



In the Matter of:

SEYANABOU A. NDIAYE,

ARB CASE NO. 05-024

COMPLAINANT,

ALJ CASE NO. 2004-LCA-36

DATE: November 29, 2006

v.

CVS STORE NO. 6081,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Seyanabou A. Ndiaye, *pro se*, Cincinnati, Ohio

For the Respondent:

**Martha A. Schoonover, Esq., John F. Scalia, Esq., *Greenberg Traurig, LLP*,
McLean, Virginia**

FINAL DECISION AND ORDER

The Complainant, Seyanabou A. Ndiaye, has filed a complaint with the Wage and Hour, Employment Standards Division of the Department of Labor (DOL), alleging a violation of H-1B provisions of the Immigration and Nationality Act.¹ A DOL Administrative Law Judge (ALJ), granted the Respondent CVS's Motion for Summary Judgment, finding that Ndiaye failed to file a timely complaint and raised no questions of fact regarding her entitlement to tolling of the statute of limitations.

The question presented to the Administrative Review Board for determination is whether the ALJ properly granted CVS's Motion for Summary Judgment and dismissed

¹ 8 U.S.C.A. § 1101 *et seq.* (West 2006).

Ndiaye's complaint on the grounds that there were no genuine issues of material fact as to the date of filing of Ndiaye's complaint with the DOL. Finding, as discussed below, that Ndiaye, as a matter of law, failed to present any genuine issue of material fact as to the date of filing of her complaint and failed to proffer grounds sufficient to toll the limitations period, we agree with the ALJ's recommendation to dismiss Ndiaye's complaint.

BACKGROUND

In November of 2000, the Respondent, CVS, submitted a Labor Contract Agreement (LCA) to the DOL seeking certification to employ Ndiaye as a pharmacy intern.² The DOL granted the certification and CVS hired the Complainant on the basis of an H-1B visa. On August 2, 2002, CVS fired Ndiaye. The Complainant describes the action taken against her as a suspension until further notice, while CVS insists the action was a termination of employment. No further employment actions occurred after this date between the two parties. On August 20, 2002, the Complainant, through counsel, sent a letter to CVS claiming retaliatory suspension of employment based on Ndiaye reporting violations of an H-1B visa. CVS responded stating that they were considering further review. Neither party to the dispute filed the letter with the DOL at the time of the correspondence.

On November 5, 2002, the Complainant filed a Title VII³ claim of discrimination action with the Equal Employment Opportunity Commission (EEOC) alleging discrimination based on race and national origin.⁴ When filling out the EEOC form, the Complainant marked the last violation as occurring on August 2, 2002. Additionally, when given the option of checking a box that marks the complaint as a "continuing

² The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty. 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels 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. After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(a), (b) (The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within the Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002)).

³ 42 U.S.C.A. § 2000e *et seq.* (West 2006).

⁴ Respondent CVS's Motion for Summary Judgment, Ex. 4: EEOC Form 5 (Rev. 07/99), Charge Number 221A300091, filed 10/28/2002.

violation,” the Complainant chose not to select that option.⁵ CVS filed a response on December 3, 2002, denying all allegations. On January 17, 2003, the EEOC closed its file stating that it found no violation of Title VII in the evidence provided.

The Complainant also filed an action with the Unemployment Compensation Review Commission (UCRC). The UCRC denied the Complainant’s request for unemployment benefits on September 16, 2002. The Complainant filed a timely appeal of the UCRC’s decision with a hearing officer. The hearing officer denied Ndiaye’s claim in January of 2003. Through counsel, Carrie Barron, the Complainant attempted to persuade the UCRC to reconsider its decision in late January 2003.⁶ The Complainant’s appeal was denied.

On March 30, 2004, the Complainant filed a WH-4 form with the DOL initiating this proceeding. Because the DOL determined that the Complainant had not filed her complaint in a timely manner, it issued its decision denying her relief in July 2004, without completing an investigation.

The Complainant appealed the dismissal of her complaint by the Wage and Hour Division to a DOL ALJ. The ALJ ruled that Ndiaye did not timely file her complaint. He found that CVS terminated Ndiaye’s employment on August 2, 2002. She did not file her complaint with the DOL until April 1, 2004. Under Title 8 U.S.C.A. § 1101 et seq. and 20 C.F.R. § 655.806(a)(2006), the statute of limitations for filing H-1B matters with the DOL Wage and Hour Division is one-year (12 months).

The ALJ also found that the Complainant’s letter of August 20, 2002, to the CVS Human Resource Manager did not constitute a continuing violation that would toll the limitations period. Most notably, the letter was not filed with the DOL until July 2, 2004, when the Complainant first filed her H-1B complaint. The ALJ ruled that there was no issue of material fact as to whether the complaint was filed within the one year statute of limitations.

Under the provisions of 29 C.F.R. § 18.40 (2006), the ALJ may “enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”⁷ On September 10, 2004, the ALJ dismissed the complaint as a matter of law in granting the Respondent’s motion for summary judgment.

