

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK J. WATSON

vs.

CHIEF ADMINISTRATIVE JUDGE,
U.S. DEPARTMENT OF LABOR

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Case No. 4:09cv310
(Judge Schneider/Judge Mazzant)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is the Motion to Dismiss with Prejudice (Dkt. #37) filed on behalf of the Secretary of Labor, Hilda L. Solis¹ (the “Secretary”), the Department of Labor’s Administrative Review Board (the “Board”), and the third-party federal respondents Department of State (“DOS”) and Department of Homeland Security (“DHS”). Having considered all of the relevant pleadings, the Court finds that the motion should be granted.

In 2003, Petitioner Mark J. Watson (“Watson”) filed complaints with the Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”) alleging violations of certain provisions of the Immigration and Nationality Act (the “Act”). Watson’s complaints pertained to the temporary employment of aliens in certain speciality occupations. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n). Under this section, aliens are referred to as H-1B workers. Watson also named his former employer, Electronic Data Systems (“EDS”), and Bank of America, N.A., (the “Bank”) and IBM Corporation (“IBM”) in the complaints. Watson had applied for employment with the Bank and IBM.

Watson alleged that he was discriminated against by EDS, the Bank, and IBM under the H-

¹ Mark J. Watson filed this action against the Chief Administrative Law Judge (“ALJ”) of the Department of Labor. The ALJ is not a proper party.

1B provisions because he was displaced by or had not been hired because of the employment of H-1B workers. The WHD of DOL determined that there was no reasonable cause to investigate Watson's allegations. Watson was notified that the determination of "no reasonable cause" for an investigation was not subject to appeal. After Watson was notified of the decision not to investigate, Watson requested an administrative hearing of his EDS complaint. Watson then requested hearings regarding his complaints against the Bank and IBM. In each case, various Administrative Law Judges granted summary judgment to EDS, the Bank, and IBM.

Watson then appealed each of these decisions to the Board. After consolidation of EDS and the Bank's cases, the Board, on May 31, 2005, issued its final decision declining review. On October 20, 2006, the Board declined to review the decision regarding IBM.

Watson attempted to appeal the Board's decisions in the Northern District of Texas.² These cases were dismissed. Watson then appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit also dismissed the appeals as frivolous. *See Watson v. Electronic Data Sys.*, 191 F. App'x 315 (5th Cir. 2006); *Watson v. Bank of Amer.*, 196 F. App'x 306 (5th Cir. 2006). Watson's petition for certiorari was denied by the United States Supreme Court. *See Watson v. Bank of America*, 548 U.S. 1362 (2007).

Watson also filed complaints relating to IBM, the Bank, and EDS in the Court of Federal Claims. These complaints were denied. *See Watson v. United States*, No. 06-716, 2007 WL 5171595 (Ct. Fed. Cl. Jan. 26, 2007), *appeal denied*, 240 F. App'x 410 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 868 (2007). Watson's requests for relief from judgment and for reconsideration were

² *See Watson v. Electronic Data Sys.*, 3:04-cv-2291-H (N.D. Tex. June 14, 2005) and *Watson v. Bank of America*, 3:05-cv-07-H (N.D. Tex. June 14, 2005).

denied by the Court of Federal Claims with instructions to the clerk not to accept further motions relating to Watson's original complaint. On March 5, 2008, Watson's complaint for "liquidated damages" was dismissed on res judicata grounds by the Court of Federal Claims. *See Watson v. United States*, 86 Fed. Cl. 399 (2009). This dismissal was affirmed. *See Watson v. United States*, No. 2009-5081, 2009 WL 3198756 (Fed. Cir. Oct. 7, 2009).

