

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 October 2010

CASE NO.: 2010-LCA-00032

In the Matter of

ARVIND GUPTA

Prosecuting Party

v.

HEADSTRONG, INC.

Respondent

ORDER OF DISMISSAL

Background

This matter arises under the Immigration and Nationality Act (INA or “the Act”) H-1B visa program, 8 U.S.C. §1101(a)(15)(H)(i)(b) and § 1182(n), and the implementing regulations promulgated at 20 C.F.R. § 655, subparts H and I (§§ 655.700 to 655.855).

By letter dated June 12, 2010, the Complainant, who is not represented by counsel, filed a request for hearing with the Chief Administrative Law Judge. Enclosed with the Complainant’s letter was a copy of a letter from the Assistant District Director, Wage and Hour Division, U.S. Department of Labor, dated June 10, 2010, informing the Complainant: “Upon review, we have determined that there is no reasonable cause to conduct an investigation because you have failed to provide sufficient information to indicate that there was a violation within the 12 months preceding your complaint.” This matter was assigned to me for adjudication on July 12, 2010. On August 23, 2010 Complainant filed his Response to my August 2, 2010 Order directing him to show cause why this matter should not be dismissed, and appended a number of Exhibits. Also included in Complainant’s Response is “Motion for Order Setting Forth Discovery and Briefing Schedule.”

On September 30, 2010, Respondent filed its reply to Complainant’s Response to my Order to Show Cause and is opposed to the Complainant’s Motion for Order Setting Forth Discovery and Briefing Schedule. The Administrator did not file any response.

Legal Framework

I. STANDARD FOR DISMISSAL

The regulations regarding practice and procedure applicable to administrative hearing under the INA do not contain a section pertaining to motions to dismiss. However, the “Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges” at 29 C.F.R. part 18 shall apply to administrative proceedings to the extent they do not conflict with the regulations. See 29 C.F.R. §655.825(a). Section 18.1(a) provides that in situations not provided for in Part 18, the Federal Rules of Civil Procedure apply.

Federal Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. On its face, the Rule refers to such dismissal on the motion of a party; however, it has been uniformly held that a court may dismiss a complaint for lack of subject matter jurisdiction. Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant’s allegations are true, the court has the authority to grant the relief requested. While *pro se* pleadings are held to a less stringent standard when faced by dismissal, a *pro se* complaint must still comply with the Federal Rules of Civil Procedure. See Kaylor v. Fields, 661 F.2d 1177, 1183 (8th Cir. 1981).

II. COMPLAINANT’S REQUEST FOR HEARING

a. Office of Administrative Law Judges (OALJ) Jurisdiction

The parties do not dispute that Complainant filed the instant complaint pursuant to 20 CFR § 655.806, which sets forth the procedure for an “aggrieved party” to file a complaint under the Act. 20 CFR § 655.806(a)(2) provides that, upon receipt of a complaint, the Administrator of the Wage and Hour Division of the U.S. Department of Labor is authorized with the discretion to determine whether there is reasonable cause to believe that a violation under the Act has been committed, and therefore that an investigation is warranted. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall notify the complainant, who may submit a new complaint, with such additional information as may be necessary. The regulation specifically provides that no hearing or appeal shall be available regarding the Administrator’s determination that an investigation on a complaint is not warranted. 20 C.F.R. § 655.806(a)(2).

On the other hand, if the Administrator determines that an investigation on a complaint is warranted, the complaint “shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing.” 20 C.F.R. § 655.806(a)(3). When an investigation has been conducted, the Administrator shall, pursuant to 20 C.F.R. § 655.815, issue a written determination as described in § 655.805(a), which generally catalogs violations and the appropriate written determinations which must be issued by an Administrator under 20 C.F.R. § 655.805(b). 20 C.F.R. §655.806(b).

Any interested party desiring a review of a determination issued under §§ 655.805 and 633.815 shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. The complainant or any other interested party may request a hearing where the Administrator determines, **after investigation**, that there is no basis for a finding that an employer has committed violations(s). 20 C.F.R. § 655.820(b)(1) (emphasis added).

In light of the foregoing, the Administrator must determine a complaint warrants an investigation; conduct an investigation; and issue a determination pursuant to 20 C.F.R. §§ 655.805 and 655.815, before a complainant can request a hearing before OALJ.

b. The Parties' Submissions

The Complainant submitted a "Response to Order to Show Cause and Motion for Order Setting Forth Discovery and Briefing Schedule," in which he requests that the "OALJ should not Dismiss the Request for Hearing (for 'timeliness') because the Administrator has declined to investigate the complaint," argues that Watson v. Elec. Data Sys. Corp., ARB Case Nos., 04-023, 04-029, 04-050, slip op. at 6 (ARB: May 31, 2005), brought to the parties attention in my Order to Show Cause, is inapplicable due to the case's focus on "merits" (Complainant's "Response..." at 4, 6).

The Respondent submitted a "Reply to Complainant's Response to Order to Show Cause and Opposition to Motion for Order Setting Forth Discovery and Briefing Schedule," which argues that the claim should be dismissed because the Administrator "did not determine that an investigation on a complaint was warranted."

III. DISCUSSION

Although the Complainant contends he orally complained to the DOL as early as January 2008 (see Complainant's Response to Order to Show Cause and Motion for Order Setting Forth Discovery and Briefing Schedule at 3), there is not any dispute that no investigation occurred on the Complainant's complaint. Likewise, there is no dispute that Complainant's complaints did not result in a determination by the Administrator, pursuant to 10 C.F.R. §§ 655.805 and 655.815. Complainant submitted no indication that any written determination issued by the Administrator was made following an investigation of his complaint. In sum, "[w]ithout that determination, no hearing [is] possible." Watson, ARB Case Nos., 04-023, 04-029, 04-050, slip op. at 6.

The Claimant cites Ndiaye v. CVS Store No. 6081, ARB No. 05-024, ALJ No. 2004-LCA-36 (Nov. 29, 2006), as an example of when OALJ reviewed a determination of "timeliness" by the Administrator. In Ndiaye, the DOL accepted an investigation before determining claim was untimely. See Ndiaye, ARB No. 05-024, slip op. at 7. Thereafter, the OALJ reviewed the determination pursuant to 20 C.F.R. § 655.820(b)(1). See id. That case is

distinguishable from the Complainant's case, because the Administrator never accepted the Complainant's case for investigation.

20 C.F.R. § 655.806 provides the Administrator with "discretion as to whether or not an investigation of a complaint is warranted." See also Watson v. Bank of America, 2004-LCA-23 (ALJ Apr. 12, 2004) *affirmed by* Watson v. Bank of America, ARB No. 04-099, ALJ No. 2004-LCA-23 (May 31, 2005). The Administrator has exercised discretion, conferred through the regulations, and has determined that no investigation is warranted. I conclude that the Act and its implementing regulations do not confer jurisdiction on OALJ where the Administrator declines to investigate.

IV. CONCLUSION

In the absence of an Administrator's acceptance of a complaint for investigation, there is no jurisdictional basis for the Complainant to request a hearing or other relief from OALJ. Accordingly, I dismiss the Complainant's request for hearing.¹

ORDER

Wherefore, the above considered, IT IS HEREBY ORDERED, that this matter is DISMISSED.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

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-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

¹ Because I find there is no jurisdictional basis for the Complainant's request for hearing, I decline to address Complainant's assertions regarding equitable tolling.

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).