U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2016

Case No.: 2016-LCA-00003

In the Matter of:

SUMAN KUMAR PILLI,
Prosecuting party,

v.

VALUE CONSULTING, LLC,
Respondent.

DECISION AND ORDER DISMISSING THIS CASE AND DENYING RESPONDENT'S REQUEST FOR A HEARING ON COUNTERCLAIMS AND DENYING RESPONDENT'S REQUEST TO VACATE THE ADMINISTRATOR'S DETERMINATION AND DENYING RESPONDENT'S REQUEST FOR AN AWARD OF ATTORNEY'S FEES

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (the "Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I.

On June 2, 2016, this Court issued an *Order Compelling the Prosecuting Party to Respond to Interrogatories and Requests for Production*, giving the Prosecuting Party thirty (30) days to respond with answers or objections to Respondent's interrogatories and requests for production filed on January 5, 2016 and January 20, 2016. The Prosecuting Party did not respond.

On July 6, 2016, this Court issued an *Order to Show Cause Why Respondent's Motion for Summary Judgment Should Not Be Granted* (hereinafter "*Order to Show Cause*"), giving the Prosecuting Party twenty one (21) days to submit evidence in opposition to *Respondent's Motion for Partial Summary Judgment*. The Prosecuting Party did not respond.

On July 26, 2016, the Court issued an *Order Cancelling Hearing*, and noted that the Prosecuting Party had not replied to two outstanding Orders of the Court. However, at that time, the Prosecuting Party's time to respond to the *Order to Show Cause* had not yet elapsed.

On July 29, 2016, Respondent filed a motion requesting that the Court dismiss the claim due to the Prosecuting Party's failure to respond to Orders of this Court. On August 22, 2016, the Court issued *Order to Show Cause why this Case Should not be Dismissed*, giving the

Prosecuting Party thirty (30) days to show cause why the case should not be dismissed for failure to prosecute and/or failure to comply with two court orders.

On September 28, 2016, Respondent filed *Respondent, Value Consulting LLC's Motion to Dismiss Prosecuting Party's Claims for Failure to Respond to Order to Show Cause in a Timely Manner* (hereinafter "*Motion to Dismiss*"). Respondent's *Motion to Dismiss* affirmed that the Prosecuting Party has still not responded to any of the above-mentioned Orders, and requested that the Court issue an order for:

> (i) a dismissal of Prosecuting Party's claims in its entirety, with prejudice; (ii) a hearing in regard to Respondent's counterclaims be held; (iii) Department of Labor, Wage and Hour Division return Respondent, Value Consulting, LLC's check in the amount of $8,866.37 . . . since Prosecuting Party has refused to accept WHD's determination, and finally (iv) Attorney's fees, as deemed appropriate by this Court, for Respondent, for defending against a frivolous complaint by Prosecuting Party, and his repeated failures to respond to motions for discovery and show cause Orders of this Court.

Motion to Dismiss at 2-3.

DISCUSSION

Dismissal

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges ("Rules of Practice and Procedure") provide for the sanction of "[d]ismissing the proceeding in whole or in part" if a party fails to obey an order to provide or permit discovery. 29 C.F.R. §18.57(b). Although the Rules of Practice and Procedure do not specifically address dismissal of a case for failure to prosecute a claim, the Rules of Practice and Procedure broadly invest a judge with the authority to exercise "all powers necessary to the conduct of fair and impartial hearings." 29 C.F.R. § 18.12(b). The Rules also provide, however, that the "Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules[.]" 29 C.F.R. § 18.10(a).

The FRCP expressly provide for dismissal of a claim where a party fails to prosecute his claim or fails to comply with an order of the court. More specifically, FRCP 41(b) states that if a plaintiff "fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." FED. R. CIV. P. 41(b). Additionally, the Supreme Court of the United States has expressly recognized a court's ability to dismiss a claim *sua sponte* under FRCP 41(b). In *Link v. Wabash Railroad Co.*, the Court held that "[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U.S. 626, 630–31 (1962). The United States Court of Appeals for the Sixth Circuit has similarly recognized a court's ability to dismiss a case *sua sponte* for failure to comply with a court order. *See Schreiber v. Moe*, 320 F. App'x 312, 317 (6th Cir. 2008); *Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 736 (6th Cir. 2008); *Steward v. City of Jackson, Tennessee*,

8 F. App'x 294, 296 (6th Cir. 2001). All of these courts, however, require that the dismissed party be provided adequate notice that his failure to comply with the court's order may result in dismissal of his claim. *See Link*, 370 U.S. at 632; *Schreiber*, 320 F. App'x at 318; *Schafer*, 529 F.3d at 737; *Steward*, 8 F. App'x at 296.

In the present case, the Prosecuting Party has not responded to my June 2, 2016 *Order Compelling the Prosecuting Party to Respond to Interrogatories and Requests for Production*, or my July 6, 2016 *Order to Show Cause Why Respondent's Motion for Summary Judgment Should Not Be Granted*. Therefore, I find that the Prosecuting Party has failed to prosecute his case despite adequate notice that his failure to comply with the Court's order may result in dismissal of his claim. Accordingly, the Prosecuting Party's claim is **DISMISSED** with prejudice.

Counterclaims

Respondent also requests that the Court hold a hearing on Respondent's counterclaims against the Prosecuting Party. Respondent's counterclaims of fraudulent conduct and unjust enrichment are set forth in *Respondent's Answer to Prosecuting Party's Complaint and Respondent's Counterclaim* (hereinafter "*Respondent's Answer*"), which was filed with this office on December 2, 2015. In essence, Respondent contends that the Prosecuting Party "presented fraudulent employee expense forms and per diem requests to [Respondent] and requested reimbursement for attending workshops and conferences out of town." *Respondent's Answer* at 8-14. Respondent requests compensatory damages for both counterclaims, and punitive damages for the counterclaim of fraudulent conduct.

The Administrative Review Board ("Board") has explicitly set forth the circumstances under which a hearing may be requested:

> The Administrator investigates complaints filed by an aggrieved party alleging that an employer failed to meet a condition specified in the LCA or misrepresented material facts in the LCA. [8 U.S.C.A. § 1182(n)(2)(A); 20 C.F.R. § 655.806(a).] The complaint must set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in 20 C.F.R. § 655.805 has been committed, and therefore that an investigation is warranted. [8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.806(a)(2).] If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator "shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary." [20 C.F.R. § 655.806(a)(2).] "No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted." [*Id.*] Thus, unless the Administrator finds that the facts presented in a complaint establish reasonable cause for Wage and Hour to investigate, there will be no investigation and ensuing determination. [*Watson v. EDS Corp.*, ARB Nos. 04-023, 029, 050, ALJ Nos. 2004-LCA-009, 2003- LCA-030 and Watson v. Bank of America, ARB No. 04-099, ALJ No. 2004-LCA-023, slip op. at 5 (ARB May 31, 2005).] The INA regulations governing an ALJ's review of an Administrator's determination state that a hearing may be requested in two instances. First, where the Administrator

> determines, after investigation, that there is no basis for finding that an employer committed violations, and second, where the Administrator determines, after investigation, that the employer has violated the INA. [20 C.F.R. § 655.820(b)(1), (2).] Thus, the prerequisite for requesting a hearing on a claim is that the Administrator has conducted an investigation and made a determination on that claim. [*Watson*, slip op. at 5.]

Jain v. Empower IT, Inc., ARB No. 08-077, ALJ No. 2008-LCA-8 (ARB Oct. 30, 2009) (footnotes omitted). Additionally, in *Sisfontes v. International Business Software Solutions, Inc.*, the Board held that state law claims are not reviewable by the Office of Administrative Law Judges, and are appropriate for summary judgment. ARB Nos. 07-107, 07-114, ALJ No. 2007-LCA-14 (ARB Aug. 31, 2009) ("We first note that the Labor Department's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions.").

Respondent's counterclaims of fraud and unjust enrichment are accordingly not reviewable in this forum for two reasons. First, there is no evidence that these issues were presented to the Administrator for investigation. Accordingly, pursuant to 20 C.F.R. § 655.806(a)(2), Respondent may not request a hearing on these issues. Second, and more significantly, fraud and unjust enrichment are not claims cognizable under the Act. Thus, this Court has no jurisdiction over Respondent's counterclaims. Therefore, Respondent's request for a hearing on its counterclaims is **DENIED**.

Return of Check Held by Wage and Hour Division

In the Administrator's Determination, dated September 16, 2015, the Administrator found that Respondent failed to pay wages as required in violation of 20 C.F.R. § 655.731. The Administrator ordered Respondent to pay back wages in the amount of $12,507.60 to the Prosecuting Party. By letter dated October 1, 2015, the Prosecuting Party appealed to the Office of Administrative Law Judges and requested a hearing. Respondent did not appeal the determination.

Respondent requests that this Court order that "Department of Labor, Wage and Hour Division return [Respondent's] check in the amount of $8,866.37 . . . since Prosecuting Party has refused to accept WHD's determination." *Motion to Dismiss* at 3. Respondent does not fully explain what this check is, but it appears to be related to the Administrator's September 16, 2015 Determination. Therefore, Respondent is essentially requesting that I vacate the Administrator's decision awarding back wages to the Prosecuting Party.

Twenty C.F.R. § 655.820 provides the procedural requirements to appeal an Administrator's determination:

> Any interested party desiring review of a determination issued under § 665.805 and 665.815, including judicial review, 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. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be

> inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

20 C.F.R. § 655.820(a). The request for hearing must be filed with the Chief Administrative Law Judge no later than fifteen calendar days after the date of the Administrator's Determination. 20 C.F.R. § 655.820(d).

Here, the case has been dismissed, and therefore the Administrator's Determination is effective. If Respondent disagrees with the Administrator's Determination, then Respondent must request a timely appeal of the determination. There is no evidence in the file that Respondent has requested an appeal of the Administrator's Determination. Accordingly, Respondent's request that the Court "return [Respondent's] check in the amount of $8,866.37" is **DENIED**.

Attorney's Fees

Respondent also requests that the Court award Respondent "Attorney's fees, as deemed appropriate by this Court, for Respondent, for defending against a frivolous complaint by Prosecuting Party, and his repeated failures to respond to motions for discovery and show cause Orders of this Court." *Motion to Dismiss* at 3. Both the Act and the regulations at 20 C.F.R. Part 655, Subparts H and I, are silent as to whether the Administrative Law Judge has authority to award attorney's fees to the prevailing party. However, the Board has stated that the prevailing party is generally not entitled to recover attorney's fees, absent explicit authority:

> Under the American Rule, however, courts generally do not award fees to a prevailing party absent explicit statutory authority. *See Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health and Human Res*., 532 U.S. 598, 602 (2001) (in United States parties ordinarily required to bear own attorney's fees; prevailing party is not entitled to collect fees from loser); *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994) (following American Rule, Court "adhere[s] to a general practice of not awarding fees to a prevailing party absent explicit statutory authority"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-262 (1975) (tracing origins and development of the American Rule). The INA does not provide for the recovery of attorney's fees, and Talukdar has provided no reason why we should not follow the general rule in his case. Therefore, we conclude that Talukdar is not entitled to recover such fees.

Talukdar v. U.S. Dept. of Veterans Affairs, ARB No. 04-100, ALJ No. 2002-LCA-25 (ARB Jan. 31, 2007).

In this case, Respondent has not provided a reason why this Court should not follow the general rule that the prevailing party is not entitled to an award of attorney's fees. Additionally, neither the Act nor the regulations at 20 C.F.R. Part 655, Subparts H and I, nor the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. Part 18A, provide for an award of attorney fees as a sanction. Accordingly,

Respondent's request that the Court award it attorney's fees for defense against this claim is **DENIED**.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that:

1. The above-captioned claim is **DISMISSED**, with prejudice;

2. Respondent's request for a hearing on counterclaims is **DENIED**, and Respondent's counterclaims are **DISMISSED;**

3. Respondent's request that the Court order the Wage and Hour Division to return Respondent's check is **DENIED**; and

4. Respondent's request for an award of attorney's fees is **DENIED**.

Digitally signed by Larry Merck
DN: CN=Larry Merck,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.