On June 22, 2009, Watson filed his Original Petition for Judicial Review and Application for Declaratory Judgment. On August 12, 2009, Watson filed his Amended Petition for Judicial Review and Application for Declaratory Judgment. In both pleadings, Watson asserted that this was "an appeal of a final agency action (a.k.a. application for writ of mandamus) filed in the district court under the jurisdictional authority of 28 U.S.C. § 1361 pursuant to 5 U.S.C. § 701 through 5 U.S.C. § 706." On August 19, 2009, EDS and the Bank filed answers. Both Defendants assert that this Court lacks jurisdiction to consider Watson's complaints. On November 16, 2009, the federal parties named in the latest action by Watson filed a motion to dismiss. In response, Watson filed his motion to strike the motion to dismiss, compel production of the administrative record, and expedite judicial review via hearing. On December 14, 2009, the Court noted that it would treat this as a response to the motion to dismiss. The Court also gave Watson fifteen days to file an additional response to the motion to dismiss, if desired. On December 18, 2009, Watson filed his response in opposition to the motion to dismiss and motion for reconsideration on compelling production of the administrative record.

ANALYSIS

The motion to dismiss raises the following issues: (1) whether the case should be dismissed with prejudice pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction; and (2) whether this

case should be dismissed with prejudice pursuant to the doctrine of res judicata.

A motion under Federal Rule of Civil Procedure 12(b)(1) should be granted only if it appears beyond doubt that the plaintiff cannot prove a plausible set of facts in support of its claim. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007)). The Court may find a plausible set of facts by considering: “(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Lane*, 529 F.3d at 557 (quoting *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)). The Court will accept all well-pleaded allegations in the complaint as true, and construe those allegations in a light most favorable to Plaintiff. *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994). The party asserting jurisdiction bears the burden of proof for a 12(b)(1) motion to dismiss. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *CleanCOALition v. TXU Power*, 536 F.3d 469, 473 (5th Cir. 2008) (quoting *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

The federal parties assert that this Court lacks jurisdiction to review Watson’s appeal of the Secretary’s determination not to investigate his claim. Watson asserts that regulations and applicable statutes are inconsistent and that he has a right to an appeal. In this action, Watson asserts that the “error” can be corrected by declaratory judgment. Watson asserts that this Court has subject matter jurisdiction to consider a declaratory judgment. Watson also requests a writ of mandamus.³

³ Watson continues to repeat the arguments that he had made in many different courts, but he never establishes how this Court has jurisdiction to take up this action, in its present form.

An employer desiring to hire foreign workers in a temporary speciality job must file a Labor Condition Application with the DOL attesting that it will pay H-1B workers the higher of the prevailing wage or the actual wage, is not engaged in a labor dispute, and has provided notice to employees of its intent to hire H-1B workers. 8 U.S.C. § 1182(n)(1). 8 U.S.C. § 1182(n)(2)(A) instructs the Secretary to establish a process for the investigation of complaints regarding an application submitted for the hiring of alien employees. The Secretary “shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure. . . has occurred.” 8 U.S.C. § 1182(n)(2)(A). Regulations address the complaint process. *See* 20 C.F.R. § 655.805. The WHD Administrator may investigate a violation alleging that the employer displaced a U.S. worker prohibited by § 655.738.

Not all actions by federal agencies of the executive branch are subject to judicial review. The primary purpose of § 1182(n) is to permit an employer to obtain H-1B non-immigrant status for alien employees under certain situations. To ensure that applications for H-1B non-immigrants are in compliance with the requirements of § 1182(n)(1)(A), (B), (E), (F) and (G), the statute provides means whereby a source may submit information which contradicts or questions the information contained in an H-1B application. However, § 1182(n)(2)(G)(I) reserves to the Secretary the determination of whether the information provides reasonable cause to believe that the employer has engaged in a willful failure to meet the requisite requirements of an H-1B application or that the employer has engaged in a pattern or practice of failure to meet the requirements.

The statute provides for procedures for the Secretary to follow when an investigation has been authorized. *See* § 1182(n)(2)(G)(ii)-(vii) and 20 C.F.R. § 655.806. The Regulations provide that “[n]o hearing or appeal pursuant to this subpart shall be available where the Administrator

determines that an investigation on a complaint is not warranted.” 20 C.F.R. § 655.806(a)(2).

