



Issue Date: 11 May 2006

CASE NO.: 2005-LCA-00017

In the Matter of:

**LUDWIG KERSTEN,
Prosecuting Party,**

vs.

**LA GARD, INC. and MASCO CORP.,
Respondents.**

Order on Motion to Strike and Granting Summary Decision Dismissing Complaint

After investigating the complaint Ludwig Kersten filed, the Administrator of the Employment Standards Administration (Administrator) found that his employer, La Gard, Inc., had not violated the H-1B provisions of the Immigration and Nationality Act of 1952, as amended¹ (Immigration Act), 8 U.S.C.A. § 1101(a)(15)(H)(i)(B) (West Supp. 2005) and § 1182(n)(2)(A) (West Supp. 2005). *See*, Administrator's Determination Letter of Feb. 5, 2005. Mr. Kersten requested review of that determination under 20 C.F.R. § 655.820(b)(1) (2004).² Pending motions by La Gard include:

1. A motion to strike the remedies Mr. Kersten seeks, other than back pay;
2. A motion to strike from his list of rebuttal witnesses an immigration lawyer; and
3. A motion for summary decision dismissing all claims.

The motion to strike remedies explores the relief an H-1B visa holder may obtain when the Administrator has decided not to prosecute his complaint; the motion for summary judgment tests whether Mr. Kersten has sufficient proof of his claims to warrant a trial. I would limit his claims for relief, but because I find the claims time barred, or not covered by the Immigration Act, I grant a summary decision dismissing those claims.

¹ Relevant amendments were made in the American Competitiveness and Workforce Improvement Act of 1998, Title IV of Pub. Law 105-277, and the American Competitiveness in the Twenty-First Century Act of 2000, Pub. Law 106-313.

² All references to the Code of Federal Regulations are to the 2004 codification unless stated otherwise.

A. *Background*

1. General

The Immigration Act permits a limited number of foreign professionals to enter the United States as nonimmigrants on H-1B visas. They are admitted to work temporarily in specialty occupations at jobs unfilled by American workers. 65 Fed. Reg. 80110 (Dec. 20, 2000); 20 C.F.R. § 655.700(a)(1); *see also*, 8 C.F.R. § 214.2(h)(1)(i). “Specialty occupations” require theoretical and practical application of a body of highly specialized knowledge in fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts. At least a baccalaureate degree is required to enter those occupations in the United States. 8 U.S.C.A. § 1184(i)(1) (West Supp. 2005), 8 C.F.R. §§ 214(h)(4)(i)(A)(1), 214(h)(4)(ii).

A Labor Condition Application³ (Application) requires an employer to attest that it will pay the foreign professional “the actual wage level paid by the employer 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 [geographic] area of employment, whichever is greater . . .” 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II) (West Supp. 2005). This serves to “protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.” 65 Fed. Reg. 80110. *See also*, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2); 20 C.F.R. §§ 655.705(c)(1) & 655.805(d) (making the employer’s representations in an Application enforceable). Regional certifying officers at the Department of Labor routinely grant all Applications completed without obvious inaccuracies. 20 C.F.R. § 655.740(a)(2). The officers do not investigate applications for “accuracy, truthfulness or adequacy.” 20 C.F.R. § 655.740(c).

The employer attaches the certified Application to a form I-129, and files it with United States Citizenship and Immigration Services (USCIS) [formerly known as the Immigration and Naturalization Service (INS)]. 8 C.F.R. § 214(h)(4)(iii). These documents comprise the employer’s petition for the professional’s admission to the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (West Supp. 2005); 20 C.F.R. § 655.705(b). Using the approved petition, the nonimmigrant professional applies at an American embassy or consulate for an H-1B visa to enter the United States. 8 C.F.R. § 214.2(h)(1)(i); 20 C.F.R. § 655.705(b). Mr. Kersten made his application from Germany.

