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

United States of America, Complainant v. The Body Shop, Respondent; 8 U.S.C. Section 1324a Proceeding; OCAHO Case No. 89100450.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History and Relevant Facts

This proceeding was initiated on September 11, 1989, when Complainant Filed a Complaint alleging violations of Title 8 of the United States Code Section 1324a(a)(1)(B) and 8 C.F.R. Sections 274a.2(b)(1)(i)(A), 274a.2(b)(1)(ii)(A) and (B) which provides that it is unlawful for a person or entity to hire for employment in the United States individuals without complying with the verification requirements as set forth in the enumerated statute.

Respondent filed an Answer to the Complaint on October 19, 1989. In its Answer, Respondent denied all the allegations of failure to comply with the record-keeping provisions of the Act and raised affirmative defenses. The affirmative defenses raised in its Answer by Respondent were ``that Respondent had complied with Section 1324a1B (sic) and has not violated paragraph 1A with respect to such hiring, recruiting or referral.''

On January 19, 1990, Complainant filed a motion for partial Summary Decision on all counts, except count 43. On January 31, 1990, because of additional discovery, Complainant filed a Motion for Summary Decision for Count 43. In its Motions, Complainant contended that Respondent's answers to its Request for Admissions constituted a basis for concluding that there was no genuine issue of material fact in this case and that Complainant was entitled to a judgment as a matter of law.

On February 9, 1990, Respondent filed its Opposition to Complainant's Motions for Summary Decision. In its Opposition, Respondent argued that the motions should be denied because (1) during an education visit to Respondent's premises on November 5, 1987, Respondent's manager was told information by INS agents

that ``left the employee/manager of the reasonable belief that the `paper' work requirement only applied to suspected individual(s) who may be undocumented'' and, therefore, Complainant is estopped from charging Respondent in this case; (2) there is a factual dispute as to what was told to Respondent by INS officials during educational visits; (3) a complaint cannot charge paperwork, violations prior to June 1, 1988, because the statute only permits a citation to be issued for paperwork violations occurring prior to June 1, 1988. Therefore, Counts 3, 9, 17, 18, 21, 24, 27, and 37 should be dismissed because these counts allege paperwork violations which occurred prior to June 1, 1988; (4) there is a factual dispute as to whether or not the employees identified in the Complaint completed section 1 on the date of hire; and (5) Respondent did not know that he was required to complete the I-9 Form within three (3) days of hire and therefore cannot be held liable for failing to complete the I-9 Forms.

In its Pre-hearing statement, Respondent clarified the issues with respect to summary decision as follows: (1) Was there in fact violations as alleged by complaint pursuant to 8 U.S.C. Section 1324a, in light of `effective date' stated under subsections (i) 1 and (i)(2) of 8 U.S.C. section 1324a. (2) Was there an `educational visit' consistent with the legislative intent under 8 U.S.C. section 1324a.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. Section 68.36 (1988); see also, Fed. R. Civ. Proc. rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, an shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L.Ed. 2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``ad-

missions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted'') U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of the party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact.).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted 28 C.F.R. Section 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Compo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill, 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be ``particularized'' in order to cut off an applicant's hearing rights. See, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (``. . . the standard of `well-controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . .)

III. Legal Analysis Supporting Summary Decision

After examining the pleadings and reviewing the legal arguments presented by both sides in this case, I have concluded that there is no genuine issue of material fact and that Complainant is entitled to summary decision. 28 C.F.R. Section 68.36(c).

Respondent in its Pre-hearing statement opposes the motion for summary decision on two grounds 1). that it did not receive a proper educational visit and 2). Complainant may not charge paperwork violations prior to June 1, 1988, because the statute only permits a citation to be issued for paperwork violations occurring prior to June 1, 1988.

Educational visit

Ignorance of the statutory requirements is no defense to charges of violations under the Immigration Reform and Control Act. Mester Manufacturing Company v. INS, 879 F.2d 561, 569-70 (9th Cir. 1989).

> . . . It is true that Congress provided for education of employers during the early period of IRCA. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanctions against an employer that can show that it has not received a handbook or other instruction, or . . . that it has simply failed to pay attention to them. . .

Mester Manufacturing Company v. INS, 879 F.2d 561, 569-70 (9th Cir. 1989).

Paperwork Violations Prior to June 1, 1988

Respondent argues that all violations of IRCA arising or occurring prior to June 1, 1988, are ``grace period'' violations and non-enforceable as civil monetary penalty proceedings. Congress intended to impose the obligation to issue a citation only during the 12-month period following the first 6-month general public education period. United States of America v. Walia's Inc., D.B.A. Walia's Restaurant, (OCAHO Case No. 89100259) (ALJ Scheinder, January 5, 1990). The Service is not under an obligation to issue a citation for violations that originally arose within the 12-month period following the initial public education period. Id.

Respondent does not factually dispute that it failed to properly complete a Form I-9 for the individuals named in the Complaint who were hired after May 31, 1987, and before June 1, 1988. Further, Respondent does not show that INS was under a mandatory statutory obligation to issue a citation pursuant to section 1324a(i)(2). There has been no showing that INS had ``reason to believe,'' prior to June 1, 1988, that a violation may have occurred. The Service is not now required to issue a citation for those paperwork violations that occurred prior to June 1, 1988, therefore Complainant is not precluded from initiating fine proceedings for these violation which occurred during the citation period but were not reasonably discoverable by INS until after the expiration of the 12-month citation period. Id. Cf. United States v. New El Rey Sausage, (OCAHO Case No. 88 100080) (ALJ Schneider, July 7, 19890.

I conclude that Complainant is not precluded from initiating a fine proceeding for paperwork violations that originally arose within the citation period because there has been no showing by Respondent that Complainant was under any mandatory obligation to have issued a citation for those violations. See, 8 U.S.C. section

1324a(i)(2). Thus, Complainant is not precluded from a summary decision for these allegations in that I find there is no per se ``grace period'' for violations that originally arose within the citation period. There is no genuine issue of material fact and Complainant is entitled to Summary decision with respect to all allegations contained in the Complaint. See, Celotex Corp. v. Catrett, supra.

Accordingly, for the foregoing reasons, I find that Respondent has violated section 1324a(a)(1)(B) of Title 8 of the U.S.C. in that Respondent hired for employment in the United States those individuals named in all counts of the Complaint without complying with the verification requirements provided for in section 1324a(b) of Title 8; and 8 C.F.R. sections 274a.2(b)(1)(i)(A), 274a.2(b)(1)(ii) (A) and (B).

Findings of Fact and Conclusions of Law and Order

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I determine that no genuine issue as to any material facts have been shown to exist with respect to all counts of the Complaint; and that, therefore, pursuant to 8 C.F.R. section 68.36, Complainant is entitled to a summary decision as to all counts of the Complaint as a matter of law.

2. That Respondent violated 8 U.S.C. section 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in the Complaint without complying with the verification requirements in section 1324a(B), and 8 C.F.R. section 274a.2(b)(1)(i)(A) and (ii)(A)(B).

3. The final decision and order in this case shall be issued after all the issues of liability and penalty amount have been considered and decided.

SO ORDERED: This 2nd day of April, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge