

**U.S. Department of Labor**

Office of Administrative Law Judges  
Heritage Plaza Bldg. - Suite 530  
111 Veterans Memorial Blvd  
Metairie, LA 70005

(504) 589-6201  
(504) 589-6268 (FAX)



**Issue Date: 12 November 2003**

CASE NO. 2003-LCA-30

IN THE MATTER OF

MARK WATSON,  
Complainant

v.

ELECTRONIC DATA SYSTEM,  
Respondent



APPEARANCES:

Mark Watson, *Pro Se*

Bradley Sherman, Esq.,  
Lisa Wallace, Esq.,  
On behalf of Respondent

Before: Clement J. Kennington  
Administrative Law Judge

**ORDER GRANTING RESPONDENT'S MOTION  
FOR SUMMARY DECISION**

This proceeding arises under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 and 1991, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c) (hereinafter "the Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I. Mark Watson (Complainant), filed an Original Claim for Relief with the Office of Administrative Law Judges against Electronic Data System, (Respondent) alleging violations of 20 C.F.R. § 655.738(b) and 739(f), (g), (h) and (j).

## I. Procedural History

On June 16, 2003, Complainant filed a complaint with the Department of Labor, Wage and Hour Division, alleging Respondent violated 20 C.F.R. §§ 655.738 and 655.739(h) and (j), and committed immigration fraud on January 28, 2002. That same day, the Department of Labor issued Complainant a determination stating no investigation would be made because Respondent was not H-1B dependant or a willful violator of its Labor Certification Application (LCA), thus, these sections do not apply to Respondent.<sup>1</sup> On July 7, 2003, Complainant filed another complaint alleging Respondent violated §§ 655.739(h) and (j); specifically, he contended Respondent may have hired a less-qualified H-1B non-immigrant worker on June 25, 2002, before offering the position to Complainant. This complaint also requested various forms of relief pursuant to § 655.810. Complainant filed his Original Claim for Relief with the Department of Labor Office of Administrative Law Judges on August 14, 2003. In this filing, Complainant contends Respondent violated the terms of the LCA it filed on January 28, 2002, by laying him off on the same day it petitioned for an H-1B worker for an essentially equivalent position. Complainant also alleges Respondent violated §§ 655.738(b) and 739(f), (g) and (j). Specifically, he asserts Respondent's willful failure to comply with § 655.738(b) allows him to file a charge based on every position it offered to a lesser-qualified H-1B worker before offering him, as of January 28, 2002 and continuing.

Respondent sent Complainant a letter on August 19, 2003, indicating it did not believe he properly filed his complaint and that it would only respond to his complaint if he cured the filing deficiencies. A Notice of Hearing was issued by the undersigned on September 11, 2003. Respondent filed a Motion to Dismiss on September 15, 2003. Telephone conferences were held on September 22, 2003, and October 29, 2003. Both parties moved for summary decision, Respondent on October 23, 2003, and Complainant on September 23, 2003, and October 29, 2003. Complainant based his Motions on the following allegations:

- (1) Respondent used its reduction-in-force process as an attempt to force Complainant to sign away his protection under § 655.738(b) and for Respondent to circumvent civil liability for their willful failure to abide by that section;

---

<sup>1</sup> Notwithstanding its substantive findings, I find this determination is procedurally deficient inasmuch as it does not comply with the requirements set forth in 20 C.F.R. § 655.815(c). Specifically, the determination did not inform Complainant he may request a hearing on the matter, or that such request must be made within 15 days of the determination. Moreover, the determination incorrectly stated 20 C.F.R. § 655.805(c) allows Complainant to file additional information. In light of these errors, I will consider Complainant's June 16, 2003, and July 7, 2003, complaints in reaching my decision.

- (2) Respondent's severance plan had been enforced as a means for it to mitigate civil and criminal liability, even though the plan had not been executed; and
- (3) Complainant was a better qualified candidate for the Enterprise Consultant position which was offered to an H-1B non-immigrant worker on June 25, 2002.

Furthermore, on November 3, 2003, Complainant alleged in a letter to the undersigned that he is entitled to a default decision because all of Respondent's pre-hearing filings were untimely in accordance with 29 C.F.R. § 18.40(a).