The Administrator investigates complaints by H-1B visa holders that an employer has not honored the attestations in its Application - especially by failing to pay the stated wage rate. 8 U.S.C.A. § 1182(n)(2)(A) & (D) (West Supp. 2005), 20 C.F.R. §§ 655.705(a)(2), 655.800. The Administrator requires the employer to pay back wages on any well-founded complaint. 8 U.S.C.A. § 1182(n)(2)(D) (West 1999). He also may impose civil money penalties, 8 U.S.C.A. § 1182(n)(2)(C) (West 1999), 20 C.F.R. § 655.810(b) & (c), and in some circumstances may bar the employer from submitting additional Applications for H-1B visas for up to 3 years. 20 C.F.R. §§ 655.700, 655.810(d)(3).

³ Form ETA 9035.

2. La Gard's Applications for Kersten

La Gard's President, Larry Cutter, offered Mr. Kersten a job with the company in December 1998; Kersten began to perform services in the United States the next month. Stipulated Facts 1 and 2. The original Application La Gard submitted to the Department of Labor on July 6, 1999 was certified, and became part of the H1-B visa petition submitted to the INS on September 21, 1999, seeking Mr. Kersten's admission for the three-year period from October 1, 1999 to October 1, 2002. Stipulated facts 6 and 21. The Application represented Kersten would be a Quality Control Engineer at a \$60,000 annual salary. His visa was issued on November 5, 1999 and he went on La Gard's payroll on November 15, 1999 in that job. Stipulated Facts 5 and 7. La Gard renewed the Application with the Department of Labor in September 2002, and filed an application to extend Kersten's H1-B status as well.

B. The Motion to Strike Remedies

Mr. Kersten alleges that: (1) La Gard employed him for many months while it knew he was in the United States on a visitor's visa (from January through September 1999), before any application for an H-1B visa had been filed, approved or issued for him, in violation of 20 C.F.R. § 655.705(c)(4); (2) the application La Gard eventually filed claimed he would work as a quality engineer when he actually worked as a production manager, misstating a material fact bearing on the prevailing and actual wage rates that set the floor for his pay, in violation of 20 C.F.R. § 655.810; (3) La Gard failed to post at his employment site notice of the applications made for his H-1B visa or its extension, in violation of 20 C.F.R. § 655.734; (4) La Gard laid off (*i.e.*, displaced) an American when it employed him to do that manager's work at a lower wage, in violation of 20 C.F.R. § 655.738 (b); (5) La Gard willfully misrepresented to him in late 1998 that it would place him in a significant management position, at an \$80,000 annual salary, to induce him to leave his job in the Netherlands and work for it in the United States, and (6) fired him in September 2003 in retaliation for his written internal complaint about La Gard's failure to have kept the promises made to him.

La Gard has challenged the wide-ranging relief the Administrator could impose if it did what Mr. Kersten alleged. Mr. Kersten claims he is due back pay, front pay, compound interest, compensatory damages, punitive damages, equitable remedies, and that La Gard should pay civil money penalties. La Gard maintains his potential recovery is limited to back pay.

1. Standing

As an "interested party," Mr. Kersten became the "prosecuting party" when he sought review of the Administrator's decision to exonerate La Gard after investigating his complaint (Complaint No. 1351980). 20 C.F.R. §655.820(b)(1). The status of "prosecuting party" neither invests him with the Administrator's authority to impose civil money penalties payable to the government, nor to bar La Gard from filing other H-1B visa petitions. *See* 20 C.F.R. § 655.810(b) and (d); *cf.*, *USDOL v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033, ALJ No. 2001-LCA-29 (ARB June 30, 2005), slip op. at 11 ["The Administrator has the authority to impose civil money penalties for willful violations of the H-1B requirements. . . ." (emphasis supplied)].

Mr. Kersten argues that a decision sustaining his claims about La Gard's transgressions of H-1B program regulations could persuade the Administrator to impose penalties. This effectively concedes La Gard's point - he seeks to prosecute matters he can obtain no relief for in his own right. His theory requires two trials: this one, and another if the Administrator seeks to impose the penalty (assumedly a substantial fine and debarment). Regulations obligate the Administrator to offer a second proceeding to the employer. 20 C.F.R. § 655.820(b)(2). His argument also fails to take prosecutorial discretion into account sufficiently. After this trial the Administrator may think the probability of success in a penalty proceeding is not high enough to warrant the expenditure of the Agency's limited resources. Two trials, after all, raise the real possibility of inconsistent results. The regulatory scheme does not contemplate this inefficient two trial procedure. Mr. Kersten may prosecute only violations that injured him.