⁵ *Id.*

⁶ Docket number #R02-23293-0000 for the Unemployment Compensation Review Commission in Columbus, Ohio.

⁷ 29 C.F.R. § 18.40(d).

The Complainant was given until October 10, 2004, to petition the Administrative Review Board (ARB or Board) for review. She did not file a petition until December 1, 2004. The ARB issued an Order to Show Cause, for the Complainant to demonstrate a sufficient reason to allow an untimely filing of her appeal. In her Response to the Order to Show Cause, Ndiaye relied on an order issued by the ALJ. In the Order, entitled “Joint Order: Order Amending Order Granting Motion for Summary Decision to be Recaptioned as Decision and Order Granting Summary Decision and Dismissal of the Complaint; Order Treating Complainant’s Document Captioned Hearing on Issues of Genuine Facts as Complainant’s Petition for Review and Request for Hearing on Issues of Genuine Facts; Order Transferring the Matter to the Administrative Reivew [sic] Board as a Petition for Review, and Order of Cancellation of Hearing,” the ALJ states that the original complaint should be transferred to the ARB and treated as a timely filed petition for review. The ALJ also attached a service sheet to the Order indicating that the Legal Assistant served a copy of the Order on the ARB via regular mail. Because Ndiaye had reasonably relied on the ALJ’s irregular order to her detriment, we determined that it was appropriate to toll the limitations period for filing her appeal and accept her petition for review.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review an ALJ’s decision concerning the INA.⁸ Under the Administrative Procedure Act, the Board, as the Secretary of Labor’s designee, acts with “all the powers [the Secretary] would have in making the initial decision”⁹ The Board reviews the ALJ’s decision de novo.¹⁰ Under a de novo standard of review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court.

⁸ 18 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).

⁹ 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).

¹⁰ *Yano Enters., 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).

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.¹¹ Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.¹² A genuine issue of material fact is one, the resolution of which “could establish an element of a claim or defense and, therefore, affect the outcome of the action.”¹³

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.¹⁴ “To prevail on a motion for summary judgment, the moving party must show that the nonmoving party ‘fail[ed] to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.’”¹⁵ Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”¹⁶

Furthermore, a party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.”¹⁷

DISCUSSION

The Complainant, in her briefs to the Board, reiterates her actual complaints against CVS in relation to the H-1B violation, but she raises no material facts related to the question of timeliness. The rule under 20 C.F.R. § 655.806(a)(5) is:

¹¹ Fed. R. Civ. P. 56.

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹³ *Bobreski v. United States EPA*, No. 02-0732(RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

¹⁴ *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (ARB Dec. 13, 2002).

¹⁵ *Bobreski*, at *3 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

¹⁶ *Bobreski*, at *3.

¹⁷ 29 C.F.R. § 18.40(c)(2006). See *Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec’y July 17, 1995).

A complaint 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.

The Respondent contends that after August 2, 2002, the date on which CVS terminated her employment, the Complainant had no further employment relationship with CVS. The limitations period begins to run from the date of the last alleged violation.¹⁸ The last alleged violation pertinent to the H-1B complaint was CVS's termination of the Complainant's employment. CVS clearly demonstrated its intention to terminate the Complainant's employment. The Complainant no longer worked for CVS after August 2, 2002, and she received no payment or benefits from CVS for time worked after this date. However, Ndiaye did not file her complaint until April 1, 2004. Additionally, the Complainant did not allege, before the ALJ or in any briefs presented to the ARB, any further violations after August 22, 2002, that might toll the statute of limitations.

In her Rebuttal Brief in Response to Respondent's Reply Brief on ALJ's Granting of Motion of Summary Judgment, the Complainant contends that the August 22, 2002 letter from her counsel to CVS and CVS's subsequent response amounted to an ongoing conflict with no resolution. However, the letter does not imply that any further employment contract would arise, or that any violation occurred, after the point of Ndiaye's termination from CVS. There is no evidence in the letter that either party expected further employment, rather only a resolution of the disputed claim. CVS believed its actions terminated the Complainant's employment on August 2, 2002. Although the Complainant contends that she believed that her employment was merely suspended and that future employment might be possible, a subjective belief by one party that termination might not occur does not toll the statute of limitations.¹⁹ An objective reading of the letter does not lead the reader to the belief that it constituted a continuance of the employment contract between CVS and Ndiaye.

The ALJ decided that the August 22, 2002 letter was not evidence of a continuing violation sufficient to toll the statute of limitations. Further, the ALJ ruled that after the August 22, 2002 letter, regardless of whether the employment action was a firing or a suspension, neither side acted in any manner to extend the employment relationship sufficient to toll the statute of limitations. The ALJ's interpretation of the letter is valid.

¹⁸ *Delaware State College v. Ricks*, 449 U.S. 250, 257-261 (1980).