Respondent moved for a judgment as a matter of law on the following grounds:

1. Complainant's June 16, 2003, complaint is time-barred because the alleged violations took place more than twelve (12) months prior to the filing;
2. Complainant's Claim for Relief is time-barred inasmuch as it was filed with the ALJ more than fifteen (15) days after the Department of Labor's determination on June 16, 2003;
3. Respondent is not subject to the requirements of §§ 655.738 and 739 because it is not H-1B dependent or a willful violator as defined under § 655.736;
4. Respondent nonetheless did not violate these sections because it terminated Complainant for legitimate, non-discriminatory reasons; and
5. Complainant did point to any specific position which he applied to, was denied, and for which an H-1B non-immigrant worker was hired.

## **II. Legal Standard**

The Administrative Procedure Act ("APA") states the rules of practice and procedure for administrative hearings before Department of Labor, Office of Administrative Law Judges. 20 C.F.R. § 18.1. The APA states:

- (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

20 C.F.R. § 18.40(d); *see also* Rule 56 of the Fed. Rules of Civil Pro.

An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. *Matsushita Elec. Inds. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Furthermore, the fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. *Id.* If the court finds a fact or facts to be material, then it must determine whether there is a "genuine issue" concerning any of them. 10 A Wright and Miller, *Federal Practice and Procedure*, § 2725 at 95 (1983). If no such issues are present, the moving party is entitled to judgment as a matter of law. If the slightest doubt remains as to the facts, the motion must be denied.

### **III. Analysis of the Case**

#### **A. First Complaint: 20 C.F.R. § 655.738(b) violation**

Complainant asserts in his Motion for Summary Decision that Respondent willfully failed to abide by 20 C.F.R. § 655.738(b). Though he does not include any specific facts to support this claim in his Motion, a review of the record indicates Complainant alleges Respondent laid him off on January 28, 2002, and then petitioned for an H-1B worker on the same day. Respondent asserts it is entitled to judgment as a matter of law on this issue because Complainant's original complaint is time-barred and Respondent is not subject to § 655.738 because it is neither H-1B-dependent nor a willful violator. Additionally, Respondent submitted evidence it did not violate § 655.738(b) because it terminated Complainant for inadequate performance and did not replace him with an H-1B nonimmigrant worker.

I have no discretion to resolve factual disputes on summary judgment. Nonetheless, regarding this issue, I find Complainant's claim must fail as a matter of law, for reasons set forth by Respondent. This complaint is time-barred under 20 C.F.R. § 655.806(a)(5), which requires the filing of complaints within 12 months of the alleged violation. Here, the alleged violation of § 655.738(b) occurred on January 28, 2002, but Complainant did not file his complaint until June 14, 2003, more than sixteen (16) months after the fact and four (4) months after the statutory period had expired.

Moreover, Complainant failed to establish how § 655.738(b) applies to Respondent. The section specifically states "[a]n employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displacement of any U.S. worker(s) . . ." § 655.738. Thus, one must consider § 655.736, which states "[t]wo attestation obligations apply *only to two types of*

*employers*: H-1B-dependent employers and employers found to have willfully violated their H-1B obligations within a certain five-year period." (Emphasis added). Section 655.736(a)(1)(iii) defines an H-1B-dependent employer, in part, as one who employs 51 or more full-time employees in the U.S., and employs H-1B non-immigrants in a number that is equal to at least 15% of such full time employees. Section 655.736(f) defines a willful violator as an employer who has been found in violation of Subpart H or Subpart I through either a Department of Labor or Department of Justice proceeding, which found the employer committed either a willful failure or a misrepresentation of material fact during the five-year period preceding the filing of the LCA, and the agency's finding was entered on or after October 21, 1998.

Complainant has offered no evidence that Respondent falls into either category set forth in § 655.736. He alleges Respondent's "willful violation" of § 655.738(b) on January 28, 2002, is sufficient to satisfy the definition in § 655.736(f). This is contrary to the plain language of § 655.738, which states it only applies where the employer has already been found to be a willful violator. Thus, it follows that an employer may not be determined a willful violator by virtue of violating § 655.738; there must have been a previous finding by either the Department of Labor or the Department of Justice for this section to apply. Here, Complainant fails to establish Respondent is H-1B-dependent or a willful violator. In fact, the Department of Labor Wage and Hour Division and Office of the Solicitor<sup>2</sup> found Respondent did not meet the requirements of § 655.736. Also, Respondent submitted uncontroverted evidence that it is neither H-1B-dependent nor a willful violator. Any factual evidence submitted by Complainant in support of his claim is irrelevant if he cannot overcome the legal threshold requirement to § 655.738. Thus, I find Respondent is not bound to abide by § 655.738 and Complainant's claim must fail as a matter of law.