Moreover, some of the acts he attributed to La Gard would not violate the H-1B program regulations. A small sub-set of employers must attest that hiring a foreign professional will displace no U.S. worker. They are "certain H-1B dependent employers and employers found to have willfully violated H-1B program requirements." 20 C.F.R. §§ 655.705(c)(1); *see also*, 20 C.F.R. §§ 655.736 and 655.738 (introductory paragraph). LA Gard falls in neither category.

2. Contract Damage Claims

The Secretary of Labor cannot adjudicate damage claims for either a breach of La Gard's alleged promise to assign him a senior management position at an \$80,000 annual salary, or for consequential damages he incurred when he returned his household to Europe after his termination (*viz.*, airfare, expenses of moving furniture and goods, and temporary housing). *Cf.*, *Temporary Employment Services, Inc. v. Trinity Marine Group Inc.*, 261 F.3d 456 (5th Cir. 2001) (Article I administrative law judges are authorized to adjudicate the rights of parties "in respect of a claim" under § 19(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, but not to adjudicate disputes involving contractual indemnity and insurance issues between an employer that lent an employee, its insurer, and the borrowing employer). *See also*, [Restatement \(Second\) of Judgments § 83](#) cmt. g (1982) (An administrative tribunal "ordinarily lacks the authority to adjudicate claims arising out of the transaction in question but which are based upon other substantive legal premises."). I concur in the conclusion another judge reached in a similar proceeding under the Immigration Act's H-1B regulations:

"The Department of Labor does not enforce private contractual agreements, such as the terms of an offer letter. Complainant's grievances pertaining to alleged discrepancies between promises in his offer letter and what was actually received do not embody a cause of action that is redressable in this forum."

Badhwar v. Clarisoft Corp., 2003-LCA-00005 (ALJ Jan. 27, 2003).

3. Tort Damage Claims

For these same reasons the Secretary cannot adjudicate common law tort damage claims for emotional distress and humiliation. Those must be brought in a federal Article III court or a state court of general jurisdiction. La Gard's reply indicates that Mr. Kersten has filed a civil

action against it in the Superior Court of California for the County of Los Angeles. Reply at 4 & n.1. Remedies for common law torts lie there.

4. Enforcement of the Wage Attestations

Mr. Kersten enjoys standing to recover the full wage La Gard listed in the Applications it filed with the Department of Labor to obtain or extend his non-immigrant admission to the United States, if La Gard paid him less. That is not his complaint.

5. Misrepresentations about his Job Category

An H-1B visa holder may obtain back pay with proof that his employer misrepresented his work duties, a fact that bears materially on the position's prevailing and actual wage rates. Understating the specific job's duties to make the position appear less skilled (and so less remunerative) violates 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II) (West Supp. 2005) and 20 C.F.R. § 655.810. The Department of Labor never analyzed whether the duties listed were accurate before it certified the initial or extension Applications for Mr. Kersten. A H-1B visa holder may recover the prevailing or the actual wage for the job performed (whichever is higher).

6. Whistleblower Relief

Mr. Kersten may obtain relief necessary to make him whole if he shows La Gard retaliated against him for intra-corporate whistleblowing. He must prove he complained about matters he reasonably believed were violations of the H-1B program, and was fired in retaliation for it. See, 8 U.S.C.A. § 1182 (n)(2)(C)(iv) (West Supp. 2005) and the discussion at 65 F.R. 80178 of the whistleblower protection provisions in the regulations that ultimately codified at 20 C.F.R. § 655.801. The text of the Immigration Act's whistleblower provision enumerates no remedies, but the implementing regulation describes them this way:

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, *the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of Sec. 655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these provisions, or other appropriate legal or equitable remedies.*

20 C.F.R. § 655.810(e)(2) (emphasis supplied)

a) Compensatory Damages

The Secretary believes Congress intended her to be “guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 C.F.R. part 24)” when she applies the whistleblower protection provisions for the H-1B visa program. 65 Fed. Reg. at 80178. Her Part 24 regulations authorize several types of damages:

Upon the conclusion of the hearing and the issuance of a recommended decision that the complaint has merit, and that a violation of the Act has occurred, the administrative law judge shall issue a recommended order that the respondent [employer] take appropriate affirmative action to abate the violation, including *reinstatement of the complainant to his or her former position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages.* In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate.