¹⁹ *Ballentine v. Tennessee Valley Authority*, ALJ No. 91-ERA-23, slip op. at 2 (Sep. 23 1992); *see English v. Whitfield*, 858 F.2d 957, 961-962 (4th Cir. 1988); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 947 (6th Cir. 1987).

The letter does not present a genuine issue of material fact relevant to the issue whether Ndiaye timely filed her complaint.

The Complainant also relies in her Brief on Review of the Administrative Law Judge's Decision on the fact that the DOL accepted her case in July of 2004 for investigation. The DOL stopped its investigation after determining that the filing of the claim was untimely. The fact that the Wage and Hour Division accepted the case prior to investigating the question of timeliness does not constitute a genuine issue of material fact relevant to the issue whether Ndiaye timely filed her complaint because the WHD could not decide whether she timely filed her complaint without first accepting the case for investigation. The Complainant has failed to demonstrate that either she or CVS initiated any action or that a subsequent violation occurred, sufficient to toll the statute of limitations.

In her Brief on Review of the Administrative Law Judge's Decision, Ndiaye focuses primarily on the merits of her claim, which are not at issue in this appeal. The Board has held that limitation periods adopted to expedite the administrative resolution of cases that do not confer important procedural benefits upon individuals or other third parties outside the ARB are subject to equitable tolling.²⁰ The ARB has recognized three situations in which it will accept an untimely complaint.²¹

- (1) When the respondent has actively misled the complainant respecting her rights to file a petition,
- (2) The complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) The complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.²²

Ndiaye bears the burden of justifying the application of equitable modification principles.²³ Ignorance of the law will not support a finding of entitlement to equitable

²⁰ *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, slip op. at 16 (ARB June 2, 2006).

²¹ *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 3 (ARB Nov. 8, 1999).

²² *Accord School Dist. of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981)(the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complaint must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling); see *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 3 (ARB Nov. 8, 1999).

tolling.²⁴ Ndiaye failed to address her entitlement to equitable tolling, either before the ALJ or the Board. Generally, the Board will not consider an issue that a party has not raised and briefed.²⁵ Nevertheless even if Ndiaye had raised this issue in this case, she has raised no genuine issue of material fact relevant to the applicability of equitable tolling to her complaint.

First, there is no evidence that the Respondent actively misled the Complainant with respect to her rights to file a complaint, nor has the Complainant made any assertion that she was so misled.

Second, there is no genuine issue of material fact regarding whether Ndiaye was in some extraordinary way prevented from asserting her rights. In fact, it appears that quite the opposite was true. The Complainant contacted at least three different organizations seeking remedies for her situation. Both the EEOC and the UCRC denied her claims on the merits. Additionally, there is no evidence that the Complainant was prevented from seeking relief on the H-1B claim prior to filing her complaint in July of 2004. Her counsel correctly identified the issue in his August 20, 2002 letter. Since the Complainant was not prevented from asserting her rights, equitable tolling is not applicable.

Finally, there is no genuine issue of material fact regarding whether Ndiaye mistakenly raised the precise statutory claim but in the wrong forum. The letter the Complainant's counsel, Richard I. Fleischer, wrote to the Human Resource Manager of CVS the appropriate statutory claim for the Complainant. In it, the Complainant asserts that the Respondent fired her when she complained that she was inappropriately placed as a Pharmacy Service Associate rather than a Pharmacy Intern, as required by her H-1B visa. In the present case, the Complainant should have filed with the Wage and Hour Division of the Department of Labor.²⁶ The Complainant's letter to CVS dated August 20, 2002, did not constitute a filing in any forum, mistaken or not. A forum is a court or other judicial body.²⁷ CVS, as an employer and not a judicial body, does not meet the

²³ *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-7, slip op. at 8 (ARB Sep. 29, 2006); *see Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

²⁴ *Accord Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000).

²⁵ *Higgins* at *8.

²⁶ 20 C.F.R. § 655.806(a)(1)(2006).

²⁷ BLACKS LAW DICTIONARY (8th ed. 2004)(West 2004).

definition of forum. There was no mistake in filing here, as the complaint was never filed in a venue qualifying as a forum.

Ndiaye raised no genuine issues of material fact in relation to the question of timely filing. The ALJ properly found that there were no material facts pertinent to the untimely filing of the Complainant's complaint. Additionally, the Complainant fails to provide any evidence of material fact which would allow her to claim relief under the doctrine of equitable tolling.

CONCLUSION

The Complainant failed to raise any genuine issue of material fact regarding the untimely filing of her claim. She fails to provide any explanation for the fact that more than 12 months elapsed prior to the filing of her claim of an H-1B violation. Additionally, Ndiaye raised no genuine issue of material fact regarding the applicability of equitable tolling in evaluating her complaint since there is no showing that the Respondent misled Ndiaye as to her rights to file a claim; she was not prevented from filing; and she failed to file this claim in any forum prior to April 2004.

Accordingly, since there are no genuine issues of material fact, we **AFFIRM** the ALJ's Order Granting Motion for Summary Judgment and **DISMISS** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge