



Issue Date: 26 April 2012

In the Matter of

MAKARAND BIDWAI,
Prosecuting Party,

Case No.: 2011-LCA-00029

v.

BOARD OF EDUCATION OF
PRINCE GEORGE'S COUNTY,
Respondent.

**ORDER DENYING PROSECUTING PARTY'S MOTION TO COMPEL DISCOVERY
AND MOTION TO ESTABLISH ADVERSE ACTION, AND GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION**

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, as amended by the American Competitiveness and Workforce Improvement Act of 1998, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1154, 1182(n), and 1184(c), and the implementing regulations found at 20 C.F.R. Part 655, subparts H and I ("H-1B program"). The INA and the regulations establish an H-1B Labor Condition Application ("LCA") program for aliens who come to the United States temporarily to perform services in a "specialty occupation," as defined in section 214(I)(1) of the INA. *See* 8 U.S.C. §1101(a)(15)(H)(i)(b).

Procedural History

After conducting an investigation into Respondent Board of Education of Prince George's County ("Respondent" or "Board"), the Administrator of the Wage and Hour Division issued a determination letter on April 4, 2011, ordering the Board of Education to pay civil penalties for willful and non-willful failure to pay the required wage rate and for recordkeeping violations. The Administrator also ordered the Board to pay back wages to over 1,000 H-1B nonimmigrant workers. The Board requested a *de novo* hearing, which was assigned OALJ Case No. 2011-LCA-026. Seven individual employees likewise requested *de novo* hearings, which were assigned OALJ Case Nos. 2011-LCA-027 through -032 (one case number included two employees who were married to each other).

On September 20, 2011, I issued an order approving a settlement agreement between Respondent and the WHD Administrator that resolved all issues in Case No. 2011-LCA-026. That settlement agreement required the Board to pay all back wages, including visa-related costs that had been incurred by individual employees, to the H-1B immigrant workers, including

Makarand Bidwai (“Prosecuting Party” or “Mr. Bidwai”). On October 5, 2011, I granted the Administrator’s motion to dismiss all cases involving individual prosecuting parties except for this matter, involving Mr. Bidwai. Based on the orders of September 20 and October 5, 2011, the sole remaining issue was whether Mr. Bidwai was subjected to adverse employment action because he raised concerns over Respondent’s H-1B program.

Pending Motions

On January 20, 2012, Respondent filed a Motion for Summary Decision, which was received in this Office on January 23, 2012. By Order dated January 25, 2012, I extended the time for Prosecuting Party to submit his opposition to the motion until February 17, 2012. On March 1, 2012, I granted Prosecuting Party’s motion for an additional extension of time to file his opposition, giving him until March 30, 2012 to do so. In that order, I recognized Mr. Bidwai’s argument that he had not received certain discovery responses, but also took him at his word that he would be able to file a motion to compel discovery and still meet the March 30, 2012 deadline for opposing Respondent’s motion for summary decision.

On March 19, 2012, this Office received Mr. Bidwai’s “Motion to Establish Adverse Inference in My First Involuntary Transfer on the First Day, in the First Hour, on the First Contact as a Fait Accompli Long Before Respondent’s Issues in its Motion for Summary Decision.”¹ Respondent filed an opposition to this motion, and Prosecuting Party filed a motion for leave to reply. Rule 18.6(b) of the Rules of Practice and Procedure Before the Office of Administrative Law Judges, 29 C.F.R. § 18.6(b), provides: “Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.” Mr. Bidwai has provided no reason for his request, and it is denied. Nonetheless, I will consider the argument raised in his motion for leave to reply as it relates to the timeliness of Respondent’s opposition to his motion.

On April 3, 2012, this Office received Mr. Bidwai’s contingency motion for extension of time to respond to Respondent’s motion for summary decision. That motion included an “embedded motion to compel discovery.” Respondent filed a timely opposition.

As of the date of this Order, Mr. Bidwai has not filed a response to Respondent’s motion for summary decision.

