



In the Matter of

DEEPAK MEHRA,

ARB CASE NO. 2017-0058

PROSECUTING PARTY,

ALJ CASE NO. 2017-LCA-00002

v.

DATE: November 21, 2019

WEST VIRGINIA UNIVERSITY,

RESPONDENT.

Appearances:

For the Complainant:

Deepak Mehra; *pro se*; Keyser, West Virginia

For the Respondent:

Samantha Hechtman, Esq.; *Ware Immigration*; Metairie, Louisiana

BEFORE: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie,
Administrative Appeals Judges

**DECISION AND ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING**

PER CURIAM. This case arises under the H-1B visa program provisions of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013), and implementing regulations at 20 C.F.R. Part 655, subparts H, I (2016). The Complainant Deepak Mehra urges the Administrative Review Board (ARB or Board) to reverse the Decision and Order Dismissing Complaint as Untimely (June 7, 2017) of the Administrative Law Judge (ALJ). The ALJ found in favor of Respondent West Virginia University.

Complainant appealed to the Board. Both parties filed briefs. The Acting Administrator of the Wage & Hour Division filed an amicus curiae brief requesting that the Board reverse the ALJ's grant of summary decision. We affirm the ALJ's decision that the October, 2014 complaint was not timely filed, but reverse and remand because we hold that equitable tolling is warranted with respect to Complainant's April, 2014 complaint filed with Department of Labor (DOL), Office of Inspector General (OIG).

BACKGROUND

Respondent employed Complainant as an H-1B non-immigrant from May 16, 2007, until May 15, 2013. D. & O. at 1. During his H-1B employment, Complainant complained that his wages had been improperly computed. *Id.* Complainant filed multiple complaints with the DOL.

1. *Complaint filed with OIG*

On April 16, 2014, Complainant filed a complaint against Respondent with the Department of Labor, OIG alleging that Respondent failed to pay him the correct salary. *Id.* at 2; see Complainant's Response to the Order to Show Cause, Annexure P-1, P-34, P-36.

On August 21, 2014, OIG referred Complainant's complaint to the Wage & Hour Division.¹ The national office advised the regional office that Complainant had initially filed his complaint on April 16, 2014. Thereafter, on March 9, 2016, the regional Wage & Hour office determined that reasonable cause existed to conduct an investigation. Complainant's Response to the Order to Show Cause, Annexure P-35; see also P-34. On October 4, 2016, the district director concluded that Respondent had not committed any violations. *Id.* at 2.

2. *Complaint filed with the Secretary of Labor and other DOL offices*

On October 8, 2014, Complainant filed another complaint that was addressed to the Secretary of the Department of Labor and other offices. *Id.* at 2. On October

¹ See Complainant's Response to the Order to Show Cause, Annexure P-36. OIG delayed referral of the complaint until Complainant returned to the United States after Complainant notified OIG that he would be out of the country until August 15, 2014. See *id.*

24, 2014, the Wage & Hour Division acknowledged receipt of the October 8th complaint. *Id.* at 2; *see* Complainant's Response to the Order to Show Cause, Annexure P-2. Wage & Hour advised Complainant that no investigation would be conducted regarding his October 2014 complaint because more than 12 months had passed since his H-1B employment had ended. Complainant's Response to the Order to Show Cause, Annexure P-34.

3. Proceedings before the Office of Administrative Law Judges

In response to the October 4, 2016 district director's determination (concerning Complainant's April, 2014 complaint filed with OIG) that Respondent had not committed any violations, the Complainant filed objections with the Office of Administrative Law Judges and requested a hearing. After Respondent filed a motion for summary judgment, the ALJ issued an Order to Show Cause why the complaint should not be dismissed for untimeliness to which Complainant responded. After considering the matter, the ALJ dismissed Complainant's claim, concluding that Complainant's October 8 complaint was not timely filed. The ALJ did not equitably construe Complainant's April, 2014 complaint filed with OIG as sufficient because Complainant "was aware of the alleged violations as early as 2012 . . ." and a complaint filed with OIG was not adequate. D. & O. at 4. Complainant appealed the ALJ's decision to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's Decision and Order Dismissing Complaint as Untimely. 20 C.F.R. § 655.845; *see* Secretary's Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019). The ARB reviews questions of law presented on appeal de novo but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 12-106; ALJ No. 2011-FRS-022, at 3 (ARB Jan. 28, 2014).

