

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

United States of America, Complainant v. American McNair, Inc.,  
Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100507.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY  
DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **DANICE ARBOR**, Esquire, for Complainant,  
Immigration and Naturalization Service  
**EDWARD BELL**, Pro Se, Respondent.

Procedural History and Statement of Relevant Facts

On June 28, 1989, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on American McNair, Inc. The Notice of Intent to Fine, in Counts numbered I and II, alleged violations of Sections 274A(a)(2), and 274A(a)(1)(B) of the Immigration and Nationality Act (the Act). In a letter dated July 5, 1989, Respondent, through its Secretary, Angeline J. Bell, requested a hearing before an administrative law judge.

The United States of America, through its attorney John B. Bartos, filed a Complaint incorporating the allegations in the Notice of Intent to Fine against Respondent on September 29, 1989. On October 6, 1989, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the administrative law judge in this case and setting the hearing place at, or around Los Angeles, California, on a date to be determined later.

Respondent answered the Complaint on October 30, 1989, relying on a ``good faith'' defense for each allegation. On October 31, 1989, I issued an Order Directing Procedures for Pre-hearing, and on December 20, 1989, I issued an Order Confirming the Pre-hearing Tel-

ephonic Conference held on December 13, 1989, and Setting Hearing Date for April 10, 1990, in or around Los Angeles, California.

On February 23, 1990, Complainant, through its Attorney, Donna Rusnak, filed a Motion For Summary Decision, stating no genuine issues of material fact existed. On March 16, 1990, I issued an Order Confirming Pre-Hearing Telephonic Conference held on March 13, 1990, granting Respondent's request to extend the time for filing a response to the Motion for Summary Decision, and continuing the hearing date to May 1, 1990.

On March 20, 1990, Respondent filed a Motion for Telephonic Conference. Respondent filed a response in Opposition to Motion for Summary Decision on March 20, 1990, asserting the existence of genuine issues of material fact.

On March 30, 1990 I issued my third Order Confirming Pre-Hearing Telephonic Conference, held that date, in which I scheduled the hearing for May 1-3, 1990, in Santa Ana, California.

On April 9, 1990, Complainant, through its Attorney Donna Rusnak, filed a Reply to Respondent's Opposition to Motion For Summary Decision. Respondent filed an undated Motion For Extension of Hearing Date, which I received on April 17, 1990.

I then granted Respondent's request to extend the hearing date and scheduled the hearing for July 10-12, 1990, in Santa Ana, California. Respondent then filed a Motion for Continuance of Hearing on April 25, 1990. On May 5, 1990, Respondent filed an Amendment to Opposition to Motion for Summary Decision, including an Affidavit of Angeline J. Bell.

After careful consideration of the documents before me, I conclude that no genuine issue of material fact exists as on Count II and that Complainant is entitled to partial summary decision as to liability on Count II as a matter of law. I further conclude that a genuine issue of material fact exists as to the knowledge of Respondent regarding the status of Marciano Alvarez and, therefore, Complainant is not entitled to summary decision on Count I as a matter of law.

#### Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding, set out at 28 C.F.R. Section 68, 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.'' See 28 C.F.R. Section 68.36 (1988).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any materi-

al fact. 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. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). Also see, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

#### Legal Analysis Supporting Decision

Complainant argues in its Memorandum in Support of Motion for Summary Decision that the pleadings and discovery establish that no genuine issue of any material fact exists and that the Complainant is entitled to summary decision as a matter of law on Counts I and II.

Complainant submits that Respondent admitted hiring Marciano Alvarez in its Answer, as well as in its responses to Complainant's First Set of Requests For Admissions. Complainant further submits that Respondent signed an Application for Alien Employment Certification (Form ETA 750) on March 22, 1988 and a Petition for Prospective Immigrant Employee (Form I-140) on January 13, 1989 on behalf of Alvarez.

Respondent argues that Marciano Alvarez was in the process of obtaining authorization to work in the United States, and that Respondent was unaware of the meaning of ``E.W.I.'' (entered without inspection), contained on the applications prepared on behalf of Mr. Alvarez. He further argues that he did not clearly understand the applicable immigration laws and did not have the constructive knowledge, let alone the actual knowledge, necessary for a violation of Section 274A(a)(2) of the Immigration and Nationality Act. Despite Complainant's strong argument to the contrary, I nonetheless conclude at this time that a genuine issue as to the material fact of the knowledge of Respondent, concerning the status of Mr. Alvarez, does exist and, therefore, Respondent is not entitled to summary decision as a matter of law. See, 28 C.F.R. Section 68.17(d).

Regarding Count II of the Complaint, Respondent does not deny that Sergio Garcia Torres, Dona Lou Strader, and Thomas J. Singleton were employees of American McNair, hired after November 6, 1986. Nor does Respondent deny that the Forms I-9 for these three employees were not complete at the time of the INS audit on May 1, 1989. Respondent argues that the failure to fully complete these forms was a clerical error, due in part to the INS audit taking place sooner than Respondent expected. It is clear and uncontradicted by Respondent that Respondent failed, as alleged in Count II of the Complaint, to complete the employment eligibility Forms I-9 within three business days of hire. Therefore, I conclude

that Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1324a(b)(1).

Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, memoranda and supporting documents submitted in support of the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determine that no genuine issues as to any material facts have been shown to exist with respect to the issue of liability on Count II. Therefore, Complainant is entitled to a partial summary decision as a matter of law pursuant to 28 C.F.R. Section 68.36.

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 Count II without complying with the verification requirements in Section 1324a(b)(1) and 8 C.F.R. Section 274a.2(b)(1)(ii).

3. That, the Court will keep jurisdiction of this matter to make a determination as to Count I and as to the civil penalties to be imposed.

**IT IS SO ORDERED:** This 9th day of May, 1990, at San Diego, California.

E. MILTON FROSBURG  
Administrative Law Judge