A. Motion to Compel

By letter dated February 27, 2012, Mr. Bidwai forwarded Requests for Production of Documents, Requests for Admissions, and Interrogatories to counsel for Respondent. On March 30, 2012, Respondent declined to answer the discovery requests. According to Mr. Bidwai, the reason given was that Respondent was not required to respond to the discovery requests because they requested information from a non-party.

¹ A second version of this motion was received on March 30, 2012. Mr. Bidwai changed some of the language from the March 19 motion, but the two motions are not substantively different.

Under the Rules of Practice and Procedure, requests for production of documents, requests for admissions, and interrogatories may be served by a party upon another party to the proceedings. 29 C.F.R. §§ 18.18(a) (interrogatories), 18.19(a) (production of documents), and 18.20(a) (admissions). Those methods of discovery are not properly used to obtain information from non-parties. In this case, a close review of Mr. Bidwai's discovery requests shows that the information he sought was information in the possession of Rudolph Saunders, identified as the principal of Frederick Douglass High School. Mr. Saunders is not a party to these proceedings. Accordingly, it was not proper to utilize these methods of discovery. On that basis, the motion to compel answers will be denied.

B. "Fait Accompli" Motion

Mr. Bidwai served his initial "fait accompli" motion on March 19, 2012 and his second version on March 27, 2012, both by mail. Respondent served its opposition on March 30, 2012, also by first-class mail. Respondent's opposition was received on April 2, 2012. Mr. Bidwai argues that Respondent's opposition was untimely, as it was due 10 days after service, or no later than March 29, 2012. Mr. Bidwai's argument is rejected. He is correct that under Rule 18.6(b), 29 C.F.R. § 18.6(b), an answer to a motion must be filed no later than 10 days after the motion is served. However, when a motion is served by mail, five days are added to the time to file an opposition. 29 C.F.R. § 18.4(c). Thus, Respondent's opposition to Mr. Bidwai's first version of this motion was due no later than April 4, 2012. As it was received on April 2, 2012, it was timely filed.

It is unclear precisely what to make of Mr. Bidwai's motion. At bottom, it appears that he wants an order establishing that his involuntary reassignment on August 14, 2006 was an adverse employment action.² Thus, I will assess the motion as if it were a motion for partial summary decision on that issue.

The parties agree that Mr. Bidwai was involuntarily reassigned on August 14, 2006. Respondent has provided evidence in the form of documents and affidavits that Mr. Bidwai was initially assigned to Croom High School, and on the opening day of the 2006-2007 school year – August 14, 2006 – he was reassigned to Frederick Douglass High School. Respondent argues, however, that such a transfer is not an adverse employment action. In support of its argument, Respondent submitted copies of two contracts between Mr. Bidwai and the school district, each of which acknowledges the district's right to assign Mr. Bidwai to any school, based on the needs of the school system. Respondent has established that a science teacher assigned to Croom High School was initially thought to be ineligible to teach after the summer of 2006 because his teaching credential was due to expire. Based on that belief, Mr. Bidwai was assigned in July of 2006 to teach at Croom. Later, but still before the start of the school year, the other science teacher established that he was still eligible to teach, and as he was already assigned to Croom he was left in place. There was therefore no position available for Mr. Bidwai at Croom. Another position for a science teacher was available at Frederick Douglass High School, and Mr. Bidwai was assigned there rather than Croom; he was informed of his reassignment upon the start of the school year.

² Mr. Bidwai identified several other acts as adverse employment actions, and they will be addressed in resolving Respondent's motion for summary decision, *infra*.

Mr. Bidwai has presented no contrary evidence regarding his reassignment from Croom to Frederick Douglass.

Under Education Article § 6-201(b) of the Maryland Code Annotated, the superintendent of schools has the authority to “transfer [teachers] as the needs of the schools require....” Mr. Bidwai’s contracts specifically referred to the school system’s right to transfer teachers as necessary, and he acknowledged that right by signing the contracts. I note that the contracts require that no reduction in salary be made due to the transfer, and there is no allegation that Mr. Bidwai’s salary was reduced when he was reassigned to Frederick Douglass High School. His reassignment was authorized by statute and contract and had no effect on the terms and conditions of his employment.

