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UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

ARVIND GUPTA, Petitioner/Cross-Respondent, v. HEADSTRONG, INC., Respondent/Cross-Petitioner.	ARB Case Nos. 15-032, 15-033

THE WAGE AND HOUR ADMINISTRATOR'S BRIEF AS *AMICUS CURIAE*

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THE WAGE AND HOUR ADMINISTRATOR'S BRIEF AS *AMICUS CURIAE*

The Administrator of the Department of Labor's Wage and Hour Division ("Administrator") submits this brief as *amicus curiae* in this matter arising under the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and the implementing regulations promulgated by the Secretary of Labor ("Secretary"), 20 C.F.R. Part 655, Subparts H and I. For the reasons discussed below, the Administrative Review Board ("ARB" or "Board") should affirm the Administrative Law Judge's ("ALJ") Decision and Order.

ISSUES PRESENTED

1. Whether the ALJ properly concluded that Headstrong, Inc. ("Headstrong") effected a bona fide termination of Arvind Gupta's employment on February 2, 2007.

2. Whether Gupta's H-1B complaint to the Department of Labor's Wage and Hour Division ("WHD") was timely.

3. Whether the ALJ properly concluded that the settlement agreement entered into by Gupta and Headstrong extinguished any claim that Gupta had that Headstrong owed Gupta back wages, benefits, or travel expenses under the H-1B visa program.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The H-1B visa program permits the temporary employment of nonimmigrants in specialized occupations in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, Subparts H and I. In order to employ an H-1B worker, an employer must first submit a Labor Condition Application ("LCA") to the Secretary. *See* 8 U.S.C. 1182(n)(1). The LCA specifies the starting and ending date of the H-1B worker's employment, as well as the wage rate the employer will pay the nonimmigrant(s) covered by the LCA. *See* 20 C.F.R. 655.730(c)(4)(iii)-(iv). In addition to wages, employers are required to offer benefits as compensation for services to H-1B employees "on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers." 20 C.F.R. 655.731(a). The INA also mandates that an employer who places an H-1B worker "in nonproductive status due to a decision by the employer (based on factors such as lack of work)" pay full-time wages to the worker for that time. 8 U.S.C. 1182(n)(2)(C)(vii)(I); 20 C.F.R. 655.731(c)(7)(i).

An employer may terminate the employment relationship prior to the end date specified in the approved LCA based on a lack of work or other reasons permitted by law. *See* 65 Fed. Reg. 80170 (Dec. 20, 2000) (discussing the effect of 20 C.F.R. 655.731(c)(7)). The employer, however, must effect a bona fide termination of the employee for the employer's wage obligation to cease. *See* 20 C.F.R. 655.731(c)(7)(ii) ("Payment [of wages] need not be made if there has been a bona fide termination of the employment relationship."). To effect a bona fide

termination, the regulations require the employer to notify the Department of Homeland Security that the employment relationship has been terminated and, under certain circumstances, provide the employee with payment for transportation home. *See* 8 C.F.R. 214.2(h)(4)(iii)(E) and (11); 20 C.F.R. 655.731(c)(7)(ii).[1]

Employees may file H-1B complaints alleging a failure to meet a condition in an application or a misrepresentation of material facts with WHD not later than 12 months after the latest date on which the violation was committed, which is the date on which the employer failed to meet a condition specified in the application or misrepresented a material fact. *See* 8 U.S.C. 1182(n)(2)(A); 20 C.F.R. 655.806(a)(5). Aggrieved parties may submit written or oral complaints. *See* 20 C.F.R. 655.806(a)(1). If the complaint is oral, the H-1B regulations direct the WHD official who receives the complaint to reduce it to writing. *See id.*

After the Administrator issues a determination letter on the complaint, an interested party can seek review of the determination by requesting a hearing before an ALJ. *See* 20 C.F.R. 655.805-.815, 655.820(a). In cases where the Administrator determines that the employer has committed violations, the employer or any other interested party may request an ALJ hearing, in which case the Administrator is the prosecuting party and the employer is the respondent in the proceedings before the ALJ. *See* 20 C.F.R. 655.820(a)(2).

B. Statement of Facts

On March 16, 2006, Headstrong filed, and the Department of Labor ("Department") certified, an LCA. *See Gupta v. Headstrong, Inc.*, ALJ Case No. 2014-LCA-00008, slip op. at

[1] Board precedent also requires that the employer notify the employee of the termination of the employment relationship. *See Amtel Grp. of Fla. v. Yongmahapakorn*, ARB No. 04-087, slip op. at 11 (ARB Sept. 29, 2006).