DISCUSSION

The issues on appeal are (1) whether Complainant's complaint was timely filed with the Wage & Hour Division, the proper entity, and if not, (2) whether

equitable modification principles apply to excuse Complainant's failure to timely file with Wage & Hour.

Complaints must be filed "not later than 12 months after the latest date on which the alleged violation(s) were committed . . ." 20 C.F.R. § 655.806(a)(6). Complaints may be filed with the Department of Labor Wage & Hour Division. 20 C.F.R. § 655.806(a)(1). Parties do not dispute that Complainant did not file a timely complaint with the Wage & Hour Division. Nonetheless, Complainant did file a complaint with the OIG on April 16, 2014.

In *School Dist. of the City of Allentown v. Marshall*, the Third Circuit recognized three situations in which tolling of statutes of limitations is proper: "(1) [when] the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Lubary v. El Floridita d/b/a Buenos Ayres Bar & Grill*, ARB No. 10-137, ALJ No. 2010-LCA-020, slip op. at 5 (ARB April 30, 2012) (quoting *Wakileh v. Western Ky. Univ.*, ARB No. 04-013, ALJ No. 2003-LCA-023, slip op. at 4 (ARB Oct. 20, 2004) (citing *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (1981) (citation omitted))).

Complainant contends that his April, 2014 complaint filed with OIG alleges that Respondent failed to pay him prevailing wages to which he was entitled under immigration law and that this complaint constitutes the precise statutory complaint but filed in the wrong forum. Complainant notes that OIG is a DOL agency vested with the power to unearth fraud. Respondent counters that equitable tolling should not apply because OIG cannot be the "wrong forum" as it does meet the definition of "forum" defined as "a court or other judicial body."

The Acting Administrator asserts that Respondent's argument that OIG is not a forum "relies on an unduly narrow understanding of what constitutes a forum that is inconsistent with Board precedent and antithetical to the principles of equitable tolling and the statutory structure and purpose of the H-1B program," citing *Shelton v. Oak Ridge Nat'l Lab.*, ARB No. 98-100, ALJ No. 1995-CAA-019 (ARB Mar. 30, 2001). Amicus Br. at 24. The Acting Administrator asserts that, like the Wage & Hour Division, OIG is authorized to accept complaints and conduct investigations related to H-1B visa violations, albeit a narrower range of such violations. *Id.* at 25.

We agree with Complainant and the Acting Administrator and hold that Complainant timely filed the precise statutory claim in the wrong forum and that equitable tolling should be granted in this instance.² While Wage & Hour was the appropriate forum to file a complaint, Complainant, being self-represented, is entitled under the present circumstances to equitable modification of that oversight under ARB precedent and *School Dist. of the City of Allentown v. Marshall*.

CONCLUSION

For the reasons explained above, we hold that the ALJ correctly found that the October 8, 2014 complaint was untimely and **AFFIRM** that portion of his decision. However, we hold that he erred in concluding that equitable modification principles do not apply to the April 16, 2014 complaint filed with OIG. Accordingly, we **REVERSE** the decision and order below and **REMAND** to the ALJ for further proceedings.

SO ORDERED.

² Respondent argues that equitable principles are not warranted because Complainant failed to raise the precise statutory claim as he cited the H-2A rather than the H-1B regulations. The Acting Administrator asserts that Complainant's citation to the H-2A regulation does not affect this analysis because the complaint is measured using the standards normally used to evaluate aggrieved party complaints which are informal, filed for the purpose of initiating an investigation, and are only required to set forth sufficient facts for the Administrator to determine whether there is cause to believe that a violation has been committed. Amicus Br. at 22-23. We agree with the arguments of the Acting Administrator that Complainant's April 16, 2014 complaint sufficiently raised the statutory claim at issue in this case.