



Issue Date: 03 May 2012

In the Matter of

SRIVINAS AKELLA,
Prosecuting Party,

Case No.: 2011-LCA-00017

v.

ALTEGRITY, INC.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101 and 1182 (the Act), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. Prosecuting Party Srinivas Akella (“Prosecuting Party” or “Mr. Akella”) filed a complaint under the Act with the Administrator of the Wage and Hour Division, alleging that Respondent Altegrity, Inc. (“Respondent” or “Altegrity”) violated the Act in several ways. After the Administrator investigated Mr. Akella’s complaint and dismissed certain matters, Mr. Akella and Altegrity both appealed the Administrator’s findings. Altegrity withdrew its appeal after the Administrator clarified that it had made no findings of violation, because Altegrity employed no H-1B workers during the relevant time period and therefore was not subject to the Act’s requirements. Remaining for resolution are Mr. Akella’s allegations that Altegrity had retaliated or discriminated against him for raising concerns about Respondent’s H-1B program, and that Altegrity had replaced Akella with an H-1B worker within 90 days of the termination of his employment.

On March 17, 2011 I issued an Order to Show Cause why the complaint should not be dismissed because Respondent did not employ H-1B workers and therefore the statute and regulations were inapplicable to this claim. See 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.715 and 655.801(a). The parties responded, but did not provide sufficient evidence for me to determine whether Respondent employed H-1B workers at the time in question, and I found that the Order to Show Cause had been satisfied.¹

A hearing was subsequently scheduled for April 24, 2012, but was canceled on motion by Prosecuting Party after receipt of additional discovery shortly before the hearing date. On April 4, 2012, Respondent’s Motion for Summary Decision was received in this Office, and Prosecuting Party’s opposition was received on April 17, 2012. There is a dispute of fact over

¹ This issue is still muddled. The evidence that Respondent submitted with its motion for summary decision shows only that no H-1B workers reported to Mr. Akella’s supervisor, Catherine DeLeonardis, but does not address whether the company as a whole employed any H-1B workers. For purposes of this motion, then, I will assume that it did.

what Akella told his supervisor about his concerns with the visa status of certain contractor employees who worked on Respondent's premises. Assuming that Akella's version of events is true, however, I will find that he did not engage in protected activity under the INA, and that Respondent is therefore entitled to summary decision in its favor.

Undisputed Facts

In late 2009, Respondent was nearing completion of a lengthy project to implement a new enterprise-wide information management system known as the SAP system. Respondent entered into a contract with Capgemini, Inc.² under which Capgemini would install and deploy the SAP system. Respondent hired Mr. Akella in November of 2009 as a SAP Technical Manager to lead Respondent's technical team in providing technical support for the SAP System once Capgemini completed its implementation. In that position, Mr. Akella was required to work with the Capgemini team to ensure a smooth and seamless transition to the new system.

The contract between Respondent and Capgemini specified the obligations and responsibilities of each party. As pertinent to this matter, the contract provided:

Personnel supplied by either party will be deemed employees of such party and will not for any purpose be considered employees or agents of the other party. Except as may otherwise be provided in this Agreement, each party shall be solely responsible for the supervision, daily direction and control of its employees and payment of their salaries (including withholding of appropriate payroll taxes), workers' compensation, disability and other benefits.

During the contractual period, Capgemini employees reported to a project manager, Alberto Soublette, who was himself a Capgemini employee. Some Capgemini employees worked at Respondent's offices and others worked remotely, but all reported to Mr. Soublette. Mr. Soublette did not work at Respondent's offices, and supervised Capgemini employees remotely. The parties agree that there were some difficulties involved in this arrangement: Mr. Soublette and Catherine DeLeonardis, Akella's supervisor, accuse Mr. Akella of trying to insert himself into a supervisory role over the Capgemini employees who worked on site, while Akella characterizes his interaction with the Capgemini employees as reflecting his attempts to ensure a smooth transition of the SAP system to Altegrity. This conflict need not be resolved in considering the instant motion.

Near the end of Mr. Akella's employment with Altegrity, he alleges, he discussed the visa status of some of the Capgemini employees who were working on the implementation of the SAP system. Specifically, he alleges³:

- Amit Gupta, a Capgemini employee, was NOT reporting to Alberto. Amit was on L-1 visa, and was working on the App Support Team and was only reporting to me and Ms.