12 (Jan. 21, 2015) ("D&O"). On March 26, 2006, Headstrong filed an H-1B petition for the period through March 26, 2009, intending to employ Gupta. *See id.* On April 26, 2006, the United States Citizenship and Immigration Services ("USCIS") approved the petition through November 8, 2007. *See id.*

On November 14, 2006, Headstrong sent Gupta a letter terminating Gupta's employment effective November 27, 2006. *See* D&O 12, 16. Headstrong and Gupta entered into a severance agreement on December 4, 2006, pursuant to which Headstrong paid Gupta $8,055.94, which represented four weeks base salary. *See id.* at 13, 15-16. Headstrong's director of human resources testified that it was Headstrong's usual practice to offer a severance payment. *See id.* at 19. On December 5, 2006, Headstrong acknowledged that it was responsible for providing Gupta with payment for transportation to return to India. *See id.* at 11, 33. Headstrong sent a letter to USCIS on January 15, 2007 notifying USCIS that it was terminating Gupta's employment. *See id.* at 16. On January 25, 2007, Headstrong purchased an airline ticket for Gupta to Bangalore, India for travel on February 24, 2007, the travel date that Gupta requested. *See id.* at 11, 33. On February 2, 2007, Headstrong sent Gupta the airline ticket to India. *See id.* at 12, 16.

In April 2008, Gupta's attorney sent Headstrong a letter demanding payment of additional wages. *See* D&O 13. After negotiations, Gupta and Headstrong executed a Confidential Settlement and Release Agreement on May 8 and 9, 2008, respectively ("2008 Settlement Agreement"). *See id.* at 12; RX 16.[2] Pursuant to the 2008 Settlement Agreement, Headstrong paid Gupta $7,000 and Gupta agreed to release all claims against Headstrong. *See* D&O 21, 23; RX 16. Specifically, Gupta released and discharged Headstrong from any and all

[2] Citations to the record reflect the citation format used by the ALJ and the parties in their Board briefs.

obligations, liabilities, claims, or demands that Gupta previously had or which may arise in the future regarding any matter arising up to the date of the 2008 Settlement Agreement. This release included, but was not limited to, "any claims, demands, or causes of action alleging violations of public policy, or of any federal, state, or local law, statute, [or] regulation, . . . [and] any claims, demands, and causes of action for monetary or equitable relief, including . . . wages, back pay, bonus, severance pay, [or] benefits . . . ." RX 16, ¶3.

Facts in a related case brought by Gupta are relevant (though not dispositive) to the bona fide termination issue in this case. *See Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049 (ARB May 29, 2014). Gupta applied for a job with another company, Compunnel Software Group, Inc. ("Compunnel"), on November 14, 2006. *See Compunnel Software Grp.*, slip op. at 3. Compunnel filed an H-1B petition to change Gupta's employer to Compunnel, which USCIS received on December 11, 2006. *See id.* Gupta began working for Compunnel on February 3, 2007. *See id.* at 3-4. On March 1, 2007, USCIS granted Compunnel's H-1B change of employer petition, effective February 27, 2007. *See id.* at 3.

C. Course of Proceedings

Gupta asserted that he made an oral complaint to WHD in January 2008 arising out of his H-1B employment with Headstrong. *See* D&O 28. He submitted a written complaint to WHD in June 2008 alleging various violations by Headstrong related to its employment of him. *See id.* at 2, 28. WHD denied the June 2008 complaint based on its conclusion that the complaint was untimely. *See id.* Gupta filed an additional complaint in January 2011, making new allegations, including retaliation. *See id.* at 2, 29. WHD denied that complaint as untimely. *See id.*

Gupta sought review of the Administrator's determination before an ALJ. On October 12, 2010, the ALJ dismissed Gupta's complaint, concluding that there was no jurisdiction to hear his

case in light of WHD's determination not to investigate. *See Gupta v. Headstrong Inc.*, ALJ Case No. 2010-LCA-00032 (ALJ Oct. 12, 2010). Gupta appealed the ALJ's dismissal to the Board. On June 29, 2012, the Board affirmed the dismissal on the same basis that the ALJ had dismissed the case. *See Gupta v. Headstrong Inc.*, ARB Nos. 11-008, 11-065 (ARB June 29, 2012).

Gupta appealed the Board's decision to the United States District Court for the Southern District of New York. *See Gupta v. Headstrong, Inc.*, No. 1:12-cv-06652-RA (S.D.N.Y. Aug. 30, 2012). On December 6, 2012, Gupta and the Department entered into a stipulation dismissing and remanding the case, which the court signed on December 10, 2012. *See* D&O 28; Stipulation and Order of Remand and Dismissal, *Gupta v. Headstrong, Inc.*, No. 1:12-cv-06652-RA, ECF No. 23 (S.D.N.Y. Dec. 10, 2012) ("Stipulation of Remand"). The stipulation and order vacated WHD's determination that Gupta's complaints were untimely and remanded for WHD to conduct an investigation. *See* D&O 28; Stipulation of Remand 2.[3]

On March 13, 2014, WHD issued a determination letter indicating that it had determined that Headstrong violated the H-1B provisions of the INA by failing to pay Gupta required wages for non-productive time and failing to provide Gupta a copy of the LCA. *See* D&O 28. WHD assessed back wages of $5,736.96, but stated that Headstrong had already paid the back wages. WHD did not access any civil money penalties.

Gupta sought review of the Administrator's determination before an ALJ. The ALJ issued a Decision and Order on January 21, 2015, concluding in relevant part that Gupta's complaint was timely, that Headstrong effected a bona fide termination of Gupta's employment, and that the 2008 Settlement Agreement relieved Headstrong of any obligation to pay Gupta

[3] Because the Stipulation of Remand concerned only WHD's decision whether to investigate Gupta's H-1B complaint, Headstrong was not a party to this agreement.

back wages. Gupta and Headstrong filed cross-petitions for review to the Board on February 10, 2015 and February 20, 2015, respectively. On March 17, 2015, the Board issued a Notice of Intent to Review the ALJ's ruling.

D. The ALJ's Decision

1. In its January 21, 2015 Decision and Order, the ALJ concluded that Gupta's June 2008 written complaint was timely. *See* D&O 29.[4] The ALJ noted that Gupta's complaint alleged that Headstrong owed back wages from November 28, 2006 until November 8, 2007, which corresponded to the end of the authorized LCA period. *See id.* at 28-29. The ALJ reasoned that because Gupta "alleged that [Headstrong] committed violations up to November 8, 2007, I find there is evidence that [Gupta's] allegation [in the June 2008 written complaint] was timely, as he alleged violations that occurred within the 12 months preceding his complaint. " *Id.* at 29. The ALJ concluded that Gupta's 2011 complaint containing new allegations was not timely. *See id.*

2. The ALJ concluded that Headstrong effected a bona fide termination of Gupta's H-1B employment on February 2, 2007. *See* D&O 31-34. The ALJ cited the relevant regulatory provisions and Board precedent establishing three prerequisites to effect a bona fide termination: (1) the employer must notify the employee of the termination; (2) the employer must notify USCIS of the termination; and (3) where applicable, the employer must pay the employee the reasonable cost of return transportation. *See id.* at 31-32 (citing 20 C.F.R. 655.731(c)(7)(ii); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008 (ARB March 30, 2007); *Amtel Grp. of Fla. v. Yongmahapakorn*, ARB No. 04-087 (ARB Sept. 29, 2006)). The ALJ rejected Gupta's

[4] The ALJ noted that WHD's determination letter did not address the statute of limitations. *See* D&O 28. Based on the fact that WHD ordered back wages, the ALJ reasoned, WHD presumably concluded that the June 2008 complaint was timely. *See id.* Neither WHD nor the ALJ addressed whether the alleged January 2008 oral complaint was timely.

arguments that an employer is barred from terminating an employment relationship prior to the end of the authorized employment period, concluding that there is neither a regulatory nor a contractual bar to Headstrong's action in terminating Gupta's employment before the end of the authorized employment period. *See* D&O 31-32.

The ALJ found that on November 14, 2006, Headstrong notified Gupta of the termination of his employment effective November 27, 2006, and thereby satisfied the first bona fide termination requirement. *See* D&O 31-32. The ALJ further found that Headstrong notified USCIC by letter dated January 15, 2007 that Gupta's employment had ended, and thereby satisfied the second bona fide termination requirement. *See id.* at 32-33.

As to the third bona fide termination requirement, the ALJ outlined the sequence of events: on December 5, 2006, Headstrong acknowledged its responsibility to provide return transportation; on January 25, 2007, Headstrong approved the purchase of a ticket and the ticket was issued; on February 2, 2007, Gupta received the ticket. *See* D&O 33. The ALJ concluded that Headstrong did not satisfy the return transportation payment obligation until it tendered the ticket to Gupta on February 2, 2007. *See id.* Because Headstrong effected a bona fide termination on February 2, 2007, the ALJ concluded, its wage obligation continued until February 2, 2007. *See id.* at 34. The ALJ noted that soon after February 2, 2007, Gupta obtained employment with Compunnel and was paid by Compunnel for the period from February 2007 to July 2007. The ALJ commented that "employment with a second employer effectively renders an employee unavailable for work with his original employer." *Id.* at 35. Thus, the ALJ reasoned, even if Headstrong had not effected a bona fide termination as Gupta contended, Gupta was not available to work for Headstrong during that period and therefore Headstrong would not have any wage obligation to Gupta during that period. *See id.*

3. The ALJ next calculated the back wages that Headstrong owed to Gupta. *See* D&O 35-39. The ALJ concluded that the back wages should be calculated based on Gupta's actual wages, which were higher than the prevailing wage listed in the LCA. *See id.* at 35. The ALJ identified the dates for which Gupta was not paid as between November 2006 and February 2, 2007 and calculated the total back wages owed for that period to be $19,568.18. *See id.* at 35-36. The ALJ noted that Headstrong paid Gupta $8,076.92 pursuant to the 2006 severance agreement, which represented four weeks base salary. *See id.* at 36. "Because [Headstrong] paid [Gupta] this amount in lieu of continuing to pay his wages, I deduct this amount from the amount owed by [Headstrong's] back wage obligation." *Id.* Thus, the ALJ credited the severance payment against Headstrong's back wage obligation.

The ALJ further noted that, pursuant to the subsequent 2008 Settlement Agreement, which Gupta's attorney negotiated with Headstrong, Headstrong paid Gupta $7,000 to release his claims against Headstrong. *See* D&O 37. According to the ALJ, Gupta admitted that he received a portion of the settlement payment. *See id.* The ALJ rejected Gupta's arguments that the 2008 Settlement Agreement should be rescinded for fraud, and that the agreement was ineffective or void. *See id.* at 37-38. She concluded that Gupta's fraud allegation, which was based on the fact that Headstrong's notice of termination to USCIS referenced Headstrong's second LCA receipt number, not its original LCA receipt number (Headstrong submitted a second LCA when it changed Gupta's job location), had no merit because referencing the second LCA receipt number was proper. *See id.* The ALJ similarly concluded that Gupta's ineffective or void argument, which was based on the fact that Headstrong Services, LLC, not Headstrong, Inc., paid the settlement amount, failed because it was consistent with Headstrong's practice to have Headstrong Services, LLC pay all non-payroll obligations for Headstrong, Inc. *See id.* at

37. Thus, the ALJ concluded, the 2008 Settlement Agreement was valid and was intended to address any complaint that Gupta had against Headstrong. *See id.* at 37-38. Citing the language in the 2008 Settlement Agreement in which Gupta released and discharged Headstrong from any back wage or benefits obligations in exchange for Headstrong paying Gupta $7,000, the ALJ concluded that any claim that Gupta had regarding Headstrong's obligation to pay him back wages or benefits was "completely extinguished" by the agreement. *Id.* at 38. Therefore, the ALJ concluded that Headstrong did not owe any back wages or payments of benefits to Gupta. *See id.* at 40.

SUMMARY OF ARGUMENT

1. The ALJ correctly concluded that Headstrong effected a bona fide termination of Gupta's employment on February 2, 2007. The first two requirements to effect a bona termination – notice to the employee and notification to the Department of Homeland Security – had already been satisfied by that date. On February 2, 2007, Headstrong tendered an airplane ticket to Gupta for travel to India, thereby satisfying the last of the three requirements to effect a bona fide termination. Compunnel's filing of an H-1B petition to change Gupta's employer to Compunnel, which USICS received on December 11, 2006, did not release Headstrong from its obligation to pay wages or, alternatively, to effect a bona fide termination. This is because Compunnel's H-1B petition for Gupta was not approved by USCIS until March 1, 2007, which was after the date that Headstrong provided the ticket to Gupta. Thus, USCIS's approval, occurring as it did after the bona fide termination, was irrelevant to Headstrong's obligation to pay Gupta; it was the bona fide termination that ended that obligation. In addition, Headstrong's December 2006 offer to provide such transportation did not satisfy the bona fide termination

requirement of providing return transportation; only tendering the transportation ticket to Gupta, which Headstrong did on February 2, 2007, satisfied that requirement.

2. Gupta's H-1B complaint was timely, but it was timely for a different reason than the one put forward by the ALJ. The statute of limitations for H-1B complaints is 12 months from the latest date a violation was committed, and oral complaints are permitted. *See* 8 U.S.C. 1182(n)(2)(A); 20 C.F.R. 655.806(a). The ALJ concluded that Headstrong effected a bona fide termination on February 2, 2007, which makes that the latest date that a violation occurred. The ALJ therefore erred in concluding that Gupta's June 2008 written complaint was timely given her conclusion that the latest date that a violation occurred was February 2, 2007. Gupta, however, testified, without contradiction, that he made an oral complaint to WHD in January 2008. Gupta's oral complaint in January 2008 was therefore timely as it was within the applicable 12-month statute of limitations.

3. Lastly, the ALJ correctly concluded that the 2008 Settlement Agreement, in which Gupta received $7,000 in consideration for his waiver of all employment-related claims against Headstrong arising up to the date of the agreement, extinguished Gupta's claims against Headstrong for back wages and benefits owed under the H-1B program. It is important to note, however, that while an employee may in a settlement agreement waive the ability to recover damages for claims (as Gupta did), the employee cannot waive the right to file an H-1B complaint with WHD. This is because, in investigating the employee's complaint, WHD may determine that the employer has committed additional violations. WHD's public interest in enforcing the H-1B provisions of the INA outweigh the private interest in dispute resolution through settlement. Therefore, any wavier by an employee in a settlement agreement of the employee's right to file a complaint with WHD would be void as against public policy.

ARGUMENT

I. HEADSTRONG EFFECTED A BONA FIDE TERMINATION ON FEBRUARY 2, 2007 WHEN IT PROVIDED GUPTA WITH A TICKET TO RETURN TO HIS HOME COUNTRY

The ALJ correctly concluded that Headstrong effected a bona fide termination of Gupta's employment on February 2, 2007 when it tendered a ticket to Gupta for a flight to India. *See* D&O 34.[5] On appeal to the Board, Headstrong makes several arguments as to why it was error to conclude that the bona fide termination occurred on February 2, 2007. None of these argument has merit.

Headstrong asserts that it was not obligated to provide Gupta transportation to India because another employer, Compunnel, filed an H-1B petition to change Gupta's employer on December 11, 2006, which rendered Gupta unavailable for employment by Headstrong as of that date. *See* Headstrong's Opening Br. 21-23. This argument is unavailing. While Headstrong is correct that an employer's obligation to pay an H-1B employee stops when the employee transfers, or "ports," from that employer to a new employer, the Board made clear in *Batyrbekov v. Barclays Capital*, ARB No. 13-013, slip op. at 2, 9 (July 16, 2014), that the first employer's wage obligation ceases only when USCIS approves the subsequent H-1B petition allowing for the change in employers. Nothing in Board precedent suggests that a second employer's filing of an H-1B change of employer petition, or an employee's mere acceptance of employment with the second employer pending approval of the second employer's H-1B petition, is sufficient to relieve the first employer of its wage obligation or, alternatively, its obligation to provide the cost of return transportation to effect a bona fide termination. USCIS actually granted Compunnel's change of employer petition on March 1, 2007, effective February 27, 2007. *See*

[5] Providing Gupta with payment for transportation home is the only element of the three-part test for effecting a bona fide termination that is at issue.

Compunnel Software Grp., slip op. at 3. Thus, until February 2, 2007, when Headstrong provided Gupta a ticket to India and thereby satisfied the third of the three bona fide termination requirements, Headstrong was still obligated to pay Gupta H-1B wages.[6]

Headstrong further alleges that, even if it was obligated to pay the costs of transportation to India, its December 5, 2006 offer to Gupta to provide him an airplane ticket to India was sufficient to meet its statutory obligation and therefore the bona fide termination occurred on January 15, 2007 when it notified USCIS that it was terminating Gupta's employment (another prerequisite for a bona fide termination). *See* Headstrong's Opening Br. 21, 23. Headstrong cites *Wirth v. University of Miami*, ARB Nos. 10-090, 10-093 (ARB Dec. 20, 2011), and *Baiju v. Fifth Avenue Committee*, ARB No. 10-094 (ARB March 30, 2012), as support for its argument that an offer to provide return transportation satisfies the bona fide termination requirement. *See* Headstrong's Opening Br. 6-7, 21, 23.

Headstrong is reading too much into *Baiju* and *Wirth*. In those cases, the Board permitted the employer's offer to provide return transportation to suffice because the employee

[6] While it appears that Gupta began working for Compunnel on February 3, 2007, *see Compunnel Software Grp.*, slip op. at 3-4, that does not change the fact that Headstrong was not relieved of its wage obligation before that date. Under the INA's portability provision, individuals may begin working for a new H-1B employer upon the filing by that employer of an H-1B change of employer petition. *See id.* at 12-13 (citing 8 U.S.C. 1184(n)(1)). In *Compunnel Software Grp.*, the Board concluded that this portability provision authorizes an H-1B worker to accept employment during the portability period (i.e, the period between the filing of the H-1B change of employer petition and USCIS's approval or denial of the petition). *See id.* Nonetheless, the Board concluded, it does not necessarily obligate the second employer to pay the worker during this period unless both the employer and worker agree to have the worker begin working. *See id.* In this case, USCIS received Compunnel's H-1B change of employer petition on December 11, 2006, Gupta began working for Compunnel on February 3, 2007, and USCIS approved the petition on March 1, 2007, effective February 27, 2007. *See id.* at 3. The Board has not addressed whether the first employer's wage obligation ceases when the employee starts working for a second employer during this portability period before USCIS has approved the H-1B change in employer petition. In any event, the facts in this case do not present the Board an opportunity to address this issue.