29 C.F.R. § 24.7(c)(1) (emphasis supplied)

La Gard says that only back wages are recoverable because Mr. Kersten cannot make out a viable cause of action for whistleblowing. Whether he can prevail will be an issue on La Gard's motion for summary adjudication. But on its motion to strike remedies, the object is to determine the relief he may have if he prevails. Reinstatement is an obvious remedy. Compensatory damages available under 29 C.F.R. Part 24 include recompense for any pain and suffering, mental anguish, embarrassment and humiliation the forbidden discrimination caused. *See, e.g., Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000) slip op. at 29. The source for these damages is not the common law of tort, but the statutory protection Congress gave employees injured by whistleblowing.

On a similar motion to strike remedies, the trial judge in *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332, 1334 (S.D. Fla. 2004) held that a successful Sarbanes-Oxley Act whistleblower would be deprived of "all relief necessary to make the employee whole," as that statute requires, unless compensation for reputational injury that diminished his future earning capacity were available. *See*, 18 U.S.C.A. § 1514A(c)(1) (West). Another trial judge disagreed, however, that reputational injury is compensable under that statute. *Murray v. TXU Corp.*, 2005 WL 1356444 (N.D. Tex. June 7, 2005). He accepted that compensatory damages normally encompass pain and suffering, mental anguish, and reputational injury, but placed more weight on the failure of the Sarbanes-Oxley Act to include to those non-pecuniary damages in its listing of reinstatement, back pay, litigation costs, experts witness and attorney fees as compensatory damages. 18 U.S.C. § 1514A(c)(2). On the salient point the *Hanna* and *Murray* decisions agree: claims for humiliation and injury to reputation are recoverable items of compensatory damages. The Secretary of Labor may award them under 20 C.F.R. § 655.810(e)(2) as "appropriate legal or equitable remedies."

b) Transportation

It also would be "appropriate" under 20 C.F.R. § 655.810(e)(2) to require La Gard to pay Mr. Kersten's airfare to Europe after a discriminatory termination. *See*, 65 Fed. Reg. 80110, 80171, relying on § 214(E)(5) (A) of the Immigration Act and the INS regulation at 8 CFR § 214.2(h)(4)(iii)(E).⁴ Each employer is responsible to provide its H-1B visa holder the means to

⁴ "(E) Liability for transportation costs. The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the

leave the country if he is fired. Liability arises from the conditions La Gard accepted when it petitioned for Mr. Kersten's admission to the United States, not from the common law of contract or tort. *See, USDOL v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033, ALJ No. 2001-LCA-29 (ARB June 30, 2005), slip op. at 3 & n. 3. La Gard's President, Larry Cutter, specifically acknowledged this liability "if [Kersten] is dismissed from employment by La Gard prior to the end of the period of his authorized stay." *See*, page 3 of Cutter's July 22, 1999 letter to the INS. The airfare is for him alone, not for members of his family who were not H-1B employees.

7. Interest

If successful Mr. Kersten may recover interest on back pay, but not on non-pecuniary damages, calculated from the date that pay accrues, at the rate applied to the underpayment of Federal income taxes (the Federal short-term rate determined under 26 U.S.C.A. § 6621(b)(3) (West 2002) plus three percentage points). *Dalton v. Copart, Inc.*, ARB Nos. 04-027 and 04-138, ALJ No. 1999-STA-46 (ARB June 30, 2005) slip op. at 7; *see also*, 26 U.S.C.A. § 6621(a)(2). Interest is compounded quarterly. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 18 (ARB Mar. 29, 2000); *Ass't Sec'y and Cotes v. Double R Trucking, Inc.*, ARB No. 99-061, ALJ No. 98-STA-34, slip op. at 3 (ARB Jan. 12, 2000).

8. Punitive Damages

Nothing in the Immigration Act or the Secretary's implementing regulations authorize punitive damages. Punitive or exemplary damages are recoverable under Title 29 C.F.R. Part 24 only when a whistleblower protection statute specifically includes them. The Safe Drinking Water Act and the Toxic Substances Control Act do. 42 U.S.C.A. § 300j-9 (i)(2)(B)(ii)(IV) (West Supp. 2005) and 15 U.S.C.A. § 2622(B)(2)(B)(iv) (West 1999). The Immigration Act does not.

9. Summary

La Gard's alleged acts of (1) employing Mr. Kersten before an application for an H-1B visa had been filed, approved or issued, in violation of 20 C.F.R. § 655.705(c)(4); (2) failing to post at the employment site notice of the applications for his H-1B visas either electronically or by hard copy, in violation of 20 C.F.R. § 655.734; (3) displacing an American manager by employing him for in that job at a lower wage; (4) willfully misrepresenting to him that La Gard would place him in a significant management position, at an \$80,000 annual salary to induce him to come to the United States, and (5) terminating him when he confronted management with its failure to honor these promises (as distinct from retaliating against him for complaints about violations of the H-1B regulations) are beyond the reach of this proceeding. Mr. Kersten also may not recover common law contract damages, tort damages, or punitive damages here.

period of authorized admission pursuant to section 214(c)(5) of the [Immigration] Act. . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status."

He may recover (1) back pay if La Gard (a) paid him less than it represented for the job in its Applications, or (b) misrepresented the prevailing or actual wage for his position by understating the job duties; (2) compound interest on back pay; (3) compensatory relief for whistleblowing that may include pain and suffering, mental anguish, embarrassment and humiliation; and (4) airfare for transportation back to Europe.

C. Motion To Strike Rebuttal Witness

Mr. Kersten may call Josie Gonzalez, Esq. as an expert witness to rebut any expert testimony La Gard may elicit from its immigration counsel, Heidi Berger, Esq.

D. Summary Judgment

Mr. Kersten's remaining substantive claims allege that La Gard willfully misrepresented his job duties on the Application, and retaliated against him for complaining about La Gard's broken promises. La Gard contends that Mr. Kersten's claim of false representations about his job duties in the initial and extension Applications are time barred, but even in the absence of this procedural bar, he cannot prove the substantive elements of either this claim or for retaliation.

1. Legal Standard for Granting Summary Adjudication

This forum's rule on summary dispositions at 29 C.F.R. § 18.40(d) is essentially identical to Rule 56, Fed. R. Civ. P. *Mehen v. Delta Air Lines*, Case No. 03-070 (ARB Feb. 24, 2005). A properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof⁵ of facts crucial to all claims for relief. It tests whether the Immigration Act's whistleblower protections and the implementing regulations at 20 C.F.R. § 655.810(a) and (e) provide a remedy when Mr. Kersten's admissible evidence is assumed to be true. Affidavits, declarations and answers to discovery (including responses to requests for admissions, answers to interrogatories, or deposition testimony) from the complainant or other witnesses are considered. The judge weighs none of this evidence, and indulges reasonable inferences in the complainant's favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (only legally permissible inferences are drawn); *see generally, Stauffer v. Wal Mart Stores, Inc.*, Case No. 99-STA-21 (ARB Nov. 30, 1999) ; *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42 4-6 (Sec'y July 17, 1995). But if a complainant adduces insufficient facts, the proceeding can be concluded or narrowed without subjecting all parties to the expense of a trial that only could produce a foreordained result. *Orr v. Bank of America*, 285 F.3d 764, 781-783 (9th Cir. 2002) (affirming summary dismissal of common law tort claims and statutory claims for failure to present admissible evidence to substantiate them).

The moving party first must explain why there is no genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). La Gard's motion conforms to the

⁵ Affidavits must be made on personal knowledge, setting forth facts that "would be admissible in evidence," and show affirmatively that the witness "is competent to testify" to the matters stated. 29 C.F.R. § 18.40(c) and Rule 56(e), Fed. R. Civ. P. *See also, Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

standard set in *Celotex* because the statement of undisputed facts⁶ in its memorandum of points and authorities identified “those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which they believe demonstrate the absence of a genuine issue of material fact.” *Id.*, at 323 [quoting [Fed.R.Civ.P. 56\(c\)](#)].

2. Statute of Limitations

I assume for this discussion that La Gard intentionally misrepresented the complexity and responsibilities of Mr. Kersten’s job duties in the Application so it could pay him less. Mr. Kersten knew exactly what he was being paid when he received his first paycheck, and had seen the description of his job at the time the application was filed.

A complaint concerning misrepresentations about job duties must be filed within twelve months of the date of the employer’s alleged transgression. 8 U.S.C.A. § 1182(n)(2)(A) (West Supp. 2005). Mr. Kersten filed his H-1B Nonimmigrant Information Form alleging misrepresentations of his job duties nearly five years after La Gard filed its initial application with the DOL and two-and-a-half years after La Gard filed its extension application. Mr. Kersten admits that La Gard showed him these documents, but at that time he took no issue with the veracity of the duties described or the wage rate he was to receive. If there were such misrepresentations, then he had knowledge of them well within the twelve-month period but he failed to act in time.

Even considering each pay period as a potential violation, thereby restarting the statute of limitations during the final month of Mr. Kersten’s employment,⁷ La Gard’s extension application appropriately represents Mr. Kersten’s job duties because he admitted that he performed only quality control functions in the 12-month period before he filed his grievance.⁸ Consequently, I find that this claim is time-barred and La Gard is entitled to summary judgment on this basis alone. In the alternative, Mr. Kersten’s claims do not survive summary judgment on a substantive basis.

⁶ The rules of federal districts courts, such as Local Rule 56-1 of the U. S. District Court for the Central District of California (the place where the claim arose and would be tried in an Article III court) requires that such statements accompany motions for summary judgment. Procedural rules of this forum impose no similar requirement, but the statement La Gard submitted detailed the record basis for all facts it relied on, so Mr. Kersten could controvert them with a responsive affidavit, declaration or other admissible evidence. His opposition failed to counter these facts with admissible proof. *Cf.*, [Nissan Fire & Marine Ins. Co. v. Fritz Cos.](#), 210 F.3d 1099, 1102, 1105 (9th Cir. 2000) (analyzing how burdens of production and persuasion shift in disposing of summary judgment motions).

⁷ Mr. Kersten argues that the theory of continuing violation should apply in order to toll the statute of limitations. Nonetheless, there could be no violation where he performed the job that La Gard reported on the Application.

⁸ *See* Declaration of Kenneth J. Rose in Support of Respondents’ Motion for Summary Decision, Exh 1, tab 12 (citing to excerpt of deposition of Ludwig Kersten, dated April 11 and 12, 2005).

3. Substantive Claims

a. Willful misrepresentation in Application

Mr. Kersten asserts that La Gard misrepresented his job title and consequently underpaid him. La Gard's original (June 22, 1999) Application to the Department of Labor was certified on July 6, 1999, then incorporated into the July 22, 1999 H-1B visa application it submitted to the INS. When approved on September 21, 1999 Mr. Kersten was entitled to work as a Quality Control Engineer at a \$60,000 annual salary on an H-1B visa for the three-year period from October 1, 1999 to October 1, 2002. This salary exceeded the prevailing wage for Quality Control Engineers in the Los Angeles area, and La Gard had no similar employees, because his position was *sui generis*. La Gard represented in the extension petition of September 27, 2001 his employment had not changed, but the salary had increased to \$66,000 annually.