² This company is spelled in various ways in the pleadings, but because the contract identifies it as "Capgemini," that spelling will be used in this Order.

³ These allegations are taken verbatim from Mr. Akella's declaration, Exhibit 1 to his opposition to Respondent's motion for summary decision.

Seyong Nicholls onsite. Amit and Alberto were peers/co-workers who were working on different contracts, different roles. [Declaration of Srinivas Akella, Exhibit 1 to Opposition, ¶ 8.]

- I told Catherine [DeLeonardis] around Dec. 30, 2009 that Mahesh Nynaru, who was on L-1 visa, cannot work onsite because of his visa status. I also told her in the same meeting that none of the Capgemini resources who were supposed to be transitioned had valid visas. I compared Mahesh's status to that of Alberto Soublette, who had the valid visa to which Catherine immediately replied that Alberto had a Green Card...Catherine knew the visa status of all the B-1 and L-1 resources and she had in fact asked Aparna to compile the list with the visa status and the rate included. Aparna sent that email to Catherine, Me and Seyong Nicholls and the attachment in that email had all the resources listed along with their visa status and billing rates...Also, she is aware that I was not approving the resources because of their visa status. That is the reason for the discussion with Catherine and Seyong which is the subject of the January 11, 2010 e-mail from Catherine. During this meeting, the visa status of Mahesh Nynaru and a comparison with Alberto Soublette's valid visa status was discussed. [*Id.*, ¶ 11.]
- As a result of my concerns and the numerous discussions with Catherine concerning the immigration status of some of the Capgemini employees, Catherine changed the organizational structure and Seyong was then going to be in control of the App Support Team. We were no longer going to be equals. [*Id.*, ¶ 12.]
- Catherine's statement in her affidavit attached to the Respondent's motion that she was not aware of any immigration concerns is completely untrue. We had several discussions about the eligibility of Capgemini employees to work on site and my concerns that we were directing employees who we could not technically supervise because they did not have the proper visas. She even asked Aparna to compile the list specifically requesting her to include the visa status and rates for all the resources and Aparna did send her the email with this information included. [*Id.*, ¶ 13.]
- I discussed my concerns regarding how we were directing Capgemini employees with the new reporting structure, specifically regarding Mahesh Nynaru. [*Id.*, ¶ 14.]
- Catherine wanted Mahesh to report directly to me and Seyong. I informed her I could not supervise him due to his visa status. [*Id.*, ¶ 15.]
- On January 14, 2010, I met with Catherine and discussed concerns about being forced to supervise employees who did not have the proper visas to work on site at Altegrity. [*Id.*, ¶ 16.]

Although the parties dispute whether Mr. Akella ever raised the issue of the Capgemini employees' visa status with Ms. DeLeonardis, I assume, solely for purposes of this motion, that he did.

Mr. Akella was terminated on January 15, 2010. [Declaration of Renee Rasmussen, Exhibit 2 to Motion for Summary Decision, ¶ 17 and attachment 5.]

Conclusions of Law

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See *Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett, supra*.

Retaliation/Discrimination Claim

The INA provides:

It is a violation ... for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee ... includ[ing] a former employee ... because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182(n)(2)(C)(iv). In the preamble to the final rule at 20 C.F.R. § 655.801 implementing this provision, the Department of Labor stated that in applying this provision, the adjudicator "should 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 CFR part 24)." 65 Fed. Reg. 80,178 (Dec. 20, 2000).

In a litigated case, Complainant bears the initial burden to show that respondent took an adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases under the INA are analyzed in the same

manner as cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, Nos. 1998-111 & 128, at 12-13 (ARB Apr. 30, 2001) (citing, *inter alia*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993)). A complainant can meet that initial burden by establishing a prima facie case. To do so, the complainant must show: (1) that he engaged in protected activity; (2) that the employer knew of the complainant's protected activity; (3) that the complainant suffered an adverse employment action; and (4) that a "nexus" exists between the protected activity and the adverse employment action. *Carroll*, 78 F.3d at 356. The complainant's burden of satisfying the four elements of the prima facie case is not "onerous," and a prima facie showing is "quite easy to meet." *Burdine*, 450 U.S. at 253. Upon a complainant's establishment of a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. When the employer satisfies its burden of production, the onus is once again on the employee to prove that the employer's proffered legitimate reason is a mere "pretext" and not the true reason for the challenged employment action. *Burdine*, 450 U.S. at 256. If complainant makes a showing that the protected activity was a "contributing factor" in the adverse employment action, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same unfavorable personnel action in the absence of such behavior. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