rejected the employer's offer. *See Baiju*, slip op. at 9; *Wirth*, slip op. at 9. There is good reason to limit these cases to their unique facts and to generally require that an employer tender a ticket for transportation to the employee's home country or provide payment to the employee for such transportation in order to satisfy the bona fide termination requirement. The language in the relevant regulations contemplates that the employer will actually provide a ticket or payment for the transportation, not merely offer to do so. *See* 20 C.F.R. 650.731(c)(7)(ii) (to effect a bona fide termination, the employer must "provide the employee with payment for transportation home"). The Department of Homeland Security's regulation makes the employer "liable for the reasonable costs of return transportation" if the employer dismissed the employee before the end of the authorized period. 8 C.F.R. 214.2(h)(4)(iii)(E). An offer, on its own, is too uncertain to satisfy the bona fide termination requirement. It provides no guarantee to the employee that the employer will, in fact, provide the ticket or payment. In cases where the employee rejects the transportation offer, however, there is no reason to require the employer to persist in providing the employee something that the employee has indicated that he or she does not want.

Moreover, limiting *Baiju* and *Wirth* to circumstances where the employee has rejected the employer's offer to provide a ticket or payment for transportation serves the equitable purpose underlying the requirement that the employer pay for the cost of return transportation in order to effect a bona fide termination. When an H-1B employee is to work in the United States, an employer obtains authorization to employ him or her for a specific period of time. An employer may, however, terminate the relationship at any time. Under typical circumstances, equitable considerations should not allow the sponsoring employer to terminate the employment relationship before the authorized period of employment lapses without bearing the financial repercussions of the employee's unexpected return home. In cases such as *Baiju* and *Wirth*

where the employee is offered but rejects the return transportation, these equitable concerns are no longer in play.

In sum, the ALJ correctly concluded that Headstrong effected a bona fide termination on February 2, 2007 when it provided Gupta with a ticket to return to India.

II. GUPTA'S H-1B COMPLIANT WAS TIMELY

The statute of limitations for H-1B complaints is 12 months after the latest date on which the violation was committed. *See* 8 U.S.C. 1182(n)(2)(A); 20 C.F.R. 655.806(a)(5). The H-1B regulations permit aggrieved parties to submit written or oral complaints. *See* 20 C.F.R. 655.806(a)(1). If the complaint is oral, the regulations direct the WHD official who receives the complaint to reduce it to writing. *See id.*

The ALJ erred in concluding that Gupta's June 2008 written complaint was timely. The ALJ stated that "there is evidence of record that, at the time [Gupta] made his June 2008 complaint to WHD, he alleged that [Headstrong] committed violations up to November 8, 2007" and, based on this, the ALJ concluded that his June 2008 complaint was timely. D&O 29 (emphasis added). Once facts have been developed in the record that bear on the statute of limitations, however, those facts, rather than the bare allegations in a complaint, determine whether the statute of limitations has run. *Cf. Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997) ("Although the mere allegation of the existence" of a fact might be sufficient to withstand a motion to dismiss for untimeliness under the applicable statute of limitations, "something more is required to avoid summary judgment on the issue"); *Pines v. Warnaco, Inc.*, 706 F.2d 1173, 1178 (11th Cir. 1983) (mere allegation unsupported by evidence is not sufficient to preclude summary judgment on statute of limitations grounds). Here, the ALJ determined that Headstrong effected a bona fide termination on February 2, 2007, which means that Headstrong

was in violation of the H-1B provisions of the INA until that date. Thus, applying the ALJ's own determination, the June 2008 written complaint was not timely because it was submitted more than 12 months after February 2, 2007, the latest date on which a violation occurred. Consequently, the ALJ erred in concluding that Gupta's June 2008 written complaint was timely.[7]

Nevertheless, Gupta's January 2008 oral complaint was timely. There is no evidence to contradict Gupta's testimony that he made an oral complaint to WHD in January 2008. *See* D&O 28.[8] Accepting his uncontroverted testimony that he made an oral complaint in January 2008 (even though WHD failed to reduce such oral complaint to writing), Gupta's January 2008 oral complaint fell within the 12-month statute of limitations given that the ALJ concluded that Headstrong effected a bona fide termination on February 2, 2007.

III. THE 2008 SETTLEMENT AGREEMENT EXTINGUISHED GUPTA'S RIGHT TO RECOVER DAMGES RELATED TO HIS H-1B COMPLAINT

The ALJ correctly concluded that the 2008 Settlement Agreement "completely extinguished" any claim by Gupta that Headstrong was obligated to pay him back wages, benefits, or travel expenses. D&O 38. An employee can, as Gupta did, waive his right to recover damages arising out of his employment. Nonetheless, while an employee can waive his

[7] The Administrator concurs, however, with the ALJ's conclusion that Gupta's new allegations in his January 2011 complaint were untimely. *See* D&O 29.

[8] Contrary to Headstrong's argument, *see* Headstrong's Resp. Br. 12-14, the fact that WHD did not reduce an oral complaint from Gupta in January 2008 to writing, although required by the regulations, is not conclusive proof that Gupta did not make an oral complaint as he alleged. Moreover, while WHD apparently failed to adhere to its regulation, that failure should not result in the denial of an employee's H-1B rights. *Cf. Brock v. Pierce Cnty.*, 476 U.S. 253, 259-60 (1986) (noting support for the proposition that government agencies do not forfeit jurisdiction for failure to comply with statutory time limits unless the statute specifies a consequence for failure to comply with the timing provision).

or her right to recover damages for violations of the H-1B provisions of the INA, an employee cannot waive his or her right to file an H-1B complaint with WHD.

There is no bar to an employee entering a settlement agreement with an employer releasing all claims relating to his or her employment arising out of actions that occurred up to the date of the agreement. Numerous courts, including the Second Circuit, have held that employees can, through a settlement agreement, waive their right to recover damages for violations of employment statutes such as Title VII, the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Equal Pay Act ("EPA"), even when the specific statute at issue is not referenced in the agreement. *See Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437-38 (2d Cir. 1998) (employee can, in a settlement agreement, release employer for liability for Title VII violations); *see, e.g.*, *Myricks v. Fed. Reserve Bank of Atlanta*, 480 F.3d 1036, 1040 (11th Cir. 2007) (noting that employees can release causes of action under Title VII); *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 498-99 (6th Cir. 2006) (noting that the Sixth Circuit has upheld employees' waivers of claims under Title VII, the ADEA, and the EPA); *Smith v. Amedisys Inc.*, 298 F.3d 434, 442 (5th Cir. 2002) (finding Title VII claims clearly waived by an employee's agreement to release the employer of all employment related claims).[9] The Board has similarly held that an employer named in a whistleblower complaint filed with the Occupational Safety and Health Administration under the Energy Reorganization Act ("ERA") can request termination of the investigation based on a settlement agreement with the

[9] It bears noting that under the Fair Labor Standards Act ("FLSA"), employees can waive their FLSA rights only with Department supervision or court approval. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945). This is based on policy considerations unique to the FLSA. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-15 (1946); *Brooklyn Sav. Bank*, 324 U.S. at 706-07. The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay and was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. *See id.*

complainant entered into before the complaint was filed. *See Khandelwal v. S. Cal. Edison*, ARB No. 97-050, slip op. at 3-4 (March 31, 1998).[10] In the Second Circuit, a release and waiver is valid and enforceable as long as it is "clear and unambiguous on its face and . . . knowingly and voluntarily entered into." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 463 (2d Cir. 1998).[11]

Although neither a court nor the Board has addressed whether a waiver in a settlement agreement applies to H-1B claims, there is no reason why such claims should be treated differently than those under other employment statutes. Nothing in the H-1B statute or regulations prescribes the circumstances under which employers and employees may enter settlement agreements resolving H-1B-related disputes. Thus, the ALJ properly concluded that, through his execution of the 2008 Settlement Agreement and his acceptance of the $7,000, Gutpa waived his right to obtain additional amounts from Headstrong for wages, back pay, or

[10] In *Gilbert v. Bauer's Worldwide Transp*., ARB No. 11-019, slip op. at 6 n.11 (Nov. 28, 2012), the Board suggested, however, that it would not find that a severance agreement barred an employee's recovery of damages under the Surface Transportation Assistance Act, but ultimately found that it did not need to resolve the issue because it could affirm the ALJ's dismissal on other grounds. It cited *Khandelwal*'s holding that an employer should be allowed to rely on a settlement agreement as a waiver of the employee's right to recover damages, and noted that the employer in *Gilbert* had the option of seeking judicial intervention to enforce the agreement but did not do so. *See id.*

[11] The Second Circuit has identified the following factors as relevant in this inquiry:

> (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Livingston, 141 F.3d at 437-38.

benefits.[12] The ALJ properly rejected Gupta's arguments for why the 2008 Settlement Agreement should be rescinded and deemed ineffective or void. Moreover, the release provision in the agreement is clear and unambiguous. *See* Rx 16 ¶ 3. Gupta was represented by counsel in negotiating the agreement, and therefore there is no reason to suspect that he entered it unknowingly or involuntarily.

An employee may not, however, waive his or her right to file an H-1B complaint with WHD. Courts have consistently held that, although employees can waive their right to recover damages under various employment statutes, such as Title VII and the ADEA, they cannot waive their right to file a complaint pursuant to such statute with the agency that enforces the statute, i.e., the Equal Employment Opportunity Commission ("EEOC"), under Title VII or the ADEA. *See, e.g., SunDance Rehab. Corp.*, 466 F.3d at 498-99 (collecting cases); *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (holding that settlement agreement's waiver of right to file Title VII charge with the EEOC is void); *see also Richardson v. Comm'n on Human Rights & Opportunities*, 532 F.3d 114, 121 (2d Cir. 2008) (recognizing,

[12] In light of the 2008 Settlement Agreement, there was no need for the ALJ to have calculated the back wages that Headstrong owed to Gupta; the 2008 Settlement Agreement obviated any need to engage in such an analysis.

Although the ALJ did not need to reach this issue, it nonetheless bears noting that it is unclear from the record whether the ALJ properly credited the 2006 severance payment that Headstrong made to Gupta to offset Headstrong's back wage obligation. *See* D&O 19. Under the H-1B regulations, an employer is required to offer benefits to H-1B employees on the same basis as the employer offers benefits to U.S. workers, but is permitted to credit benefits provided as compensation for services towards satisfying the employer's wage obligation if certain requirements are met, including reporting and recording the payment as earnings with appropriate taxes and FICA withheld and paid. *See* 20 C.F.R. 655.731(a) and (c)(3)(iv). While the record suggests that Headstrong provides severance payments in the normal course, *see* D&O 19, it is unclear whether Headstrong satisfied these requirements and therefore whether it was proper to credit the severance payment against Headstrong's wage obligation.

without deciding the issue, that other circuits have not allowed any release or waiver of the right to file a charge with the EEOC).

Courts have concluded that an employee's waiver in a settlement agreement of the employee's right to file a complaint with the appropriate enforcement agency is void as against public policy. *See, e.g.*, *Cosmair*, 821 F.2d at 1090. Thus, the Fifth Circuit in *Cosmair* reasoned that an employee cannot waive his right to file a complaint with the EEOC because it would "impede [the] EEOC's enforcement of civil rights laws." *Id.* The court explained that "[a] charge not only informs the EEOC of discrimination against the employee who files the charge or on whose behalf it is filed, but also may identify other unlawful company actions." *Id.* Thus, as the Sixth Circuit noted, "the filing of charges and participation by employees in EEOC proceedings are instrumental to the EEOC's fulfilling its investigatory and enforcement missions." *SunDance Rehab.*, 466 F.3d at 499. The Board has recognized this same principle in the context of the ERA, explaining that as matter of public policy, parties cannot agree to bar the complainant from filing an ERA complaint with the Department. *See Khandelwal*, slip op. at 3. The Board reasoned that the Department's "administration of the ERA greatly outweighs the public interest in dispute resolution through settlement. An ERA complaint is filed with the Department for the purpose of initiating an investigation on behalf of the Secretary . . . [which] may well uncover questionable employment practices and nuclear safety deficiencies about which the government should know." *Id.* at 4.

As with Title VII, the ADEA, and the ERA, the Department has a significant interest in enforcing the H-1B provisions of the INA to protect both American workers and the foreign workers employed under the program. The Board has acknowledged that WHD has broad authority to determine the scope of its investigations of H-1B violations and therefore has the authority to investigate alleged INA violations involving H-1B workers who did not file complaints.

See Administrator v. Greater Mo. Med. Pro-Care Providers, Inc., ARB No. 12-015, slip op. at 8, 14 (ARB Jan. 29, 2014). Permitting an employee to waive his or her right to file an H-1B complaint with WHD would impede WHD's ability to enforce the H-1B provisions of the INA. In investigating an H-1B complaint of an employee who entered into a settlement agreement containing a waiver provision, the Administrator may determine, for example, that back wages are owed to employees other than the complainant or that civil money penalties are warranted for the violations as to the complainant. WHD's public interest in enforcing the provisions of the INA outweigh the interest in dispute resolution through settlement, and therefore an employee cannot waive his or her right to file an H-1B complaint with WHD.[13] This means that, as a practical matter, an employee can submit an H-1B complaint to WHD notwithstanding any release of such claims in a settlement agreement entered into by the employee and employer; the employee cannot, however, seek a hearing before an ALJ because he effectively waived his right to do so in the settlement agreement.[14]

[13] An employee can, however, waive his or her right to recover damages ordered or obtained by the Administrator on the employee's behalf. *Cf. Cosmair*, 821 F.2d at 1091 ("[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf.").

[14] The employer can request termination of the investigation based on a settlement agreement. *See Khandelwal*, slip op. at 3-4. WHD would then determine whether further investigation or dismissal is warranted.

CONCLUSION

For the reasons set forth above, the ALJ's January 21, 2015 Decision and Order should be affirmed.

Respectfully submitted,

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