



Issue Date: 10 March 2009

CASE NO. 2009-LCA-00004

In the Matter of:

LIAOSHENG ZHANG,
Complainant,

vs.

WASHINGTON DENTAL SERVICE,
Respondent.

**DECISION AND ORDER OF DISMISSAL GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION AND DENYING COMPLAINANT'S
MOTION FOR SUMMARY DECISION**

This claim arises under the H1B visa provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b) and regulations at 29 C.F.R. Part 507. Following the Notice of Appeal filed by Complainant Liaosheng Zhang, this case was assigned to me for hearing on October 15, 2008.

On October 23, 2008, I issued a Notice of Docketing and Assignment and an Order Setting Forth Discovery and Briefing Schedule for Threshold Issue. In that order, I stated that before this claim could be scheduled for a hearing the preliminary issue of jurisdiction needed to be determined. I explained that if the Office of Administrative Law Judges ("OALJ") did not have jurisdiction to hear an appeal of a decision by the Administrator, Wage and Hour Division ("Administrator"), it could not do so. I further stated that in the absence of evidence that an issue raised by Complainant was investigated and made the subject of a determination by the Administrator, the OALJ had no jurisdiction to review the Administrator's determination. *See* 8 U.S.C. § 1182(n)(2)(B); 20 C.F.R. § 655.820(b)(1)-(2); *Watson v. Electronic Data Systems Corp.*, ARB Nos. 04-023, 04-029, 04-050; ALJ Nos. 04-LCA-00009, 03-LCA-00030 (May 31, 2005 ARB); *Jain v. Empower IT, Inc.*, 2008-LCA-00008 (Mar. 21, 2008 ALJ). I then set forth a discovery and summary decision motion schedule on the specific and narrow issue of whether the OALJ had jurisdiction to review the issues raised in Complainant's Notice of Appeal.

The discovery period concluded and both parties timely filed Motions for Summary Decision, to which both parties timely responded and replied. After a careful review of all of the pleadings, I conclude that I have no jurisdiction to conduct a hearing because the Administrator did not conduct an investigation on any of the issues Complainant has appealed. I make the following findings of fact and conclusions of law to reach this determination:

Findings of Fact

The facts are not in dispute.

On or around June 5, 2008, Complainant filed two complaints with the Wage and Hour Division, United States Department of Labor (“WHD”) in which she stated that Respondent had violated various immigration laws. The first form, ESA WH-4, stated that Complainant was a U.S. worker and current employee of Respondent, as well as a job applicant. Complainant’s Motion for Summary Judgment (“CSM”), Exhibit (“EX”) A, p.1. Complainant checked a number of boxes which state the substance of her complaint:

(a) Employer supplied incorrect or false information on the Labor Certification Application (LCA). . . .

(g) Employer failed to comply with “nostrike/lockout” requirement by: 1) placing or contracting out H-1B worker(s) during the validity period of the LCA to any place of employment where there is a labor dispute; 2) failing to notify the DOL, within 3 working days of the occurrence, of such a labor dispute; or 3) using an SCA for H-1B worker(s) to work at a site before the DOL has determined that a labor dispute has ended.

(h) Employer failed to provide employees or their collective bargaining representative, either by hard copy posting or electronically, notice of its intentions to hire H-1B worker(s), **or** has failed to provide H-1B worker(s) with a copy of the LCA. . . .

(l) Employer failed to maintain and make available for public examination the SCA and necessary documents at the employer’s principal place of business or worksite.

(m) Employer laid off U.S. worker(s) and has replaced or seeks to replace U.S. worker(s) with H-1B worker(s) within 90 days before or after filing H-1B visa petitions.

(n) Employer placed H-1B worker(s) at another employer’s worksite where U.S. workers have been laid off, and/or has failed to inquire of the second employer whether it has or intends to lay-off U.S. worker(s) and replace them with H-1B worker(s).

(o) Employer failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought.

(p) Employer failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought. Complaints regarding this violation should be filed with the U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C., 20530.

CSM, EX A, p.2-3. The second complaint alleged facts in support of items *h*, *o* and *p*. Respondent's Motion for Summary Judgment ("RSM"), EX B.

The WHD conducted an investigation of Respondent Washington Dental Service ("WDS") and issued a determination letter on September 29, 2008. WHD made two findings: WDS "failed to provide notice of the filing of the Labor Condition Application" and WDS "required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date." RSM, EX C, p.1.

The determination letter informed the parties of their appeal rights:

You and any interested party have the right to request a hearing on this determination. Such a request must be dated, be typewritten or legibly written, *specify the issue(s) stated in this notice of determination on which a hearing is requested* state the specific reason(s) why the requestor believes this determination to be in error, be signed by the requestor or by an authorized representative, and include the address at which the requestor or the authorized representative desires to receive further communications relating to the hearing request.

The request must be made to and received by the Chief Administrative Law Judge (OALJ) . . . no later than 15 calendar days after the date of this determination.

RSM, EX C, p.2 (italics mine).

Complainant filed a Notice of Appeal on October 15, 2008. RSM EX E, p.1. She stated that she was filing the appeal because "other violations are not on the 'Summary of Violations and Remedies . . .'" Complainant stated that as well as the violations found by WHD, WDS was "responsible for my damage" based on other violations, which she then listed. The list replicated four of the eight boxes she had checked in her original complaint to the Administrator, and added one she had not checked: "Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e., whistleblower)." See *Id.* There is no evidence that WHD investigated any of the issues Complainant raised in her appeal.

Conclusions of Law

Section 29 C.F.R. § 18.40 sets forth the protocol for seeking summary adjudication at the Office of Administrative Law Judges. The summary decision procedure is authorized by Rule 56 of the Federal Rules of Civil Procedure and 29 C.F.R. § 18.40. An administrative law judge may grant summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40(d). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. Ltd. v. Zenith*, 475 U.S. 574 (1986). If the slightest doubt remains as to the facts, the motion

must be denied. A non-moving party, however, may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

The burden of proof in a motion for summary decision is borne by the party bringing the motion. By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding to the opposing party all unfavorable inferences which may be drawn from the record, there is no genuine issue of material fact to be decided and that the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56; 29 C.F.R. § 18.40(d).

The evidence is consistent. I conclude that there is no genuine issue of material fact to be decided and that Respondent is entitled to a decision as a matter of law. Complainant raised four issues on appeal that the Administrator declined to investigate. She raised a fifth issue, the “whistleblower” complaint, for the first time on appeal, an issue the Administrator has never seen before. As an investigation by WHD is a prerequisite to a hearing, all other facts alleged by Complainant are immaterial. Such allegations go to the substance of her complaints, which I cannot reach, as I have no jurisdiction to hear them. *Watson v. Electronic Data*, ARB Nos. 04-023, 04-029, 04-050; ALJ Nos. 04-LCA-00009, 03-LCA-00030. The evidence submitted by Complainant did not set forth specific facts showing that there is a genuine issue for trial. Thus, I must find that Respondent is entitled to summary decision.

ORDER

Respondent’s Motion for Summary Decision is **GRANTED**.

Complainant’s Motion for Summary Decision is **DENIED**.

The Administrator’s September 29, 2008 determination is **AFFIRMED**.

Complainant’s request for hearing is **DISMISSED**.

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ANNE BEYTIN TORKINGTON
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, Suite S-5220, 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).