Based on the foregoing, I find that Mr. Bidwai’s involuntary reassignment was not an adverse employment action, and his “fait accompli” motion will be denied.

C. Motion for Extension of Time to Respond to Summary Decision

Mr. Bidwai’s opposition to Respondent’s Motion for Summary Decision was initially due in early February of 2012. I issued an order *sua sponte* extending that deadline to February 17, 2012 in light of Mr. Bidwai’s pro se status. I later granted Mr. Bidwai’s motion to extend the deadline further, to March 30, 2012, upon his representation that he would be able to respond to the motion by that date. The order granting the additional extension of time limited the scope of discovery to the issues raised in Respondent’s motion for summary decision. Mr. Bidwai now requests an additional extension based on Respondent’s alleged failure to produce requested discovery and his inability to arrange for depositions of certain unnamed witnesses.

This matter was docketed in this Office on April 19, 2011. With the exception of a stay imposed for a few days in December of 2011, the parties have been authorized to engage in discovery for over a year. Mr. Bidwai represented that he would be able to complete his discovery and file a response to Respondent’s motion for summary decision no later than March 30, 2012. Although he attempted to obtain discovery from Respondent, he did so in a way that is not allowed under the procedural rules. He has admitted that although he is aware of the availability of depositions, he has been unable to retain a court reporter and finds them too costly. There is, therefore, little reason to believe that if the deadline is extended a third time, Mr. Bidwai will be in any better position to respond, and he has made no showing that he will. Accordingly, his motion for an extension of time to respond to the motion for summary decision will be denied.

D. Motion for Summary Decision

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*.

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).

For purposes of its motion for summary decision, Respondent assumes that Mr. Bidwai engaged in protected activity and that he was subjected to adverse employment action. It submits, however, that the decision-makers were unaware of Mr. Bidwai’s protected activity when the decision not to renew his contract was made, and that it did so for reasons unrelated to the protected activity.

Undisputed Facts

For the purposes of this motion, the following facts are undisputed:

Visa Issues

1. On July 20, 2006, Mr. Bidwai signed a disclosure statement stating that he was legally authorized to work for Respondent. He wrote in the phrase “visa required” without explanation. [Motion for Summary Decision (“MSD”), Ex. 3.]
2. On October 3, 2006, Mr. Bidwai submitted a request for reimbursement of certain fees paid to USCIS in connection with his visa to John Robinson, Respondent’s Director of Labor Relations, along with copies of checks for \$190 and \$500. Mr. Robinson wrote to USCIS, asking them to return Mr. Bidwai’s check for \$500 and accept a check in the same amount from Respondent. [MSD Ex. 9A, 9B.]
3. On November 14, 2006, USCIS requested that the Board provide additional evidence by February 6, 2007 to support the approval of its petition to sponsor Mr. Bidwai as an H-1B worker for three years. USCIS informed the Board that Mr. Bidwai had been present in the United States since March 7, 2001, and was ineligible to extend his H-1B stay beyond March 6, 2007 absent evidence that he qualified for one of four exceptions. [MSD Ex. 15.]
4. On January 4, 2007, Mr. Bidwai asked the Board’s personnel staff about the status of the Board’s response to the USCIS request, and staff asked Mr. Bidwai to provide evidence to support his ability to work past March 6, 2007. [MSD, Ex. 15A.]
5. On February 2, 2007, Mr. Robinson responded to USCIS on behalf of the Board stating that Mr. Bidwai was prosecuting the appeal of a denial in an unrelated visa case. [MSD Ex. 20, 21.]

6. On February 5, 2007, Mr. Robinson informed Mr. Bidwai's of his communication with USCIS, and told Mr. Bidwai that he had asked USCIS to notify Respondent of Mr. Bidwai's status after March 6, 2007. [MSD Ex. 20.]
7. In March of 2007, Mr. Bidwai's visa was approved. [MSD Ex. 33A.]

Work History and Performance

8. Mr. Bidwai signed a provisional contract on July 20, 2006, and a regular contract on August 8, 2006 for employment as a teacher with Prince Georges County Public Schools. Under the regular contract, his status was that of a first year, non-tenured teacher who was not entitled to a renewal of his contract unless he showed satisfactory performance. [MSD Ex. 1, 2.]
9. Mr. Bidwai's initial annual salary was \$45,493 based upon his teacher certification and verified years of experience; that salary was retroactively increased to \$46,731 and then to \$66,242 based on his submission of material showing additional prior experience. [MSD Ex. 40, 5A, 5B, 6A, 6B.]
10. Before the first day of the 2006-2007 school year, Mr. Bidwai was reassigned from Croom High School to Frederick Douglass High School (FDHS). [MSD Ex. 8B.]
11. Mr. Bidwai grieved his reassignment to FDHS, but did not assert a claim that his reassignment violated the Labor Condition Application submitted on his behalf. [MSD Ex. 8A.]
12. Rudolph Saunders, the principal of FDHS, was Mr. Bidwai's immediate supervisor at all times relevant to this matter. [MSD Ex. 39.]
13. Mr. Saunders was not aware of any complaint relating to any violation of the Labor Condition Application or of any issue involving Mr. Bidwai's payment of H-1B filing fees at any time while he supervised Mr. Bidwai. [MSD Ex. 39, ¶¶ 3, 4, 5, 13.]
14. Mr. Bidwai's father passed away in India in October of 2006. Mr. Bidwai informed Mr. Saunders that he was unable to attend the funeral because of the status of his visa, and asked that he be permitted to use bereavement leave to move his belongings from New York to Maryland. Mr. Saunders granted the request and authorized 5 days. [MSD Ex. 39, ¶ 6.]
15. On November 3, 2006, Mr. Saunders reprimanded Mr. Bidwai for failure to submit his first quarter grades on time, failure to maintain accurate and timely records, and failure to provide documentation to support student grades. The reprimand was documented in writing. [MSD Ex. 11, 39 ¶ 7.]
16. On November 17, 2006, Valerie Williams, Assistant Principal at FDHS, sent a memorandum to Mr. Bidwai summarizing her investigation into grading complaints filed by his students and the grade adjustments she made because Mr. Bidwai failed to provide adequate justification for his grades. She admonished Mr. Bidwai to maintain current and accurate information. [MSD Ex. 12.]
17. On December 14, 2006, Ms. Williams met with Mr. Bidwai to discuss a number of student complaints she had received, particularly that he had used derogatory names in addressing them, had yelled at them, had failed to provide clear and consistent classroom instructions, and that he violated grading protocols. Ms. Williams admonished Mr. Bidwai to improve his behaviors. [MSD Ex. 13.]

18. On January 25, 2007, Mr. Bidwai received an unsatisfactory interim evaluation from Mr. Saunders, who based the evaluation on (1) Mr. Bidwai's refusal to follow grading policies, curriculum mandates, and classroom management procedures; (2) poor communications with students and parents; and (3) inability to maintain a safe and orderly classroom environment conducive to teaching and learning. The evaluation was communicated to Mr. Bidwai by Ms. Williams. [MSD Ex. 16, 39 ¶¶ 8, 9.]
19. On January 26, 2007, Katherine Kurtz, Assistant Superintendent for Region IV, wrote to Mr. Bidwai scheduling a meeting with him for February 6, 2007 to discuss his unsatisfactory interim evaluation. The meeting was rescheduled three times, with the last scheduled for March 23, 2007. [MSD Ex. 17A, 17B, 17C, 39 ¶ 10.]
20. Also on January 26, 2007, Ms. Williams informed Mr. Bidwai by memorandum that she had received numerous grading complaints from parents and students with regard to his second quarter grade reports, and asked him to explain the grades. [MSD Ex. 18.]
21. On March 5, 2007, Mr. Bidwai was reprimanded by Mr. Saunders for insubordination after he disobeyed a direct order not to lock his classroom door. Mr. Saunders reprimanded Mr. Bidwai again on March 9, 2007, after again finding Mr. Bidwai's door locked. Mr. Saunders reprimanded Mr. Bidwai again on March 16, 2007, after finding that Mr. Bidwai's classroom door was locked again. [MSD Ex. 22A, 22B, 22C.]
22. On March 12, 2007, Mr. Bidwai filed a grievance through the teachers' union challenging his unsatisfactory interim evaluation and all of his reprimands. He alleged that the actions were taken in retaliation for a number of complaints he had made, but did not allege that the actions were taken because he engaged in any protected activity under the INA. [MSD Ex. 23.]
23. Mr. Bidwai did not appear for the meeting with Ms. Kurtz on March 23, 2007 meeting and was cited for insubordination. [MSD Ex. 17C, Ex. 39 ¶ 10.]
24. On March 30, 2007, Mr. Saunders instructed Mr. Bidwai to report to Mr. Robinson on April 2, 2007. Mr. Bidwai emailed Mr. Saunders informing him that he would like union representation for the meeting. Mr. Saunders replied, informing Mr. Bidwai that he did not need union representation, and reiterating that the meeting was scheduled for April 2, 2007. [MSD Ex. 26.]
25. On April 1, 2007, Mr. Bidwai left for India without obtaining advance approval for leave, and was gone until April 30, 2007. [MSD Ex. 33A.]
26. On April 2, 2007, Mr. Bidwai failed to appear for a disciplinary hearing before Mr. Robinson regarding the charge of insubordination for failure to appear for the meeting with Ms. Kurtz on March 23, 2007. [MSD Ex. 25B.]
27. On April 3, 2007, Mr. Bidwai faxed a letter dated April 2 to Mr. Saunders requesting after-the-fact approval for leave to travel to India, with a return date of either April 26 or May 1, 2007. On the same day, Mr. Saunders denied the leave request, notified Mr. Bidwai that he was placed on leave without pay pending his return to work, and notified Mr. Bidwai that he was being referred for additional disciplinary action for desertion from duty. Mr. Saunders also reprimanded Mr. Bidwai in writing for his failure to report to Mr. Robinson on April 2, 2007, and his failure to report for duty at FDHS on April 2 and 3, 2007. [MSD Ex. 26A, 26B.]

28. On April 3, 2007, the Respondent's Superintendent submitted the names of five probationary teachers, including Mr. Bidwai, recommending their termination. [MSD Ex. 42.]
29. On April 16, 2007, Mr. Bidwai made his first response to Mr. Robinson regarding the April 2 disciplinary hearing. He sent an email informing Mr. Robinson that he had been unable to respond on April 2 because he had no access to email. He informed Mr. Robinson that he would return to work on May 1, 2007. [MSD Ex. 26.]
30. On April 30, 2007, Mr. Robinson replied to Mr. Bidwai, ordering him not to return to his teaching duties at FDHS and informing him that he was subject to a charge of insubordination for abandoning the job. [MSD Ex. 26.]
31. On April 30, 2007, the Superintendent sent a certified letter to Mr. Bidwai informing him that the Board had approved his recommendation not to renew Mr. Bidwai's teaching contract, and that his current contract would terminate on June 18, 2007. [MSD Ex. 27.]
32. Upon Mr. Bidwai's return from India, he was instructed to report to an alternative work location and await further instruction. He refused to do so, and remained in leave-without-pay status through June 18, 2007, the end date of his contract. [MSD Ex. 30, 31.]
33. On May 25, 2007, the teachers' union submitted a request for reconsideration of the decision not to renew Mr. Bidwai's contract. The request did not make any allegation that the non-renewal was based on any protected activity under the INA. On October 10, 2007, the Superintendent denied the request for reconsideration. [MSD Ex. 28, 30.]
34. Mr. Bidwai appealed the Superintendent's denial of his request for reconsideration to the Board, which accepted his appeal. The appeal did not make any allegation that his contract was not renewed in retaliation for his having engaged in protected activity under the INA. Although the Board accepted his appeal, Mr. Bidwai did not pursue it. [MSD Ex. 31, 32.]

Discussion

A. Mr. Bidwai's Protected Activities Were Not a Contributing Factor to Any of the Adverse Employment Actions

In addition to the involuntary reassignment on August 14, 2006, Mr. Bidwai alleges several other adverse employment actions, including (1) failure to take steps by February of 2007 to ensure that his visa was extended; (2) placement on leave without pay status on April 2, 2007 and removal from payroll on April 9, 2007; (3) non-renewal of his teaching contract on April 30, 2007; (4) benching without pay on May 1, 2007, and (5) placement on "involuntary servitude" on May 14, 2007. In addition, the undisputed facts show additional adverse employment actions, including five reprimands and an unsatisfactory interim evaluation.

Visa renewal

Mr. Bidwai alleges adverse employment action by failing to respond timely to the USCIS request for information, resulting in the “failure” of his H-1B visa. The undisputed facts show otherwise: Mr. Robinson responded to USCIS on February 2, 2007, which was before the February 6, 2007 deadline and was therefore timely. Additionally, Mr. Bidwai’s visa was renewed in March of 2007, and he continued to work between February 6, 2007 and March 30, 2007. Mr. Bidwai’s allegation of adverse employment action fails as a factual matter – Respondent did respond timely to the USCIS request, and Mr. Bidwai’s visa was approved.

Leave Without Pay

On April 3, 2007, Mr. Saunders placed Mr. Bidwai on leave without pay effective April 2, 2007, when Mr. Bidwai did not report to work. The letter informing Mr. Bidwai of this fact makes no reference to his immigration status or to Respondent’s H-1B program. Instead, it is based explicitly on Mr. Bidwai’s unauthorized absence from work for a period beginning on April 2 and his expressed intent to remain absent for an extended period of time. The undisputed facts show that Mr. Saunders was not aware of Mr. Bidwai’s immigration status or of his having made any complaint about Respondent’s H-1B program at the time he issued the letter of April 3, 2007. Accordingly, I find that Mr. Bidwai’s protected activities were not a contributing factor to Mr. Saunders’ decision to place Respondent on leave without pay.³

“Benching” and “Involuntary Servitude”

Mr. Bidwai was ordered to report to an alternative work site on May 1, 2007, after his return from India. He refused to do so. He therefore remained on leave without pay through the end of his contract, June 18, 2007. As discussed above, the decision to place him on leave without pay was not based, even in part, on his having engaged in protected activities. Likewise, the decision to leave him in that status after April 30, 2007 was made by Mr. Saunders, who was not aware of Mr. Bidwai’s immigration status or of his having made any complaint about Respondent’s H-1B program at the time he did so. The decision was based on Mr. Bidwai’s refusal to report to an alternative work site or to perform duties other than teaching. Accordingly, Mr. Bidwai’s protected activities were not a contributing factor to Mr. Saunders’ decision to keep Mr. Bidwai in leave without pay status after April 30, 2007.

Reprimands

Mr. Saunders reprimanded Mr. Bidwai five times between November 3, 2006 and April 3, 2007. The first reprimand, issued on November 3, 2006, was for failure to submit his first quarter grades on time, failure to maintain accurate and timely records, and failure to provide documentation to support student grades. Three of the reprimands, issued in consecutive weeks in March of 2007, were for keeping his classroom door locked in disobedience of direct orders to

³ I note that as a result of the settlement between Respondent and the Administrator in Case No. 2011-LCA-026, Mr. Bidwai was paid for the time that he was in leave without pay status. That he received payment, however, did not preclude this claim of retaliation based on his being placed in leave without pay, as other remedies may have been available had he proven retaliation.

leave the door unlocked. The last reprimand was for failing to report to Mr. Robinson on April 2, 2007 as directed, failing to obtain approval for leave during April of 2007, failing to report to work on April 2 and 3, 2007, and failing to follow proper procedures for notifying the school of his absence. Mr. Saunders was not aware of Mr. Bidwai's immigration status or of his having made any complaint about Respondent's H-1B program at the time he issued any of the reprimands. His decision to do so was based on Respondent's conduct, and not on any protected activities. Accordingly, Mr. Bidwai's protected activities were not a contributing factor to Mr. Saunders' decision to issue him the reprimands between November 3, 2006 and April 3, 2007.

Interim Evaluation

In January of 2007, Mr. Saunders issued an interim teacher evaluation to Mr. Bidwai. Mr. Saunders rated Mr. Bidwai's performance as "satisfactory" on six rating elements, as "needs to improve" on 14 others. On the rating element requiring that he show significant and demonstrable progress by the students, he was rated as "not achieved." His overall rating was "unsatisfactory." At the time he evaluated Mr. Bidwai, Mr. Saunders was not aware of Mr. Bidwai's immigration status or of his having made any complaint about Respondent's H-1B program. He evaluated Mr. Bidwai after Mr. Bidwai had been counseled on a number of occasions regarding his failure to follow grading policies and his disrespect to his students. I find that Mr. Bidwai's protected activities were not a contributing factor to Mr. Saunders' decision to issue an unsatisfactory interim evaluation.

Non-Renewal of Contract

Respondent determined in April of 2007 that Mr. Bidwai's teaching contract would not be renewed, and communicated that decision to him by letter dated April 30, 2007. The decision to recommend non-renewal was made by Mr. Saunders, who sent his recommendation to the Superintendent. The Superintendent agreed and presented the matter to the Board, which made the ultimate decision not to renew Mr. Bidwai's contract. Mr. Saunders was not aware of Mr. Bidwai's immigration status or of his having made any complaint about Respondent's H-1B program at the time he recommended non-renewal of Mr. Bidwai's contract. There is no evidence that the Superintendent or any of the Board members who voted not to renew the contract knew of his protected activities at the time the decision was made. Thus, I find that Mr. Bidwai's protected activities were not a contributing factor in Mr. Saunders' decision to recommend non-renewal, the Superintendent's agreement with that recommendation, or the Board's decision not to renew Mr. Bidwai's contract.

B. Respondent Has Demonstrated That It Would Have Taken the Same Actions In the Absence of Protected Activities

As discussed above, Mr. Bidwai's protected activities were not a contributing factor to any of the adverse employment actions taken against him. In the event that my determination is incorrect as to any of the adverse employment actions, and his protected activities did contribute to the decision to take those actions, the burden shifts to Respondent to show by clear and convincing evidence that it would have taken those actions even in the absence of protected activities. I find that Respondent has met that burden.

Mr. Bidwai was placed on leave without pay when he left the country on April 1, 2007, and informed Mr. Saunders that he would return no later than May 1, 2007. He did so without obtaining approval ahead of time, and failed to report to work on April 2 and 3 without following proper procedures to notify his school that he would not be there. Mr. Bidwai had met with Mr. Saunders on March 30, 2007 (MSD Ex. 25B) and directed him to report to Mr. Robinson's office on April 2, and reminded him by email the same day; Mr. Bidwai did not inform Mr. Saunders then that he would be leaving the country the next day. It defies belief that Mr. Bidwai would not have reminded Mr. Saunders that he would be out of the country on April 2 if he truly thought he had permission to be absent from school at that time. Mr. Saunders was not aware of Mr. Bidwai's immigration status or of his having made any complaint about Respondent's H-1B program at the time he put Mr. Bidwai on leave without pay. There is no evidence that Respondent's reasons for placing Mr. Bidwai on leave without pay were pretextual, or that the true reason for doing so was his having engaged in protected activities. Respondent has shown by clear and convincing evidence that it would have placed Mr. Bidwai on leave without pay in the absence of his having engaged in protected activities.