As pertinent to this matter, a protected activity is defined under the statute as disclosure of information to the employer that the employee "reasonably believes evidences a violation of *this subsection*, or any rule or regulation pertaining to *this subsection*...." 8 U.S.C. § 1182(n)(2)(C)(4). "This subsection" refers to 8 U.S.C. § 1182(n). Section 1182(n) refers exclusively to the H-1B nonimmigrant visa, and does not refer to any other type of visa. A close review of Mr. Akella's declaration shows that he raised concerns over contractor employees who had B-1 and L-1 visas. A B-1 visa is a temporary business visitor visa, issued to aliens who wish to enter the United States to engage in limited business activities.⁴ An L-1 visa is issued to allow an executive or manager of a foreign company who is transferred internally to enter the United States for limited purposes (L-1A)⁵, or to allow an employee with specialized knowledge relating to the company's interests a company who is transferred internally to enter United States for limited purposes (L-1B).⁶ Both a B-1 visa and an L-1 visa are different from an H-1B visa. The

⁴ See

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=cf6d83453d4a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=cf6d83453d4a3210VgnVCM100000b92ca60aRCRD>, last visited on May 2, 2012.

⁵ See

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=64d34b65bef27210VgnVCM10000082ca60aRCRD&vgnnextchannel=64d34b65bef27210VgnVCM10000082ca60aRCRD>, last visited on May 2, 2012.

⁶ See

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bfd10b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=bfd10b89284a3210VgnVCM100000b92ca60aRCRD>, last visited on May 2, 2012.

three types of visa are established under different statutory authority.⁷ The H-1B program requires an employer to submit a Labor Condition Application and obtain certification from the Department of Labor, while the B-1 and L-1 visas do not, and are therefore outside the jurisdiction of the Department. The anti-discrimination provision of the INA covers only employees who communicate information to an employer about the employer's compliance with H-1B provisions, and not with provisions related to any other type of visa. There is no evidence that Mr. Akella raised any concerns relating to H-1B nonimmigrant visas, which is a requirement for a retaliation claim brought under the INA. As a result, Mr. Akella's provision of information to Respondent concerning the B-1 or L-1 visa program do not qualify as protected activities under the INA.

I further find that the undisputed facts show that Mr. Akella did not reasonably believe that his concerns were related to Respondent's H-1B program. First, none of Capgemini's employees have been identified as H-1B workers. Second, none of Altegrity's employees have been identified as H-1B workers. Third, Mr. Akella holds himself out to be intimately familiar with L-1 visas, as a former L-1 visa holder himself. [Opposition, p. 17.]

Because Mr. Akella did not engage in activity that is protected under the applicable statute, Respondent's motion for summary decision on the retaliation/discrimination claim will be granted.

Replacement by H-1B Worker

Under the Act, an H-1B employer may not displace a U.S. worker and replace the worker with an H-1B nonimmigrant. 8 U.S.C. § 1192(n)(1)(E). More specifically, an employer must certify, in a labor condition application for an H-1B nonimmigrant worker, that it did not displace and will not displace a U.S. worker "within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application." I need not determine whether Mr. Akella was displaced under the meaning of the INA and its implementing regulations. Assuming the allegations made in his declaration are true, Mr. Akella claims that his job duties were assumed by Mahesh Nynaru [Akella declaration ¶ 18], but identifies Mr. Nynaru as having an L-1 visa [*Id.*, ¶ 11.] Even if Mr. Akella was replaced by a nonimmigrant, the replacement worker did not hold an H-1B visa, and Mr. Akella's claim must fail.

⁷ The H-1B visa is established under the authority of 8 U.S.C. § 1101(a)(15)(H)(1)(b), the B-1 visa is established under authority of 8 U.S.C. § 1101(a)(15)(B), and the L-1 visas are established under the authority of 8 U.S.C. § 1101(a)(15)(L).

ORDER

For the foregoing reasons, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED; and
2. The complaint is DISMISSED.

SO ORDERED.

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PAUL C. JOHNSON, JR.

Associate Chief 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-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).