The statute reserves to the Secretary the initial determination of whether the complaint contains sufficient information to provide “reasonable cause to believe” that a violation has occurred. Congress gave discretionary authority to the Secretary to decide when and if an investigation should be conducted. *See* 5 U.S.C. § 701(a)(2). This discretion is similar to the discretion that the Department of Justice has in determining whether criminal charges should be brought. This Court has no jurisdiction to review an agency discretionary decision. *See Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *Perales v. Casillas*, 903 F.2d 1043, 1047-48 (5th Cir. 1990). The regulations are very clear that no appeal is available from the decision to find no reasonable cause to investigate.

Watson asserts that this is an appeal of a final agency action. Watson requests that the administrative record be submitted to the Court. Essentially, Watson wants a declaration of his rights and his mistaken belief that he should be able to appeal the decision not to investigate EDS, the Bank, or IBM. Watson has no right to appeal. Therefore, this Court has no jurisdiction to review the decision questioned by Watson in this current action. Two other courts reviewing Watson’s complaints have held that Watson’s claims are not reviewable and dismissed Watson’s cases for lack of jurisdiction. *See Watson v. Electronic Data Sys.*, 3:04-cv-2291 (N.D. Tex. June 14, 2005) and *Watson v. Bank of America*, 3:05-cv-07 (N.D. Tex. June 14, 2005).

Section 1182(n) does not create a private cause of action on behalf of an employee who was allegedly terminated or not hired in favor of the employment of H-1B non-immigrant employees, whose status was obtained by a fraudulent application. *See e.g. Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422-24 (4th Cir. 2005); *Shah v. Wlco Systems, Inc.*, 126 F. Supp.2d 641, 647 (S.D.N.Y. 2000); *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 743-46 (S.D.N.Y. 1997).

Therefore, the Court also lacks jurisdiction to consider Watson's claims against EDS, the Bank, or IBM.

The fact that Watson requests a declaratory judgment or a writ of mandamus does not grant this Court jurisdiction over this action. Jurisdiction was also claimed by Watson under the Declaratory Judgment Act, 28 U.S.C. § 2201. This Act, however, plainly does not confer an independent source of jurisdiction upon courts for a suit against the government, since relief thereunder is premised upon the existence of a judicially remediable right. *See e.g., Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *Powers v. United States*, 218 F.2d 828, 829 (7th Cir. 1955); *Anderson v. United States*, 229 F.2d 675, 677 (5th Cir. 1956). Watson has no independent source of jurisdiction to support his claim for declaratory relief.

The federal mandamus statute provides that district courts shall have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. A writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. United States Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). To obtain this writ, Watson would need to establish "(1) a clear right to the relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy." *Davis v. Fechtel*, 150 F.3d 486, 487 (5th Cir. 1998) (citation omitted). Watson has not shown that he is owed a duty, and, in fact, since he has no right to challenge the actions taken, this Court has no jurisdiction to consider this action.

The second ground for dismissal is based upon res judicata. Although the Court does not need to reach this issue, the Court believes that this action would also be barred by res judicata.

Watson has pursued these claims in various venues for more than six years. The issues are the same in each venue. Watson merely alters the relief sought or the claim asserted, but all of the issues arise out of the same facts:⁴ Watson's failure to obtain review of the decision not to investigate his claims.

RECOMMENDATION

The Court recommends that the Motion to Dismiss with Prejudice (Dkt. #37) filed on behalf of the Secretary of Labor, Hilda L. Solis (the "Secretary"), the Department of Labor's Administrative Review Board (the "Board"), and the third-party federal respondents Department of State ("DOS") and Department of Homeland Security ("DHS") be **GRANTED** and the case be **DISMISSED** with prejudice. All other relief not specifically granted should be **DENIED**.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest

⁴ A prime example of Watson's view that he can merely alter the remedy thereby granting this Court jurisdiction can be found in Watson's response to the motion to dismiss. Watson argues that "...I was unsuccessful arguing it. My Amended Petition for Judicial Review and Application for Declaratory Judgment is on this court's docket styled as an application for writ of mandamus making the doctrine of res judicata not applicable." See Original Response in Opposition to Respondent's Motion to Dismiss (Dkt. # 41), p. 6.

injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 10th day of February, 2010.


AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE