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Issue Date: 19 July 2022

CASE NO.: 2021-LCA-00018

In the Matter of:

ANKIT JAIN,
Prosecuting Party,

v.

METROMILE, INC.,
Respondent.

DECISION AND ORDER GRANTING BACK WAGES AND DISMISSING CLAIM IN PART

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), as amended, (8 U.S.C. § 1101 *et seq.*), and 20 C.F.R. Part 655, Subparts H and I. Ankit Jain (hereafter "Jain", "Prosecuting Party" or "Complainant") filed a timely appeal of the Administrator's Determination issued on September 29, 2021, contending that the Administrator erred in finding Metromile, Inc. ("Respondent" or "Metromile") committed no violation. Ankit Jain is the Prosecuting Party and represented himself. Attorneys Tyler Brown and Gonzalo Morales of Jackson Lewis PC represent Respondent.

A video hearing was held on February 23, 2022. During the hearing, I admitted into evidence Jain Exhibits ("CX") 1, 2, 4 through 18, including CX 14A,[1] and Respondent's Exhibits ("RX") 1 through 4. At the hearing I took official notice of two facts:

1. On January 1, 2020, the U.S. Department of Labor certified a labor condition application ("LCA"), Form ETA 9035/9035E, approving the Prosecuting Party, Ankit Jain's, employment with an employer, Hinge Health, from January 6, 2020 to January 5, 2023. Hinge Health indicated the document would be publicly available at its principal place of business. The position was for full-time employment, and the visa classification basis for the certification was for a "change in employer," not "concurrent" employment. Respondent's Exhibit 1 in pending *Jain v. Hinge Health, Inc.* ALJ Case No. 2021-LCA-00015.

[1] Per the February 3, 2022, order setting the hearing, all exhibits were due by February 17, 2022 at 4:30 p.m. PT. At the hearing, Jain sought to admit an additional email to Judy Bauer sent on March 19, 2021. Respondent did not object, and I admitted the exhibit as CX 14A. HT 63-68.

2. Under penalty of perjury, Mr. Jain testified in *Jain v. Hinge Health, Inc.* ALJ Case No. 2021-LCA-00015 that he began his employment with Hinge Health, Inc. on or about January 6, 2020. HT 50 at 9-19. Prior to Hinge Health, Mr. Jain worked for a company called ForeThought San Francisco. Prior to working for ForeThought, Mr. Jain worked for Metromile from 2018 to 2019. *See Jain v. Hinge Health* Hearing Transcript HT 51 at 8-18.

Prior to the hearing both parties submitted briefs and replies regarding the question of timeliness. At the hearing, both parties made oral closing arguments. Following the hearing, I admitted into evidence an additional exhibit—Jain Exhibit 19 (CX 19, a declaration from Joong Im) and excluded Jain Exhibit 20 (CX 20, heavily redacted Kaiser medical records).

For the reasons explained below, I find Jain's claim for back wages timely and order Metromile to pay back wages from February 22, 2019, to June 13, 2019. Jain's claim that Metromile retaliated against him on February 22, 2019, for requesting Family and Medical Leave Act is dismissed as untimely.[2]

ISSUES

In the Prehearing order, I specified that the hearing was limited to the allegations investigated by the Wage and Hour Division ("WHD"), as well as the timeliness of Jain's complaint. In the prehearing order, I listed the following issues and directives for the hearing:

1. Whether any party objects to official notice as outlined above.[3]
2. Provide copies of the I-129s utilized for employment with Hinge Health and ForeThought.
3. Did Mr. Jain make complaints to WHD regarding Metromile's wage violations before July 14, 2021?
4. On what basis, concurrent or change in employers, did the U.S. DOL certify and USCIS approve Mr. Jain's employment with other employers after February 2019?
5. Provide a copy of the June 13, 2019 USCIS approved a Form I-129 referenced in Jain Metromile Prehearing Exhibit 9. On the I-129 was the position for concurrent employment or did it indicate a change in employer?
6. Did Complainant have a duty to mitigate any damages under H-1B?
7. Specific monetary amounts that Complainant is seeking and how the numbers were calculated.
8. Other issues limited only to the WHD determination dated September 29, 2021.

At the hearing, I informed the parties that I would consider Jain's testimony regarding a retaliation claim. If it appeared that the retaliation claim was properly before me and more evidence was needed to adjudicate the claim, I would reopen the record. HT at 23-24.

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[2] Additionally, the kind of retaliation that Jain alleged is not covered under the INA. *See* 20 C.F.R. § 655.801.

[3] Neither party objected at the hearing. HT at 25.

FACTUAL FINDINGS[4]

Respondent filed a Labor Condition Application ("LCA") to hire Ankit Jain as an H-1B worker from January 29, 2018, to January 28, 2021. CX 1 of Jain's Timeliness Brief.[5] Respondent hired Jain as a Senior Software Engineer to work exclusively at its Headquarters in San Francisco, California for an annual salary of $158,000.00. RX 1. Jain began working for Respondent in February 2018. HT 32: 2-5. In the January 17, 2018 offer letter, Metromile recommended to the Company's Board of Directors that Jain be granted "an option to purchase 15,000 shares of the Company's Common Stock at a price per share equal to the fair market value per share of the Common Stock on the date of grant, as determined by the Company's Board of Directors." RX 1 at 1-2. The letter stated, "25 percent of the shares subject to the option shall vest 12 months after the date your vesting begins subject to your continuing employment with the Company, and no shares shall vest before such date." RX 1 at 2. There is no evidence in the record that Jain opted to purchase the shares or that any stock options vested.[6]

Jain alleged in November 2018 that his manager denied his request to go to temple during his religious festival. HT 31: 12-18, 25. He also alleged his manager asked him to come into the office during Christmas vacation, even though the manager would not be in the office. HT 32: 23-25.