## **B. Complaint #2: 20 C.F.R. § 655.739 violation**

Complainant alleges Respondent violated the recruiting provisions of §§ 655.739(f), (g), (h) and (j) by offering a position to an H-1B nonimmigrant worker on June 25, 2002, before offering the job to him. Complainant supports this allegation in his Motion for Summary Decision, stating he was a better qualified candidate than the nonimmigrant worker who was hired. Also, Complainant asserts Respondent's alleged violation of § 655.738(b) allows him to file a charge based on every position offered to a lesser-qualified H-1B worker before being offered to him, as of January 28, 2002 and continuing. Respondent contends it is not subject to § 655.739 because it is not H-1B-dependent or a willful violator under § 655.736. Notwithstanding, Respondent states it

---

<sup>2</sup> The Wage and Hour Division released its determination on June 16, 2003, based on Complainant's original complaint. The Office of the Solicitor submitted its Memorandum to the Court on November 3, 2003.

did not violate § 655.739 because Complainant did not apply for any specific position which was then given to an H-1B worker.

Regardless of the factual dispute surrounding this issue, I find Respondent is entitled to judgment as a matter of law. As explained in detail, *supra*, Respondent does not meet the § 655.736 definitions of an H-1B-dependent employer or a willful violator; therefore, they are not required to abide by § 655.739. As such, Complainant has failed to satisfy the basic threshold requirements of § 655.739, and no fact he alleges, material or otherwise, could support a judgment in his favor. Thus, I find Respondent is not bound by § 655.739 and is entitled to judgment as a matter of law.

### **C. Complaint #3**

In his Motion for Summary Decision, Complainant alleges Respondent enforced its severance plan against him as a means to mitigate civil and criminal liability, even though he did not sign it. This does not fall into the issues already outlined for hearing, and is not relevant to this decision and order.

### **D. Claims of Untimely Filings**

Respondent asserts in its Motion that it is entitled to summary decision because Complainant's Original Claim for Relief was untimely, as it was filed on August 14, 2003, more than fifteen (15) days after the Department of Labor's determination on June 16, 2003. For the reasons set forth in footnote one, *supra*, I find the determination of June 16, 2003, to be insufficient. Therefore, I have considered both Complainant's June 16 and July 7, 2003, complaints in this matter. The record does not indicate that the Department of Labor made any determination based on Complainant's July 7, 2003, complaint. As such, I find the 15 day limitation for requesting a hearing before the ALJ is inapplicable and Complainant's request on August 16, 2003, was timely. Thus, Respondent is not entitled to judgment on this issue.

In a letter dated November 3, 2003, Complainant asserts all of Respondent's filings, specifically its Motion for Summary Decision, have been untimely per 29 C.F.R. §§ 18.40(a) and 18.5(b). The record does not support such an assertion. Section 18.5 requires a respondent's answer to be filed within thirty (30) days of the complaint. Under 29 C.F.R. § 18.4(a), in computing a period of time, the time begins with the day following the act and includes the last day, unless it is a Saturday, Sunday or legal holiday, in which case it includes the next business day. Further, § 18.4(c) states service of documents other than complaints is deemed effected at the time of mailing. Here, the thirtieth day following the filing of the claim was September 13, 2003, a Saturday. In

accordance with § 18.4, Respondent's answer was filed timely on Monday, September 15, 2003.

Respondent's Motion for Summary Judgment, filed October 22, 2003, was also timely. Although § 18.40(a) requires such motions to be filed at least twenty (20) days before the hearing, § 18.1 allows the undersigned to waive, modify or suspend any rule in the Rules for Practice and Procedure, so long as no party is prejudiced and the ends of justice are served thereby. Thus, while October 22, 2003, was less than twenty (20) days before the hearing date of November 3, 2003, Respondent's filing was timely inasmuch as it complied with the September 23, 2003, Order Rescheduling Hearing, which set the deadline for pre-trial motions for October 22, 2003.

In conclusion, I find all filings in this matter have been timely. Moreover, Respondent is entitled to judgment as a matter of law because Complainant has failed to meet the threshold requirements of §§ 655.738 and 739. The record overwhelmingly establishes that Respondent is neither an H-1B dependent employer nor a willful violator. Therefore, it is not bound by these sections. As it is legally impossible for Respondent to have violated §§ 655.738 or 739, Complainant's claim and Motion for Summary Decision must fail.

#### IV. ORDER

Based upon the foregoing Conclusions of Law and upon careful consideration of the entire record, I enter the following Order:

Complainant's Motion for Summary Decision is **DENIED**. Respondent's Motion for Summary Decision is **GRANTED**, in that it is not compelled to abide by 20 C.F.R. §§ 655.738 and 739.

**A**

CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.