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Office of Administrative Law Judges
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Issue Date: 03 July 2019

Case No.: 2019-LCA-00015

In the Matter of:

PEROUMAL PAJANY,
Prosecuting Party,

v.

CAPGEMINI, INC.,
Respondent,

and

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Party-in-Interest.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS, CANCELLING HEARING AND CANCELLING TELEPHONE CONFERENCE

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C.A. § 1101, et seq, as amended, and its implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. A formal hearing is set for July 9, 2019 at 9:00 a.m. in Columbus, Ohio.

This case was initially docketed in the Office of Administrative Law Judges on February 12, 2019. The Regulations[1] required the matter to be assigned to an ALJ "promptly." However, issues affecting the flow of case assignments prevented this matter from being assigned to me until May 10, 2019. I have tried to expedite my consideration of this case.

During a telephone status conference on June 4, 2019, Capgemini America, Inc. ("Respondent") indicated it would be filing a dispositive motion. On June 24, 2019, Respondent submitted a Motion to Dismiss under 29 C.F.R. §18.70 (c) and Rule 12(c) of the Federal Rules of Civil Procedure, which allows for "judgment on the pleadings." Respondent essentially argues that Peroumal Pajany ("Complainant" or "Mr. Pajany") has failed to state a claim upon which relief can be granted per Fed.R.Civ.P. 12(b)(6).[2]

A substantial amount of evidentiary materials were attached to Respondent's Motion. I believed it possible that I would consider those materials in my consideration of Respondent's

[1] 20 C.F.R. § 655.835(b).
[2] *Resp. Mot. To Dismiss Complaint.*

Motion, and that Respondent's Motion to Dismiss would thereby be converted to a Motion for Summary Decision. I thus issued an Order to Complainant informing him of his obligation to come forward with information sufficient to create a justiciable question of fact.

On July 2, 2019, Complainant filed papers in opposition to Respondent's Motion. I have carefully reviewed Mr. Pajany's July 2, 2019 submission. I have now determined that I do not need to consider any evidentiary materials outside the pleadings in order to rule on Respondent's Motion. I make the following decision without reference to the evidence outside the pleadings.

Motion to Dismiss Standard

Rule 12(c) of the Federal Rules of Civil Procedure allows a party to move for judgment on the pleadings. In addressing such a motion, I apply the same standard as for a Motion to Dismiss made under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under that standard, "a party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness." 29 C.F.R. § 18.70(c).

In this administrative proceeding, Complainant's initial pleading is reviewed to determine whether it provides "fair notice of [Complainant's] claim."[3] A complainant's claim provides fair notice by encompassing: "(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes under the ALJ's jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation, and (4) a description of the relief that is sought."[4] "A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[5] A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6] This standard demands "more than a sheer possibility that a defendant has acted unlawfully."[7] In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor.[8] A complaint need not make "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."[9] "The tenant that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements [which are] supported by mere recital of conclusory statements. … While legal conclusions can provide the complainant's framework, they must be supported by factual allegations."[10]

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[3] *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 6 (ARB Feb. 25, 2013) *citing Evans*, ARB No. 08-059.

[4] *Evans*, ARB Case No. 08-059 at p. 11. To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6),

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[6] *Id.*

[7] *Id.*

[8] S*ee Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3rd Cir. 2008) (a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine, whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.").

[9] *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

[10] *Iqbal*, 129 S.Ct. at 1940.

Immigration and Nationality Act

A justiciable claim made under the relevant provisions of the Immigration and Nationality Act,[11] must allege that the Employer committed one of the following violations:

> (1) Filed a labor condition application with ETA which misrepresents a material fact…;
>
> (2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);
>
> (3) Failed to provide working conditions as required under § 655.732;
>
> (4) Filed a labor condition application for H-1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;
>
> (5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;
>
> (6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed;
>
> (7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B worker is placed), as prohibited by § 655.738 (if applicable);
>
> (8) Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);
>
> (9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

[11] 8 U.S.C. §§ 1101, et seq, as amended, and the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I,

> (10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section, or willful misrepresentation of a material fact on a labor condition application;
>
> (11) Required or accepted from an H-1B nonimmigrant payment or remittance of the additional $500/$1,000 fee incurred in filing an H-1B petition with the DHS, as prohibited by § 655.731(c)(10)(ii);
>
> (12) Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);
>
> (13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;
>
> (14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);
>
> (15) Failed to maintain documentation, as required by this part; and
>
> (16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.[12]

Complainant's Complaint to Wage and Hour Division

In his complaint to Wage and Hour Division ("WHD"), Mr. Pajany made the following allegations:

> H1B Workers Treated Better Than American Workers
>
> H1B Workers are Expense Paid with More Flexibility Than [sic] the U.S. Citizens
>
> U.S. Citizen on the road/dangerous drive whereas, H1B receive better care
>
> H1B Interview U.S. Workers and Reject American Citizens for their Job Security
>
> U.S Citizens are Hired to Cover H1B Workers When H1B is on Vacation / Visa Stamping

[12] 20 C.F.R. §655.805(a).

> H1B Lack Experience and Skills
>
> Sean Moore– Capgemini - I have 1000's of H1B how come you (Citizen) enter Capgemini
>
> Mike Price – Capgemini VP- H1B is our Company Model and Future
>
> I was Harassed, Discriminated and Forced to resign
>
> Forced to work over the Labor Day weekend:
>
> L&T Infotech – Just wanted to share an old H1B incident at Honda (Sallie/Thomas)
>
> My Qualification: Still I Cannot get Job – Blacklisted[13]

In his initial pleading, Complainant did not elaborate on any of the details of these allegations.