In February of 2019, Jain was assaulted and robbed. HT 33:3-17; HT 35:18-24. He told one of his managers, Alexey Sednev, that he had been injured. HT 33: 8-17. On February 21, 2019, Steve Roman, another one of Complainant's supervisors, texted him and stated he would be in the office in about 10 minutes. CX 4. Mr. Roman then texted he was in a Starbucks and provided details describing where the Starbucks was located. *Id.* Jain's friend and lawyer Joong Im drove him to the location to meet up with Mr. Roman. HT 33: 18-21; CX 19 at ¶¶ 2-4. Mr. Im suggested Jain ask for FMLA leave, and Jain testified that he asked Mr. Roman for FMLA. HT 34: 5-8; CX 19 at ¶ 3. Mr. Im also asserted that Jain asked Mr. Roman for FMLA leave. CX 19 at ¶ 5.

The next day, February 22, 2019, Mr. Sednev called Jain around 9:00 am and informed him that he was being terminated effective immediately. HT 36: 6-11. As a result of his termination, Jain lost his insurance. *Id.* That same day, Metromile sent Jain a termination packet with the following documents: change in relationship notification notice, Termination Certification, Metromile Offboarding, CA EDD unemployment information, and HIPPA Notice to Terminating Employees. CX 7. The Change in Employee Relationship Notice stated Jain was discharged February 22, 2019. RX 2. Jain viewed these documents at 11:56 am on February 22, 2019. CX 7.

On February 23, 2019, Jain texted Mr. Roman asking, "Hi steve, didn't you talk to Alexey [Sednev] about my injuries? Now I am left with a fracture on my face with no insurance coverage!"

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[4] The parties submitted stipulations in their prehearing statements, however, each party submitted different stipulations. I, thus, found there was not sufficient evidence to accept them as findings of fact.

[5] The only full copy of the LCA was included in exhibits submitted with Jain's timeliness brief. A partial copy was admitted at the hearing as CX 1.

[6] Jain's exhibit regarding stocks (CX 11) was illegible.

CX 4. Jain scheduled a medical appointment for an office visit on February 23 with Dr. Blackwell in an urgent care after hours clinic.[7] CX 5.

At an unspecified time following the termination of his employment with Metromile, Jain started interviewing for new jobs, because "[he] needed to save his visa." HT 38 at 12-14. Jain went to some job interviews while he still had visible injuries. *See* HT 37: 7-15. Jain testified that he still had pain 1.5 to 2 months after he was attacked, and his black eye took six months to heal. HT 39: 12-16. On June 4, 2019, Colm A. Doyle, a representative of ForeThought, Inc., filed an I-129 on behalf of Jain for an amendment to or extension of stay for Jain's current H-1B classification. CX 13. The I-129 requested a "change of employer" and stated Jain would be employed in a full-time position from June 5, 2019 to May 28, 2022 with ForeThought, Inc. CX 13 at 1-5. On June 13, 2019, the United States Citizenship and Immigration Services ("USCIS") approved Form I-129 Petition for a Non-Immigrant Worker for Case No. WAC1921951207. CX 9.

Jain testified that he began to file complaints against Metromile in February of 2020. HT 42 at 18-21. He testified that he met Alberto Raymond from the Department of Labor's Wage and Hour Division ("WHD") in Walnut Creek, and Mr. Raymond took his phone number, told him they would "get back to [him]," and advised him to file a complaint with the California Department of Fair Employment and Housing ("DFEH").[8] HT 43 at 1-5. Jain stated that following the beginning of the Covid 19 pandemic, he called a national hotline in April 2020 to file complaints against Metromile. HT 44: 5-14. He spoke with Tracy Williams, who told him to send in a complaint. HT 44: 9-14.

On April 28, 2020, Jain emailed Tracy Williams, an employee with WHD, a complaint attachment named "wh4." CX 16. The body of the email stated that Jain was sending the complaint against his employer as requested. *Id.* In the email Jain stated, "they violated h1b laws and also retaliated against me for requesting FMLA leaves." *Id.* The attachment was WHD Form WH-4. *Id.* Jain checked the box for "other" violations and wrote, "the company violated my h1b rights. They did not fulfill conditions of my LCA. They discriminated against me and retaliated when I requested FMLA leaves." *Id.* Jain listed February 22, 2019 as the date of the violation. *Id.* The form includes a section in which the worker is asked to describe facts and circumstances which support the allegations. In that section Jain wrote, "The company violated my H1b rights. They did not fulfill conditions of my LCA. They discriminated against me and retaliated when I requested FMLA leaves. I asked FMLA to get my self treated for physical injuries." *Id.*

On August 25, 2020, Respondent notified USCIS of Claimant's employment termination and its intent to withdraw its H-1B sponsorship of Ankit Jain (Case No. WAC1808551224). RX 3. On September 4, 2020, USCIS revoked approval of Case No. WAC1808551224. CX 8.

Jain testified that he subsequently called the San Jose WHD office in February 2021 to make an oral complaint, and he stated he also called the Los Angeles office in March of 2021. HT 44 – 45. Jain testified he again visited the Walnut Creek WHD Office in June 2021 and met with Alberto Raymond, who did not remember him. HT 45: 14-17. Jain testified that in March 2021, someone named Lilita Holmes told him not to file any more complaints and threatened to report him to DHS.

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[7] This exhibit is a barely legible (the year is not at all legible) screenshot of an appointment record, which Jain may or may not have attended. No medical record related to Jain's physical injuries was provided.

[8] There is no evidence in the record of a complaint filed with DFEH.

HT 45:14-25. On February 10, 2021, Jain emailed someone named Ariana with an "at dol.gov" email address, stating, "we just spoke. Attached is my copy of the Wh4 complaint." CX 15. The email included an attachment named "wh-4(1)." *Id.* There was no reference to Metromile. *See id.*

On Friday, March 19, 2021, Jain emailed Judy Bauer, another person with an "at dol.gov" email address, and attached a complaint with the file name "wh-4-arizona," and requested that she forward his email. CX 14. In the body of the email, he cited to an Administrative Review Board case, *Gupta v. Jain Software Consulting, Inc.* ARB No. 05-008, ALJ No. 2004-LCA-39 (ARB Mar. 30, 2007). Later that day, Jain followed up with Judy Bauer informing her that he had a talk with Mr. Rois, and he was attaching the LCA as requested so "the complaint could be filed to be assigned to the investigator." CX 14. The email had a pdf attachment named "LCA-metromile." CX 14.

On July 14, 2021, Kelly Bosco in the Boston, Massachusetts WHD District Office received and documented a complaint against Metromile submitted by Ankit Jain. RX 4. Jain alleged that from February 1, 2019 to July 16, 2020, Metromile willfully failed to pay the required wage rate. *Id.* He also alleged that from February 5, 2018 to July 16, 2020, Metromile failed to either offer benefits or equal eligibility for benefits. *Id.* Jain alleged to Ms. Bosco that Metromile: (1)"benched her[9] periodically," (2) discriminated by offering US workers more paid vacation days, and (3) did not conduct a bona fide termination. *Id.* Jain told Ms. Bosco he originally worked in San Francisco from February 5, 2018 to December 31, 2018 and was paid a salary of $158,000.00. *Id.* He told Ms. Bosco that he was then transferred to the Boston Office in January of 2019 and paid $120,000.00. Jain alleged the pay issues started in Boston with periodic benching and his not being allowed to take as many paid vacation days as U.S. workers on the same team. *Id.* Jain alleged his last day was July 16, 2020. *Id.* He told Ms. Bosco that he went to a funeral and was informed on July 24, 2020 "not to come back" even though the leave was approved. Jain stated Metromile did not notify USCIS of his termination until September of 2020. *Id.*

On September 29, 2021, Lucy Ferrara, Assistant District Director of the WHD Boston Office, wrote a letter to Lindsey Orr of Metromile, informing her that WHD concluded that no violation was committed in connection with Jain's LCA. RX 4.

CREDIBILITY

The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw inferences from the evidence, and is not bound to accept the opinion or theory of any particular witness or advocate. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 290 U.S. 459, 467 (1968); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 613 (11th Cir. 1990). The fact finder is not bound to believe or disbelieve the entirety of a witness's testimony but may choose to believe only certain portions of the testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 52 (7th Cir. 1971) *(quoting Carbo v. United States*,

[9] At the hearing, Jain explained that his sister initiated the phone call and that is why the notes contain inaccuracies, such as the allegation that he was transferred to the Boston office. HT 55. Jain alleged he never told the Boston WHD that he was transferred to Boston, and stated, "So basically like my – I don't know what my sister said, but I was able to correct later, you know, when I talked to Thomas, and you know, basically, this is also not the real complaint that I had filed." HT 55.

314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but "be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it," as well as "meet[] the test of plausibility." *Id.* (internal quotations omitted). The Administrative Review Board ("ARB"), which performs appellate review of cases involving the H-1B provisions of the INA,[10] prefers that judges "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071 (ARB Jul. 2, 2009).

In weighing the testimony of witnesses, the Administrative Law Judge ("ALJ") may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, slip op. at 4 (ARB Jan. 31, 2006).

Jain's testimony and evidence were inconsistent and lacked credibility. Jain's reporting to Ms. Kelly Bosco in the Boston WHD office undermines his credibility. The Boston WHD noted in Jain's complaint that he was currently in India, that he was transferred to the Boston Office in January 2019 and was paid $120,000 per year following the transfer. RX 4 at 4. The notes indicate the pay issues started in Boston, and he was unsure if the proper agency was notified of the transfer. *Id.* The notes also indicate his last day was July 16, 2020, when Jain went to a funeral and was informed on July 24, 2020 "not to come back" even though leave was approved. RX 4.

The details of the complaint strongly suggest that Jain misled the Northeast Regional Office of WHD. Ms. Bosco's notes are very detailed, and I am not persuaded by Jain's story that he did not know what his sister said. I also do not credit Jain's implication that the inaccuracies were accidental. *See* HT 55 at 13-25. Jain testified that he discussed with his sister that "even after filing so many complaints, they weren't investigating." HT 55 at 18-19. The notes include an elaborate narrative with untrue allegations that seem designed to (1) make the claim seem timely to the employee at WHD taking the complaint, and (2) bring the complaint under the Northeast Regional Office's purview. Jain was not transferred to Metromile's Boston office,[11] there was no reduction in salary to $120,000, his last day was not July 16, 2020,[12] and he was not fired after attending a funeral. Additionally, there is a place on the phone intake notes form where Ms. Bosco could have indicated that the complaint was not submitted by Jain. *See* RX 4 at 3. There is no indication that someone else submitted the complaint, instead the notes indicate Jain submitted the complaint. *Id.* Even if Jain's sister started the phone call, I do not find it credible that he did not know what she told WHD, and that he simply corrected it later. Jain was frustrated that his previously filed complaints were not investigated. I conclude that he, perhaps with the help of his sister, intentionally made untrue allegations to WHD in an attempt to get his claims investigated.

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[10] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[11] This misrepresentation makes little sense, but is very detailed, including detailing an alleged reduction in salary because of the fabricated "transfer." Mr. Jain alleges he contacted multiple offices in California and a general hotline. I conclude he falsely alleged a transfer in an attempt to get the Northeast Regional Office to investigate his complaint.

[12] Notably, Mr. Jain made the phone call to the Northeast Regional Office of WHD on July 14, 2021, so the allegation that his last day was July 16, 2020, which is also false, conveniently would have made his July 14, 2021, complaint timely.

Jain testified that he began working at ForeThought in June 2019 and that ForeThought submitted a visa application for a change of employer that USCIS approved. HT 51:23-25; HT 52:1-8. In contrast, in Jain's reply brief regarding the timeliness of his complaint, he alleged that the employment was for "concurrent" employment, not a change in employer. Jain Reply Brief at 3.[13] Jain provided no support for this, and at the hearing, to his credit, he did produce the I-129 demonstrating that his visa application with ForeThought had been for a "change in employer." CX 13. Even though Jain ultimately produced the I-129 document, his willingness to make unsupported assertions seriously undermines his credibility. Furthermore, even if Jain did not remember or know which box was checked on his visa application for ForeThought, he knew that he was not simultaneously employed by Metromile and ForeThought. He clearly testified that Metromile terminated his employment on February 22, 2019. I further note this was not Jain's only experience with H-1B applications. When he subsequently took a job with Hinge Health, the I-129 was for a "change in employer." I conclude Jain had at least some familiarity with the categories of employment, and his assertion that the ForeThought I-129 was for "concurrent employment" is misleading and seems likely motivated by a desire to render his complaint timely.

Additionally, I do not credit Jain's testimony that Exhibit 17 (Voicemail 4285) is a call from "around like the last week of February 2020." HT 50 at 18-20. Jain testified the voicemail was from Raul Corral in the San Jose office. Jain testified earlier in the hearing that he did not contact the San Jose office until February 2021. HT 44 at 15-16. It does not fit with Jain's narrative of his complaints that there would be a voicemail from anyone in the San Jose office in February 2020. His testimony on this point was self-serving and unsupported by any corroborating evidence, and I do not credit it.[14]

In sum, Jain's willingness to mislead this court and a WHD investigator seriously undermined his credibility. Where his testimony was not corroborated by additional evidence, I did not credit it.

DISCUSSION

1. *General Principles of the INA H-1B Provisions*

The INA permits an employer to hire non-immigrant, H-1B workers in "specialty occupations" to work in the United States for prescribed periods of time in specialized occupations,[15] which require specific knowledge and a relevant degree. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. The H-1B hiring process involves three procedural phases. *Manoharan v. HCL America, Inc.* ARB No. 2021-0060, ALJ Nos. 2018-LCA-00029 & 2021-LCA-00009, slip op. at 8-9 (ARB Apr. 14, 2022). An employer seeking to hire an H-1B worker must first obtain a labor certification from the Department of Labor ("DOL") by filing a LCA and attesting that it will employ an identified person

[13] "The Prosecuting party argues the applications were filed under 'concurrent employment.'" Jain Timeliness Reply Brief, filed December 17, 2021 at 3.

[14] In March of 2021, Jain received a voicemail from Mr. Rios in the Los Angeles office (CX 18 Voicemail 4293), which he alleged receiving in March of 2021. This would coincide with Jain's narrative of his complaint; however, there is no evidence that this complaint refers to Metromile, and furthermore it is not relevant to the question of timeliness. HT 51 at 1-4.

[15] "Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the particular specialty. 8 U.S.C. § 1184(i)(1); 20 C.F.R. § 655.715.

for a specific job, at a specified place, for a specified time, and at a specified wage. *Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 5, (ARB Jun. 6, 2013); 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.700 to 655.760 (Subpart H).

Once DOL certifies the LCA, the employer must file an I-129 Petition with USCIS requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa. 20 C.F.R. § 655.705(a), (b). If USCIS approves the H-1B petition, it issues a Notice of Action specifying the dates the nonimmigrant may work for the employer and informs the U.S. Consulate where the nonimmigrant intends to apply for an H-1B visa of the approval. 20 C.F.R. § 655.705(b); 22 C.F.R. § 41.112(a). The worker then applies for an H-1B visa. When the worker arrives at a port of entry in the U.S. with a valid H-1B visa, Customs and Border Patrol authorizes the worker to stay in the country for a length of time, which is recorded on a Form I-94.

Once the H-1B petition is granted, the employer assumes various legal obligations after the H-1B worker becomes eligible to work for the employer. 20 C.F.R. § 655.731(c)(6)(ii). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of the authorized employment. 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731. The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants 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). By signing and filing the LCA, the employer "attests the statements in the LCA are true and promises to comply with the labor condition statements." 20 C.F.R. §§ 655.730(c)(2), 655.705(c)(1); *see* 20 C.F.R. § 655.805(d).

2. *Filing a Complaint*

Section 655.806 sets forth the procedures for filing and processing a complaint under the H-1B program. 20 C.F.R. § 655.806. A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA. 20 C.F.R. § 655.806(a)(5). A complainant may submit a complaint to any local WHD office. No particular form is required and, except if the complaint is made orally, a WHD official taking the complaint shall reduce it to writing. 20 C.F.R. § 655.806(a)(1) and (6). The complaint must set forth sufficient facts for the WHD Administrator to determine whether there is reasonable cause to investigate, and within 10 days of receiving the complaint, the Administrator shall determine whether there is reasonable cause for an investigation. 20 C.F.R. § 655.806(a)(2). If the Administrator determines there is not reasonable cause for an investigation, the Administrator shall notify the complainant, who may submit a new complaint with additional information as necessary. *Id.* The complainant may not have a hearing or appeal the Administrator's determination that there was not reasonable cause for an investigation. 20 C.F.R. § 655.806(a)(3). If the Administrator determines that an investigation is warranted on a complaint, the complaint shall be accepted for filing, and a determination shall be issued within 30 calendar days, subject to some exceptions. *Id.* When an investigation has been conducted, the Administrator shall issue a written determination. 20 C.F.R. § 655.806(b).

The Administrator through investigation shall determine whether an H-1B employer has failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain unproductive time). 20 C.F.R. § 655.805(a)(2). When "an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732,

the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required." 20 C.F.R. § 655.810(a). In calculating damages, "[t]he back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s)." *Id.*

Any interested party desiring review of the Administrator's determination may request a hearing before an ALJ. The ALJ may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. 20 C.F.R. § 655.820; 20 C.F.R. § 655.840(b). The prosecuting party has the burden of proof at the hearing, and the party who requests a hearing before an ALJ in an LCA case is the prosecuting party. *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076 (ARB Jul. 29, 2005). The prosecuting party has the burden of providing sufficient evidence such that the requisite calculations can be made. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, slip op. at 16 (ARB Jul. 16, 2014). An H-1B worker who is the prosecuting party in an LCA case may meet his or her initial burden through his or her testimony, and other evidence that he or she performed work without fair compensation; where an employer fails to provide adequate records, such testimony and evidence may be accepted by the finder of fact as a matter of just and reasonable inference. *Jain v. ACI InfoTech, Inc.*, ARB No. 2019-0038 (ARB Oct. 29, 2020).

3. *Back Wages: Timeliness*

A central issue of the hearing was the timeliness of Jain's complaint. To determine whether Jain's claim for back wages is timely, I must determine when the last alleged violation occurred, when Jain filed his complaint, and, if necessary, whether his prior complaints equitably toll the time for filing.

a. Last Alleged Violation

Jain argues Respondent committed ongoing violations because it failed to make a bona fide termination and failed to pay his wages through the expiration of the LCA. I reject Jain's conclusion that the last alleged violation was the date the LCA expired (January 28, 2021), and that the statute of limitations began to run on January 28, 2021.[16] Instead, I find the last alleged violation occurred on June 13, 2019, when USCIS approved his change of employer I-129 application to work for ForeThought. Jain had 12 months following that date to file a complaint for back wages.

Generally, an H-1B employer is obligated to pay wages "for the entire period of authorized employment." 20 C.F.R. § 655.731(a). "If an employer discharges the employee but does not make a bona fide termination of the employment relationship, its obligation to pay the employee the actual wages continues until the expiration of the employee's authorized period of employment." *Manoharan v. HCL America, Inc.* ARB No. 2021-0060, ALJ Nos. 2018-LCA-00029 & 2021-LCA-00009, slip op. at 12 (ARB Apr. 14, 2022) (cleaned up). If there has been a bona fide termination of the employment relationship, an H-1B employer is no longer obligated to pay wages. The ARB has held that to effectuate a bona fide termination, employers must typically meet three requirements. They must: (1) expressly terminate the employment relationship with the H-1B nonimmigrant; (2) notify USCIS of the termination, and (3) in certain circumstances, provide the H-1B worker with the reasonable cost

[16] The complete LCA with Metromile can be found in CX 1 of Jain's timeliness brief filed on Dec 10, 2021.

of return transportation home.[17] *See Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(b)(7)(ii).

However, the three-part *Amtel* definition is not the only means of making a bona fide termination. Notably, the ARB has held that the *Amtel* definition of bona fide termination cannot be strictly applied in cases involving multiple H-1B employers, because it does not account for the complexities that can arise in these cases. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, ALJ Case No. 2011-LCA-025, slip op. at 10 (ARB July 16, 2014). A strict reading of *Amtel,* for example, would suggest that each time an H-1B nonimmigrant changes employer, the former employer would remain liable for back wages until it provides the nonimmigrant with the cost of return transportation. Instead, the ARB has held that back wage claims against a former employer "stop accruing if it is clear that the H-1B employee changes from one H-1B employer to another and USCIS approves the subsequent H-1B petition allowing for the change." *Batyrbekov,* ARB No. 13-013, slip op. at 10. When USCIS approves a petition for "change of employer,"[18] the previous H-1B employer's obligation to pay wages and the cost of the H-1B employee's return to his or her home country ends. *Id.* at 11-12. The burden of proving the end of back wage liability remains with the employer.[19] *Id.* That is, a bona fide termination of employment can occur and end back wage liability for an employer that proves it (1) expressly notified an H-1B employee that it terminated the H-1B employment, and (2) thereafter, the H-1B employee secured USCIS's approval for a "change of employer." *Id.* at 10.

The implementing regulations require a prosecuting party file a complaint "not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA." 20 C.F.R. § 655.806(a)(5). Thus, if an employer is obligated to pay wages until a bona fide termination is made, the latest alleged violation for back wages would be when the employer made a bona fide termination. *See Manoharan*, slip op. at 12.[20]

Based on the record, Jain had 12 months from June 13, 2019, to file his back wages complaint against Metromile. On February 22, 2019, Metromile terminated its employment relationship with

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[17] The regulations specify that an H-1B employer must provide payment of return transportation costs to an H-1B employee who has been terminated under certain circumstances. 20 C.F.R. § 655.731(c)(7)(ii).

[18] The visa classification on the DOL certification ETA Form 9035 and the USCIS Form I-129 both require an employer to indicate whether a position involves a change of employer or additional concurrent employment. The forms require the employer to classify the worker's position as one of the following: new employment, continuation of previously approved employment without change with the same employer, change in previously approved employment, new concurrent employment, change of employer, or amended petition. *Batyrbekov* at 11.

[19] Employer has the burden of demonstrating that there was a bona fide termination, but if an H-1B worker refuses to produce documents, such as the Form I-129, or allow them to be released, the ALJ may draw an adverse inference from the lack of cooperation. That is, the ALJ may assume the documents would damage the prosecuting party's case. *See Batyrbekov* at 12.

[20] *But see Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ Case No. 2004-LCA-36, slip op. at 6-7 (ARB May 9, 2007) (holding the limitations period begins to run on the date that a complainant receives final, definitive, and unequivocal notice of a discrete adverse employment action.). The ARB confirmed and refined its *Amtel* holding in *Batyrbekov* and *Manoharan*, and declined to address whether *Ndiaye* was rightly decided in *Vyasabattu v. eSemantiks,* ARB No. 10-117, ALJ No. 2008-LCA-022, slip op. at 7 (ARB February 11, 2015).

Jain.[21] On June 13, 2019, USCIS approved an I-129 application for change in employer for Jain to begin work at ForeThought. And on August 25, 2020, Metromile sent a letter to USCIS stating that Jain was no longer employed at Metromile.[22] Because USCIS approved Jain's change of employer I-129 application on June 13, 2019, it was already aware that Jain no longer worked for Metromile. Jain knew he no longer had an employment relationship with Metromile, DHS knew of the change in Jain's employer, and Jain had no intention of leaving the United States permanently and therefore had no need for return airfare. Thus, on June 13, 2019, there was a bona fide termination, and Jain had 12 months after this date to file any complaint for back wages against Metromile.

Jain argues that based on *DeDios V. Medical Dynamite System Inc.*, ARB No. 16-072, ALJ No. 2013-LCA-9 (ARB Mar. 30, 2018), the last date of an alleged violation was the expiration of the LCA, or January 28, 2021, "when the employer refused to do […] its duties towards the LCA…." HT 71 at 5-7.[23] *DeDios*, however, is factually distinct. In *DeDios*, there was some ambiguity regarding the employment relationship. In *DeDios*, the employer failed to inform Mr. DeDios, an H-1B worker, that he was fired, and even continued to tell him that it was arranging interviews and potential work for DeDios but stopped paying his wages. *DeDios*, slip op. at 8-9. The ARB found that the employer likely never effectuated a bona fide termination. *Id.* Here, although Jain's July 14, 2021 complaint to the WHD Boston office misrepresented the employment relationship to a WHD investigator, there was no ambiguity; Metromile fired him on February 22, 2019. *See* RX 4 and RX 2.

In *DeDios*, the ARB held that the time to file a complaint began to run following the expiration of the LCA because the alleged benching violation was a continuing violation. Based on the relevant regulatory language, "a complaint's timeliness is based in part on the content and allegations contained in the complaint." *DeDios*, slip op. at 8-9. The ARB also noted "it would be poor practice to invalidate a timely complaint based upon a post facto finding that certain of the complainant's allegations were not substantiated or only partially substantiated later at a hearing." *Id.* at 9, fn. 50. Like Mr. DeDios, Jain alleged a benching complaint, but his allegation is not merely "unsubstantiated" or "only partially unsubstantiated," it was a wholly inaccurate and misleading allegation that, at the hearing, Jain denied ever making. Unlike Mr. DeDios, Jain received clear notice of termination of the employment relationship on February 22, 2019. Metromile failed to notify USCIS until August 25, 2020, but DHS had notice of the change of employer as of June 13, 2019 when it approved Jain's I-129 to work at ForeThought. Additionally, Jain became unavailable to work for Metromile on that date. Thus, I find that the last date of the alleged back wages violation was June 13, 2019, and Jain had 12 months from that time to file his claim for back wages.

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[21] In his July 14, 2021 complaint to Wage and Hour Division, Jain alleged he had been transferred to Boston and benched. This was false. At the hearing Jain denied making this statement, acknowledged that he never worked for Metromile in Boston, and acknowledged that he was fired on February 22, 2019. *See* HT 55.

[22] There was no evidence that Metromile offered Jain return airfare. However, Jain started attending job interviews to save his visa. *See* HT 37: 7-15. I conclude Jain had no intention of leaving the United States, and thus it was not necessary to pay return airfare to make a bona fide termination.

[23] Jain also cited to *Gupta v. Jain Software Consulting, Inc.* ARB No. 05-008, ALJ No. 2004-LCA-39 (March 30, 2007) for the proposition that the expiration of the LCA starts the time limitation for filing. In *Gupta*, however, the ARB stated, "the limitations period for a benching complaint does not begin to run as long as the employer maintains an employment relationship with a nonimmigrant it has chosen to place in nonproductive status." *Gupta v. Jain Software Consulting, Inc.* ARB No. 05-008, ALJ No. 2004-LCA-39 (March 30, 2007) slip op. at 5. Here, the circumstances are factually distinct as there was no longer an employment relationship between Jain and Metromile.

b. When Jain Filed His Complaints

Jain alleged that he made oral complaints regarding Metromile as early as February 2020. He testified that he went to the Department of Labor in Walnut Creek and met with an employee named Alberto Raymond in February 2020. HT 42:23-25, 43:1-25. However, as stated above, I did not find Jain to be a reliable witness, and I do not credit that testimony without corroboration.

A complaint emailed to WHD employee Tracy Williams, dated April 28, 2020, is the earliest complaint with corroborating evidence. Respondent argues that any complaints earlier than the July 14, 2021 complaint are "incompetent evidence" and "does not prove that a complaint was actually filed with the DOL." HT at 29. However, while the attached complaint is not dated, there was a timestamp on the email. Jain also testified that he spoke to Tracy Williams in April 2020. While he is not a credible witness, the email provides support for the contention that he actually filed a complaint in April 2020. Thus, I find on April 28, 2020, Jain emailed a complaint to WHD alleging Metromile "violated h1b laws" and "discriminated against [him] and retaliated when [he] requested FMLA leaves. [He] asked FMLA to get [him]self treated for physical injuries." *See* CX 16. Jain alleged Metromile "did not fulfill conditions of [his] LCA." Jain checked the box for "other" violations and wrote "the company violated my h1b rights. They did not fulfill conditions of my LCA. They discriminated against me and retaliated when I requested FMLA leaves." *Id.* Jain listed February 22, 2019 as the date of the violation. *Id.* The form includes a section in which the worker is asked to describe facts and circumstances which support the allegations. In that section Jain wrote, "The company violated my H1b rights. They did not fulfill conditions of my LCA. They discriminated against me and retaliated when I requested FMLA leaves. I asked FMLA to get my self treated for physical injuries." *Id.* There is no evidence that WHD responded to the April 28, 2020 complaint.

This case is before this Office due to Jain's appeal of the Administrator's Determination issued on September 29, 2021. That determination was based on Jain's July 14, 2021 complaint. The July 14, 2021 complaint alleged that Respondent "willfully failed to pay required wage rate" and "failure to either offer benefits or equal eligibility for benefits." RX 4. Because the statute of limitations expired on June 13, 2020, the July 14, 2021 complaint is untimely. However, Jain made his April 28, 2020 complaint *before* the statute of limitations expired. Thus, the April 28, 2020 complaint for back wages would have been timely.[24] Accordingly, it is necessary to determine if equitable tolling should apply to render Jain's July 14, 2021 complaint timely.

c. Equitable Tolling

Jain is entitled to equitable tolling because there was no evidence that WHD declined to investigate his timely April 28, 2020 back wages claim or responded to his April 28, 2020 complaint in any manner.

[24] Jain's April 28, 2020 complaint did not specifically allege that Metromile owed him back wages. But he alleged generally that Metromile violated H-1B laws and did not fulfill the conditions of the LCA, which would include a claim for back wages. Further, in his July 14, 2021 complaint, he alleged that Metromile failed to pay the required wage rate. In *Puri v. Univ. of Ala. Birmingham Huntsville*, ARB No. 10-004, ALJ Case No. 2008-LCA-008 (ARB Nov. 30, 2011), the Board held that "the ALJ erred in focusing on whether the Administrator investigated Puri's *claim* for the payment of wages beyond June 30th, whereas the proper focus is on whether the Administrator investigated Puri's *complaint*; and . . . [i]n the absence of notice by the Administrator pursuant to 20 C.F.R. § 655.806(a)(2) that any particular claim contained in Puri's complaint failed to present reasonable cause for investigation, the presumption is that his entire complaint was investigated." *Puri*, ARB No. 10-004, slip op. at 10 (italics in original).