Mr. Kersten insists that La Gard violated the prevailing wage requirements by not paying him the salary Juan Gonzales earned. Gonzales was La Gard's former general manager, who was terminated a short time after Mr. Kersten began his employment.⁹ Mr. Kersten argues that he did not work as a Quality Control Engineer, but rather as Mr. Gonzales's replacement. He submitted the testimony of Walter Magana in support of his claim that he assumed Mr. Gonzales's job. La Gard challenged this testimony as fraught with omissions, and misleading in that Mr. Magana had poor knowledge of Mr. Gonzales' and Mr. Kersten's job duties. In response, Mr. Kersten attempted to bolster Mr. Magana's credibility with a subsequent declaration testifying that he did not lie, but he may have made mistakes based on his inexperience with this process. Whether Mr. Magana had actual knowledge of job duties remains undetermined, but the outcome of this dispute does not bear on material facts. It is no basis for denying summary judgment.

An Employment Standards Administration investigator requested that Mr. Kersten provide him with Mr. Kersten's specific, daily job duties. He used those to evaluate whether La Gard's description was false. The duties Mr. Kersten gave the investigator was a copy of the job duties that La Gard had listed in its H-1B Application. He did not list the job responsibilities of a general manager.¹⁰ Mr. Kersten contends that he did not understand the request, despite his counsel's assistance.

Although I do not weigh the credibility of the evidence on summary judgment, Mr. Kersten's declaration that he did not understand the request does not create a genuine issue of material fact because it is uncorroborated by other evidence. *See Villiarimo v. Aloha Island Air Inc.*, 281 F3d 1054, 1061 (9th Cir. 2001). Mr. Kersten provided some evidence that he supervised one to two employees,¹¹ yet he fails to present proof that, viewed in his favor, would

⁹ See Declaration of Kenneth J. Rose in Support of Respondents' Motion for Summary Decision, Exh 1, tab 2 (citing to excerpt of deposition of Ludwig Kersten, dated April 11 and 12, 2005); see also the Declaration of Walter Magana in support of Kersten's Revised Opposition to Respondents' Motion for Summary Decision, Exh. 1 (testifying that Mr. Kersten began working one to two months before Mr. Gonzales's termination).

¹⁰ See *Id.*, Exh 1, tab 33.

¹¹ See Declaration of Vida M. Holguin in Support of Revised Opposition to Respondents' Motion for Summary Decision, Exh 2 (providing Mr. Kersten's deposition testimony).

show he was the facility's general manager, or show that La Gard had willfully misrepresented his job duties.

b. retaliation by firing

La Gard terminated Mr. Kersten after it received three letters, two from Kersten himself dated June 16 and 30, 2003 and one from his attorney dated July 23, 2003. Causation for termination cannot be inferred from chronology alone.¹² All three letters complained that La Gard had failed to keep promises about the level of responsibility and pay he would enjoy if he left his job in Europe to work for La Gard. None alleged La Gard had misrepresented anything in his H-1B visa applications, or had violated the Immigration Act, the Secretary's H-1B program regulations or those of the USCIS. Evidence fails to support a claim that La Gard terminated him in retaliation for claiming violations of the H-1B program. He has not made out a whistleblower protection claim under 8 U.S.C.A. § 1182 (n)(2)(C)(iv) (West Supp. 2005) or the regulations at 20 C.F.R. § 655.80.

E. Conclusion

Mr. Kersten's claims are flawed on procedural and substantive grounds. His allegations that La Gard employed him before filing an Application; failed to post notice of the Applications at his employment site; displaced an American worker; willfully misrepresented material facts to recruit him; and terminated him when he confronted management all fall outside the purview of the jurisdiction of the Secretary. Mr. Kersten's claim that La Gard underpaid him as a consequence of misstating his job duties on the Application is barred by the statute of limitations. He also fails to meet the standard of proof to establish the substantive elements of this claim, and did not allege facts to sustain a claim for whistleblower protection.

ORDER

La Gard's motion for summary judgment is GRANTED. Mr. Kersten's claims are hereby DISMISSED.

A

William Dorsey
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,

¹² This is the false cause or *post hoc ergo propter hoc* fallacy. *See generally*, R. J Adviser, LOGIC FOR LAWYERS (NITA 1997) at 199.

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).