Discussion

Complainant has not alleged that Employer failed to meet any of the requirements related to the filing of the labor condition application, the failure to meet the requirements related to the pay and treatment of H-1B non-immigrants, the hiring of H-1B workers during a strike, the failure to maintain documentation as required under the act, or the failure to make that documentation available.[14] Therefore, 20 C.F.R. §655.805(a) (1)-(6) and (11)-(12), (14)-(15) do not apply. He has not pointed to any other specific failure "to comply in any other manner with the provisions of this subpart I or subpart H of this part."[15] I therefore find that §655.805(a)(16) does not apply.

In order for 20 C.F.R. §655.805(a)(7)-(8) and (10) to be applicable, a complainant must allege that one or more U.S. workers has been displaced by H-1B non-immigrants by either the employer or a secondary employer with whom the H-1B non-immigrants are placed. Displacement requires the laying off of a U.S. worker in an essentially equivalent job to that filled by the H-1B worker.[16] Under 20 C.F.R. 655.738(b) an essentially equivalent job is one with essentially the same job responsibilities, qualifications, and experience, in the same area of employment, and:

> (1) Lay off of a U.S. worker means that the employer has caused the worker's loss of employment, other than through—

[13] *Complaint to WHD*.
[14] *Id*.
[15] 20 C.F.R. §655.805(a)(16).
[16] 20 C.F.R. §655.738.

> (i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker's performance or behavior on the job;
>
> (ii) A U.S. worker's voluntary departure or voluntary retirement …
>
> (iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade the employer's non-displacement obligation.…or
>
> (iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer.[17]

Here, Complainant has alleged that H-1B workers were treated better, had expenses paid with greater flexibility, received better care, conduct interviews of American citizens and reject their applications, and that two individuals working for Employer made comments about the use of H-1B workers. He also alleged that U.S. citizens were hired to cover for H-1B workers on vacation.[18] However, he never alleged that any U.S. citizen lost their job only to have an essentially equivalent job filled by an H-1B worker. He alleged that he was "Harassed, Discriminated and Forced to resign"[19] but did not allege that he was replaced by an H-1B worker. His conclusory statement that he was "not able to find a job because of Capgemini and other companies priority on H1B over the U.S. Citizens" was insufficient to show displacement, and he in fact indicated that he believed his alleged forced resignation may have been due to his disability, beginning his complaint by stating that he is "disabled with one eye," and that he "was harassed, discriminated, [his] disability criticized, and forced to resign."[20] This does not constitute the displacement of a U.S. worker by an H-1B non-immigrant. I therefore find that Complainant has not stated a claim for relief "that is plausible on its face"[21] under 20 C.F.R. §655.805(a)(7)-(8) or (10), because the facts alleged do not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged"[22] as a violation of §655.805(a)(7)-(8) or (10).

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[17] 20 C.F.R. §655.738(b)(1)-(2).
[18] *Complaint to WHD*.
[19] *Id*.
[20] *Id*.
[21] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).
[22] *Id*.

In order for 20 C.F.R. §655.805(a)(9) to apply, Employer must be considered either an H-1B dependent employer or have been found by the agency to be a willful violator.[23] As Complainant has not alleged any facts establishing that Employer was an H-1B dependent employer or a willful violator and the regulation was therefore applicable, I find that Complainant has not stated a claim for relief "that is plausible on its face"[24] under 20 C.F.R. §655.805(a)(9)

Finally, in order for 20 C.F.R. §655.805(a)(13) to apply, Complainant must allege that Employer discriminated against him, by intimidating, threatening, restraining, coercing, blacklisting, discharging or in any other manner discriminating against him for reporting what he reasonably believed to be a violation of the INA, or cooperating or seeking to cooperate in an investigation of compliance under the INA.[25] Although Complainant has alleged that he was discriminated against and that he was "[b]lacklisted" he has failed to allege that he participated in any of the described protected activities prior to Employer's actions, or that these actions were taken due to his engagement in protected activity.[26] I therefore find that Complainant has not stated a claim for relief "that is plausible on its face"[27] under 20 C.F.R. §655.805(a)(13).

In addition, Complainant has failed to describe the relief sought, as required to provide fair notice of his claim.

Conclusion

Complainant has failed to state a claim for relief that is plausible upon its face under INA, 8 U.S.C.A. § 1101, et seq, as amended, and its implementing regulations found at 20 C.F.R. Part 655, Subparts H and I, and failed to describe the relief sought, and therefore has failed to provide fair notice of Complainant's claim.[28] I find that he has failed to state a claim upon which relief can be granted. Therefore, the Respondent's Motion to Dismiss should be granted.

ORDER

For the reasons outlined above, Respondent's Motion to Dismiss is **GRANTED**. Complainant's Complaint is **DISMISSED.** The hearing set for July 9, 2019 in Columbus, Ohio is **CANCELLED**. The telephone status conference scheduled for July 8, 2019 is **CANCELLED**.

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[23] 20 C.F.R. §§ 655.736(f), 655.739.

[24] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[25] 20 C.F.R. §§ 655.801(a), 655.805(a)(13).

[26] *Complaint to WHD*.

[27] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[28] *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 6 (ARB Feb. 25, 2013) *citing Evans*, ARB No. 08-059.

Steven D. Bell
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.