"The Board has held that limitation periods adopted to expedite the administrative resolution of cases that do not confer important procedural benefits upon individuals or other third parties outside the ARB are subject to equitable tolling." *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, slip op. at 16 (ARB June 2, 2006). The ARB has recognized four principal situations in which equitable modification may apply:

> (1) when the defendant has actively misled the plaintiff regarding the cause of action;
> (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights;
> (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and
> (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.

Bagri v. Erection and Welding Contractors, LLC. ARB No. 2020-0033, ALJ Case No. 2020-LCA-00003 (ARB Jan. 2, 2021); *Mehra v. West Virginia University*, ARB No. 2017-0058, ALJ Case No. 2017-LCA-00002 (ARB Nov. 21, 2019). "The party requesting tolling bears the burden of establishing the applicability of the equitable tolling principles. Though the inability to satisfy one of these elements is not necessarily fatal to a party's claim, courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise *due diligence* in preserving his legal rights." *Bagri*, ARB No. 2020-0033 (cleaned up). The ARB also "construes complaints and papers filed by pro se complainants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude." *Id.*

Jain referenced equitable tolling during the hearing. HT at 49, 57. Jain did not allege that one of these scenarios applies, instead he argues that WHD did not act as required by the implementing regulations on the complaints that he filed.[25] *See* HT at 49. However, these circumstances closely resemble the second scenario, that extraordinary circumstances prevented Jain from pursuing his claim. The record before me establishes that Jain filed a complaint against Metromile on April 28, 2020, which would have been a timely complaint for back wages. He also filed a subsequent documented complaint against Metromile again on March 19, 2021, and alleged additional oral complaints. It was not until the July 14, 2021 complaint was filed that WHD finally investigated his complaint. Jain alleged that when he spoke with a WHD investigator in September of 2021, he told them about his previous complaints, and they investigated all the allegations he made. HT at 47, 49.

While the April 28, 2020, complaint only vaguely alleges that Metromile failed to fulfill its obligations under the LCA, a claim for back wages at that point would have been timely and Jain was entitled to notice from WHD that there was insufficient evidence to investigate, so that he could file a new complaint with additional evidence. There was no evidence that WHD informed Jain that it declined to investigate his claims, or that there was insufficient evidence to investigate his claims. *See* 20 C.F.R. § 655.806(a)(2). Jain was therefore not allowed an opportunity to submit a new complaint

[25] While Jain testified that he was frustrated that WHD was not investigating his complaints, there is insufficient evidence to infer from that testimony that WHD notified him that it would not investigate his complaints.

with additional information, if necessary.[26] *See id.* I find it is appropriate to equitably toll the statute based on Jain's initial April 28, 2020 complaint because there was no evidence he received notice from WHD that there was insufficient evidence to investigate his back wages claim. WHD's failure to act due to agency inaction or case backlogs should not deny Jain the opportunity to have his complaint heard.[27]

4. *Back Wages Award*

The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s). 20 C.F.R. § 655.810(a). Jain requested $51,219.00 in back wages, $923.00 for four months of insurance, $50.00 for four months of sickness benefit, half of his stocks or 5,078 stocks valued at the date of opening $17.16 ($87,138.00 in stocks), $45.00 per week for 12 weeks in lunch benefits, and $75,000.00 in damages for emotional distress, loss of reputation, loss of appetite, depression, and anxiety. HT 79-81. Jain failed to submit evidence of regarding insurance costs, sickness benefits, lunch benefits, and he is not entitled to compensatory damages for Metromile's failure to pay wages until it made a bona fide termination. Jain's exhibit regarding stocks (CX 11) was illegible and unexplained. Additionally, there was no evidence that he opted into this benefit at Metromile, and thus that he was eligible for any award of stock values. However, I find that Jain is entitled to back wages from February 22, 2019 through June 13, 2019.

Metromile paid Jain an annual salary of $158,000.00, paid every two weeks less required deductions and withholdings. RX 1 at 1. Jain submitted a "screenshot of W2 wages paid by Metromile." CX 12. This exhibit is unreliable evidence. There is no source, it is impossible to verify these are the actual amounts from his W2, and it does not inform what the agreed annual salary was. Jain also submitted his last pay stub, which covered his work with Metromile from February 1, 2019 to February 15, 2019. CX 10. The paystub indicated he was compensated for 86.67 hours and paid $6,608.34 for that pay period. It is not possible, however, to extrapolate back wages from one paystub. A bimonthly salary of $6,608.34 yields an annual salary greater than $158,000.00. Jain presented no evidence that Metromile awarded him an annual raise. Thus, I use the documented annual salary to calculate his back wages. $158,000.00 divided by 26 pay periods in a year yields a bimonthly salary of $6,076.92 before required deductions and withholdings. His weekly rate would be approximately $3,038.46, and his daily rate would be approximately $607.70.

Claimant is due back wages from February 22, 2019 to June 13, 2019, that is 15 weeks and 3 days of wages. Thus, he is due $47,400.00, less required deductions and withholdings in back wages. Because there was no evidence that Metromile paid him for that week, Jain is also entitled to pay for February 18, 2019 through February 22, 2019. I award an additional $3,038.46 for this period. In total,

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[26] Section 655.806(a)(2) provides that within 10 days of receiving the complaint, the Administrator shall determine whether there is reasonable cause for an investigation. If the Administrator determines there is not reasonable cause for an investigation, the Administrator shall notify the complainant, who may submit a new complaint with additional information as necessary.

[27] At the hearing, Jain cited to *Brock v. Pierce Cty*, 476 U.S. 253, 266 (May 19, 1986). This case established that an agency does not necessarily lose jurisdiction when it fails to adhere to a statutory time requirement within which to issue a determination. Jain's arguments were difficult to follow, but *Brock* does not support a proposition that 20 CFR 655.206(a) allows the *H-1B worker* to file an older complaint, instead it concerns the agency's jurisdiction. *See* HT 71 at 14-24.

Metromile is ordered to pay Claimant $50,438.46 less required deductions and withholdings.[28] Metromile is also ordered to pay pre- and post-judgment interest on back pay wages due.[29] Metromile is entitled to a credit for any wages already paid for the period that back wages are due.

Jain, otherwise, failed to meet his evidentiary burden regarding the other benefits, and his requests are denied.

