UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Edith Fine, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100363.

DECISION AND ORDER ON DEFAULT

(December 19, 1989)

MARVIN H. MORSE, Administrative Law Judge

Appearances: MARGARET PHILBIN, Esq., for the Immigration and Naturalization Service.

JOEL L. STEWART, Esq., for the Respondent.

Statutory Background

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), at section 101, enacted section 274A of the Immigration and Nationality Act of 1952, (INA or the Act), 8 U.S.C. § 1324a, introducing an enforcement program designed to implement the employer sanctions provisions prohibiting the unlawful employment of aliens.

Procedural Background

On July 28, 1989, the Immigration and Naturalization Service (INS or the Service), filed a Complaint against Edith Fine (Respondent), alleging one count of unlawful employment of a named alien and one count of failure to properly verify the employment of the same named individual.

The first count alleges that Respondent knowingly hired and/or continued to employ a named individual unauthorized for employment in the United States in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2). The second count alleges that Respondent failed to properly prepare, retain or produce after request an employment eligibility verification form, INS Form I-9, for the same named individual in violation of 8 U.S.C. § 1324a(a)(1)(B).

These allegations were set forth in a Notice of Intent to Fine (NIF) dated May 31, 1989.

The Complaint, dated July 20, 1989, incorporating by reference the NIF, transmitted Respondent's request for hearing in the form of a letter from Respondent's attorney dated June 26, 1989.

The Complaint requests an order directing Respondent to cease and desist from violating 8 U.S.C. § 1324a; seeks a $500.00 civil money penalty for knowingly hiring and/or continuing to employ an unauthorized alien, and requests a $250.00 civil money penalty for a single paperwork violation.

By Notice of Hearing dated August 1, 1989, Respondent was advised of the filing of the Complaint, the opportunity to answer within thirty (30) days after receipt of the complaint, my assignment to the case, and the approximate location for a hearing, i.e., in or around Miami, Florida. The Notice provided, inter alia that ``[T]he Respondent's Answer must be filed within thirty (30) days after receipt of the Complaint. . . . If the Respondent fails to file an Answer within the time provided, the Respondent may be deemed to have awaited his/her right to appear and contest the allegations of the Complaint, and the Administrative Law Judge may enter a judgment by default along with any and all appropriate relief.''

By Motion for Enlargement of Time dated August 18, 1989, Respondent, reciting that Respondent's counsel had recently been attending ``the Board of Governors Meeting of the American Immigration Lawyers Association . . .'' and that ``. . . the case involves substantial issues of constitutional law which need to be adequately researched before an Answer can be filed,'' Respondent asked that the time in which to respond to the Complaint be extended to August 30, 1989.* By telephone call to my secretary on August 23, 1989, Respondent's counsel advised that he now realized that time for reply to the service of the Complaint ran from receipt of the Notice of Hearing (transmitting the Complaint) rather than from his earlier receipt of a courtesy copy of the Complaint (presumably received from Complainant), rendering the motion unnecessary.

As more fully described in my order dated September 20, 1989, Respondent on September 5 filed an August 30 Motion to Quash the Complaint. I understood Respondent's Motion to have claimed in effect that constitutional infirmities so infected INS subpoena practice against Respondent in an investigation implicated by the instant proceeding as to render the Complaint ineffective. Follow

*References to Respondent, except where the text implies otherwise, are references to pleadings filed (or, not filed) by counsel for Respondent.

ing receipt on September 13, 1989, of Complainant's September 8 Response, on September 20, 1989, I issued my Order Denying Respondent's Motion to Quash the Complaint and Permitting Answer Within A Time Certain. Having rejected the Motion on the merits, I provided that ``. . . consistent with FRCP 12(a), an answer by respondent will be timely if filed not later than Tuesday, October 3, 1989.''

An Answer was not forthcoming in response to my September 20 order. Instead, on October 6, 1989, I received a Motion to Reconsider Respondent's Motion to Quash the Complaint, dated October 2, 1989. As recited in the third paragraph of my Order Denying Motion for Reconsideration and Extending Time to Answer issued October 11, 1989, without awaiting a responsive pleading, I considered the Motion notwithstanding it was an unauthorized pleading. After explicitly cautioning respondent ``that unless an answer to the complaint is received by me not later than October 23, 1989, I will entertain an appropriate motion by complainant for entry of a default decision.'' I concluded the order as follows:
``I have entertained respondent's motion for reconsideration, and . . . have found it wanting. The motion is denied. It remains for respondent timely to answer the complaint.''

By Motion for Default Judgment dated October 13, 1989, filed October 18, INS asked that respondent be found in default for failure timely to answer the complaint. By Notice of Interlocutory Appeal dated October 18, 1989, filed October 20, 1989, Respondent advised that she had filed a petition for review in the Eleventh Circuit of the October 11 order denying reconsideration of the original motion to quash. Acknowledging the heavy burden to be overcome by a petitioner for interlocutory review, Respondent nevertheless again declined to file an Answer, instead requesting a stay pending decision by the court of appeals. By Notice dated October 18, 1989, filed October 23, 1989, Respondent asked that I ``grant an appropriate extension of time to reply to any pleadings that may be filed'' between October 19 and 23, 1989, because Respondent's counsel ``a solo practitioner, will be out of the country . . .'' at that time.

The INS motion appeared to me premature in light of my having on October 11, 1989, granted Respondent a further period of time until October 23 to provide me with an Answer to the Complaint. Also, I was unpersuaded that Respondent had not had ample opportunity to comply with repeated extensions of time in which to file an Answer. Accordingly, I issued on October 25, 1989 an Order Overruling Motion for Default Judgment, Without Prejudice to Filing a Renewed Motion, and Rejecting Respondent's Notices for Additional Time.

By Response dated November 9, 1989, filed November 13, Respondent answered the Complaint, reciting, inter alia, that she incorporated ``all previous pleadings and motions into this Answer,'' and adding as an ``additional defense not yet raised,'' that IRCA ``as it applies to domestic household workers is unconstitutionally vague . . .,'' precluding any enforcement action. Complainant on December 4 filed a December 1, 1989 Motion to Strike contending that Respondent was not only out of time and that, in any event, the newly articulated constitutional defense was ``insufficient, impertinent, and without merit.'' Respondent on December 18, 1989, filed an undated Response to Complainant's Motion to Strike attempting to refute Complainant's conditional arguments against her challenge to section 101 of IRCA as unconstitutionally vague and overly broad as applied to Respondent as a homeowner.

Findings of Fact and Conclusions of Law

Respondent, through no fault of Complainant or the bench, has forfeited whatever defense she might timely have asserted in response to the Complaint in this case. Had Respondent only answered the Complaint in accord with the timeframes set by regulation, as twice extended further by the judge, she would have preserved her posture as a party litigant without prejudice to her claims before me or on appeal. Instead, Respondent, through counsel, has utterly failed to follow elementary procedures which are virtually universal in character throughout the American system of justice. Failure on the part of Respondent to adhere to established precepts requires me on the bases of prudence and principle to reject as late-filed her Response dated November 9, 1989.

Accordingly, failure of Edith Fine to file a timely Answer to the Complaint constitutes the basis for entry of a judgment by default within the discretionary authority of the administrative law judge. The conclusion to that effect renders moot the motion practice addressed to Respondent's affirmative defense in her Response dated November 9, 1989, that IRCA as it applies to domestic employees ``. . . is unconstitutionally vague. . . .''

Whatever precedent a decision in this case might have provided with respect to applicability of 8 U.S.C. § 1324a to employment of domestic employees has been substantially sacrificed by Respondent's persistence in delaying an Answer. I do note, however, that I essentially addressed, and rejected, the argument raised by Respondent's affirmative defense, although in a commercial employment context, in United States v. Big Bear Market, No. 88100038 (OCAHO March 30, 1989) (supplemental decision and order, April 12, 1989), aff'd by Attorney General (Acting CAHO) (May 5, 1989),

Empl. Prac. Guide (CCH) para. 5193, appeal pending, 9th Circuit (No. 89-70227 filed May 31, 1989), at pp. 29-31 (slip. op.). I am unaware of any distinction in section 102 between household employers on the one hand and any or all other kinds of employers on the other hand. Liability for breach of 8 U.S.C. § 1324 does not turn on any threshold number of employees as does liability for unfair immigration-related employment practices under Section 102 of IRCA, specifically 8 U.S.C. § 1324b(a)(2)(A). It follows that although the grant of Complainant's Motion for Default Judgment moots the pleadings on this score, it is nonetheless certain that Section 101 of IRCA applies to domestic employers in the United States no less than to other employers. See, e.g. ``Committee on the Judiciary Report on S. 1200, as amended,'' S. Rep. 99-132, 99th Cong., 1st Sess. 31-32 (1985).

No timely Answer having been received from Respondent, I find Edith Fine in default, having failed to answer the allegations of the Complaint, notwithstanding repeated directions and opportunity to do so. Respondent's failure to timely answer entitles the administrative law judge to treat the allegations of the complaint as admitted.

The history of the filings, and non-filings, in this case is reflected in the several orders mentioned in this Decision and Order, here incorporated by reference and attached as Exhibits A, B and C, dated September 20, 1989, October 11, 1989 and October 25, 1989, respectively.

ACCORDINGLY, IN VIEW OF ALL THE FOREGOING, IT IS FOUND AND CONCLUDED, that respondent is in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or 8 U.S.C. § 1324a(a)(2) with respect to her hiring and/or continuing to employ in the United States Olive Cornwall, the individual named in the first count of the Complaint, knowing that this person was unauthorized for employment in the United States, and in violation of 8 U.S.C. § 1324a(a)(1)(B) for failure to comply with the employment verification requirements with regard to Olive Cornwall, the individual named in the second count of the Complaint.

IT IS HEREBY ORDERED:

(1) that respondent pay a civil money penalty in the amount of $500.00 for the violation in the first count of the Complaint and $250.00 for the violation in the second count for a total of $750.00.

(2) that respondent cease and desist from further violating section 274A of the Act, 8 U.S.C. § 1324a; and

(3) that the hearing in this proceeding is cancelled.

This Decision and Order on Default is the final action of the judge in accordance with 28 C.F.R. § 68.50(b) of the rules of practice

and procedure of this Office, 54 Fed. Reg. 48593, 48606, November 24, 1989, replacing former 28 C.F.R. § 68.51(b). As provided in those Rules at new 28 C.F.R. § 68.51 (replacing former 28 C.F.R. § 68.52), this action shall become the final Order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED.

Dated this 19th day of December, 1989.

MARVIN H. MORSE
Administrative Law Judge