Mr. Bidwai's leave without pay was continued after his return on or about April 30, 2007. On that date, he was instructed by Mr. Robinson to await instructions for a conference, accompanied by a union representative, and not to return to work on May 1, 2007. He was directed to report to an alternative work site the same day, and refused to do so. The reason given for giving the instructions to Mr. Bidwai was that Mr. Bidwai had been absent without leave. There is no evidence that Mr. Robinson knew of Mr. Bidwai's protected activities when he directed Mr. Bidwai to await instructions for a disciplinary conference and not to return to work. There is no evidence that Respondent's reasons for continuing Mr. Bidwai on leave without pay were pretextual, or that the true reason was his having engaged in protected activities. Respondent has shown by clear and convincing evidence that it would have taken the same step in the absence of Mr. Bidwai's having engaged in protected activities.

Mr. Bidwai was reprimanded several times for failing to report to meetings as ordered, and for failing to keep his classroom door unlocked as ordered. The reasons for issuing the reprimands were explicitly spelled out in the reprimands themselves. Mr. Saunders, who issued most of the reprimands, was not aware of Mr. Bidwai's protected activities when he did so. There is no evidence that the reasons for the reprimands were pretextual, or that the true reason for issuing the reprimands was that Mr. Bidwai had engaged in protected activities. Respondent has shown by clear and convincing evidence that it would have issued the reprimands to Mr. Bidwai in the absence of his having engaged in protected activities.

Mr. Saunders issued Mr. Bidwai an unsatisfactory interim evaluation in January of 2007. He based his evaluation on Mr. Bidwai's documented failure to follow grading policies, his difficulties in maintaining control of his classroom, and on observation of Mr. Bidwai in the classroom. Mr. Saunders was unaware of Mr. Bidwai's protected activities when he issued the interim evaluation. There is no evidence that the reasons for the unsatisfactory evaluation were pretextual, or that the true reason was that Mr. Bidwai had engaged in protected activities. Respondent has shown by clear and convincing evidence that Mr. Bidwai would have received the same evaluation in the absence of his having engaged in protected activities.

Mr. Saunders recommended to the Superintendent that Mr. Bidwai's contract not be renewed after its termination. He did so for several reasons, including:

- Mr. Bidwai's failure to submit his first-quarter grades on time, to provide documentation to support his grading, or to maintain accurate and timely records;
- Numerous complaints from students and parents regarding Mr. Bidwai's grades as well as his unprofessional conduct toward his students;
- Mr. Bidwai's failure to appear for a thrice-scheduled meeting with the Area Superintendent to discuss his unsatisfactory interim evaluation;
- Mr. Bidwai's failure to comply with Mr. Saunders' direct instructions to leave his classroom door unlocked;
- Mr. Bidwai's extended unapproved leave;
- Mr. Bidwai's failure to show any effort to try to comply with suggestions or direction provided to him by Mr. Saunders; and
- Mr. Bidwai's substandard teaching.

No employee, whether a teacher or not, whether possessing an H-1B visa or not, whether engaging in protected activities under the INA or not, can simply decide to leave work for a month without obtaining approval in advance. Mr. Bidwai's absence alone would be reason enough to terminate him, even if he did engage in protected activities. Likewise, his consistent failure to follow the instructions of his principal and his failure to report for meetings as directed demonstrate that he was an unsuitable employee. Combined with the frequent and continuing complaints from students and parents, his insubordination and extended unauthorized absence are ample reason for non-renewal of his teaching contract. There is no evidence that the many bases for not renewing Mr. Bidwai's contract were pretextual, or that the true reason for doing so was his having engaged in protected activities. Respondent has shown by clear and convincing evidence that it would not have renewed Mr. Bidwai's contract even in the absence of protected activity.

C. Conclusion

Mr. Bidwai's protected activities were not a contributing factor to any of the adverse employment actions taken against him. Even if they were, Respondent has shown by clear and convincing evidence that it would have taken the same actions even in the absence of protected activities. His claim of retaliation must therefore be dismissed.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Prosecuting Party's Motion to Compel is DENIED;
2. Prosecuting Party's Motion to Establish Adverse Action ("fait accompli motion") is DENIED;

3. Prosecuting Party's Motion for Extension of Time is DENIED;
4. Respondent's Motion for Summary Decision is GRANTED; and
5. The complaint in this matter is DISMISSED.

SO ORDERED.

A

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).