5. *Retaliation for Requesting FMLA or Failure to Offer Same Benefits as U.S. Workers*

Jain also alleged that on February 22, 2019, Metromile retaliated against him for requesting leave under the Family and Medical Leave Act ("FMLA"), and retaliated and discriminated against him when it failed to grant him FMLA leave.[30] The INA, however, provides a limited set of circumstances in which a prosecuting party can allege retaliation. *See* 20 C.F.R. § 655.801.[31] None of Jain's allegations fit within those delineated circumstances. Thus, there is no viable claim for retaliation as contemplated under the INA.[32]

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[28] Jain's paystub indicates Metromile deducted $146.00 in medical, vision, and dental benefits. CX 10. Because Jain did not receive these benefits for the period of back wages, they should not be deducted from his back wages. Jain submitted no evidence to support his claim for additional payments related to medical insurance.

[29] *See Vudhamari v. Advent Global Solutions*, ARB No. 2021-0018, ALJ No. NO. 2018-LCA-00022 (ARB Apr. 26, 2021); *Doyle v. Hydro Nuclear Servs*., ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 16 (May 17, 2000).

[30] The February 3, 2022 prehearing order erroneously stated that "**claims** not investigated by WHD may not be raised at a subsequent hearing," citing *Jain v. Empower IT, Inc*., ARB No. 08-077, ALJ No. 2008-LCA-8 (ARB Oct. 30, 2009)(emphasis added). As noted above, in *Puri v. Univ. of Ala. Birmingham Huntsville*, ARB No. 10-004, ALJ Case No. 2008-LCA-008 (ARB Nov. 30, 2011), the Board held that "the ALJ erred in focusing on whether the Administrator investigated Puri's *claim* for the payment of wages beyond June 30th, whereas the proper focus is on whether the Administrator investigated Puri's *complaint*; and . . . [i]n the absence of notice by the Administrator pursuant to 20 C.F.R. § 655.806(a)(2) that any particular claim contained in Puri's complaint failed to present reasonable cause for investigation, the presumption is that his entire complaint was investigated." At the hearing, I ultimately allowed Jain to present evidence regarding the FMLA retaliation claim (HT 23-24), and I admitted his untimely filed CX 19, the declaration from Joong Im. Even if the FMLA "retaliation" claim is found timely and allowable under the INA on appeal, it may be unnecessary to reopen the record to hear additional evidence related to the alleged retaliation, because, as described in more detail below in footnote 32, Jain failed to establish that Metromile denied him FMLA benefits in violation of the INA.

[31] 20 C.F.R. § 655.801(a) states:

> No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has -
>
> > (1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or
> >
> > (2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).

[32] Jain argued at one point that Metromile did not offer him the same benefits and leave as US workers. *See* HT at 75. Under Section 655.731(c)(3), "Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers." It is questionable whether the FMLA, which provides for unpaid job-protected leave

Even had Jain alleged a valid claim for retaliation, the claim was untimely. As discussed above, I find that Jain filed his complaint against Metromile on April 28, 2020. The alleged retaliation occurred on February 22, 2019, and Jain had 12 months from this date to file a complaint regarding Metromile's actions in allegedly denying him FMLA leave. Thus, I find he filed his claim for "retaliation" after the time to file had expired, and the claim is time-barred. Because the initial retaliation claim would not have been timely, I find the principles of equitable tolling as discussed above do not apply.

ORDER

1. Within 14 days of the date of this order, Respondent shall pay Jain back wages from February 22, 2019 through June 13, 2019, for a total of $50,438.46, subject to appropriate withholdings.

2. Respondent is entitled to a credit for any wages already paid for the period February 22, 2019 through June 13, 2019.

3. Respondent shall pay Jain pre-judgment and post-judgment interest on the back pay wages for the period February 22, 2019 through June 13, 2019 due at the applicable rate of interest as specified in 26 U.S.C. § 6621.

4. The Administrator, Wage and Hour Division, shall make all calculations with respect to back pay and interest necessary to carry out this Decision and Order.

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for certain family and medical reasons, *see* 29 C.F.R. Part 825, is included under the type of "benefits" described in Section 655.731(c)(3). FMLA leave is not offered as "compensation for services," but is required of certain employers under specific circumstances. *See* 29 C.F.R. § 805.102. The H-1B regulations reference FMLA in a peripheral manner related to non-productive status and it appears to be something that could be available to H-1B workers, but is a completely separate statute and not a fringe benefit. *See* 20 C.F.R.§ 655.731(c)(7)(ii) ("If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience, . . . then the employer shall not be obligated to pay the required wage rate during that period, . . . provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.* or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*)"). The remedy for a potential FMLA violation is not to bootstrap a tenuous allegation to the H-1B regulations, but to file a separate lawsuit.

Regardless, even if the claim were timely and allowable under the INA, Jain did not establish that Metromile denied him FMLA benefits in violation of the INA. Jain testified that he asked for FMLA leave, but he lacks credibility. Mr. Im declared that Jain testified that Jain told him he asked for FMLA leave, but this is also based on Jain's personal account and is unreliable. As the ARB has stated, "although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Pike v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6, slip op. at 5 (ARB May 31, 2012). I am not persuaded by Jain's argument related to FMLA, and I do not find it to be the sort of fringe benefit that falls within the H1-B statute or regulations. Most importantly, I do not find Jain credible and when the crux of the information turns on his credibility, as the FMLA argument does here, without credible corroborating evidence, I do not give it any weight. Additionally, Jain's passing reference to his manager's alleged denial of his request to go to temple and asking him to come into the office during Christmas vacation are insufficient to establish a violation under Section 655.731(c)(3), especially considering Jain's credibility issues.

5. The Prosecuting Party's retaliation and/or discrimination claim is denied.

6. Respondent's request for attorney fees and costs is denied.

7. All other requests for relief are denied.

SO ORDERED.

RICHARD M. CLARK
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. Such petition shall be received by the Board within 30 calendar days of the date of the decision and order. The petition shall be served on all parties and on the administrative law judge.

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.

IMPORTANT NOTICE ABOUT FILING APPEALS:
The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

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Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at

https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.
Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.
If you file your appeal online, no paper copies need be filed with the Board.
You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

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If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

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After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.