proceeding desiring review of this Decision and Order may petition the Secretary of Labor to review this Decision and Order. To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of this Decision and Order. Copies of the petition shall be filed with the Secretary at the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. Copies of the petition shall be served on all parties and on the Administrative Law Judge. Provisions regarding review rights are set forth at 29 C.F.R. §507.845.