

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

United States of America, Complainant, vs. Alvand, Inc. d/b/a ;410 Diner, Respondent; 8 U.S.C. § 1324a Proceeding; OCAHO Case No. 90100201.

**DECISION AND ORDERING GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION**

Procedural Facts

A Complainant Regarding Unlawful Employment was filed against Respondent Alvand, Inc. d/b/a 410 Diner on June 22, 1990. The Complaint alleges five causes of actions arising under the Immigration Reform and Control Act of 1986 ('IRCA') against the Respondent.

The first cause of action alleges that Respondent has violated IRCA's paperwork requirements [8 U.S.C. § 1324a(a)(1)(B)] by failing to complete, retain and produce employment verification forms ('I-9's) for fifty-eight (58) of its current and former employees. The second cause of action alleges that Respondent has further violated 8 U.S.C. § 1324a(a)(1)(B) when it failed to timely complete the I-9s for three (3) of its employees within 3 business days from the date of hire. The third cause of action alleges additional paperwork violations by the Respondent due to its failure to ensure the proper completion of part 1 of the I-9 forms by three of its employees. The fourth cause of action alleges that the Respondent has failed to properly date the I-9 form for one of its employees. The fifth and final cause of action alleges Respondent has failed to properly complete part 2 of the I-9s for two of its employees in violation of IRCA.

Respondent filed an Answer to the Complaint on July 19, 1990. In its Answer, the Respondent denied that it had violated any IRCA provisions. It also advanced three 'affirmative defenses'. The first of the claimed defenses alleges Respondent's good faith compli-

ance with IRCA. This defense was struck from the pleadings by an order issued from this tribunal on December 3, 1990. Respondent's second defense alleges what appears to be a claim of ``vindictive prosecution''. Respondent's third ``affirmative defense'' alleges that the amount of fines sought by the Complainant in this case is excessive.

On January 25, 1991, Complainant filed a Motion for Partial Summary Decision in this matter. In its Motion, Complainant seeks a favorable summary adjudication with respect to each and every liability issue contained in this case. However, the Complainant is not seeking an adjudication of the penalty issue in its Motion.

Legal Standards Applicable in Summary Decision Proceedings

Administrative law judges are empowered to issue summary decisions in IRCA proceedings by the authority of 28 C.F.R. § 68.36. The intent of this regulatory section is similar to Rule 56 of the Federal Rules of Civil Procedure. Both the regulation and Rule 56 allow for the summary disposition of issues and cases where there does not exist any disputes of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if it controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2506, 2510 (1986).

In summary adjudication proceedings, the moving party has the initial burden to establish there does not exist any issues of material fact and that it is entitled to judgment as a matter of law. See Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987). All reasonable factual inferences from the record must furthermore be resolved in favor of the nonmoving party. See Harbor Ins. Co. v. Trammell Crow Co., Inc. 854 F.2d 94 (5th Cir. 1988), certiorari denied 109 S.Ct. 1315, 103 L.Ed.2d 584. Once the moving party has met its initial evidentiary burden, the nonmoving party must then advance facts which demonstrate the existence of genuine factual issues in order to survive the motion for summary decision. Thus, the nonmoving party cannot rest upon conclusory statements contained in its pleadings. See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988).

Applying the above principles to Complainant's Motion, I find as follows:

Complainant's Factual Showing

A. First Cause of Action

Complainant has presented voluminous evidence to support its contention that it is entitled to a summary decision as to its first cause of action. Complainant's evidence consists of party admissions, documentary evidence, deposition testimonies and the sworn statements of several witnesses.

Such evidence clearly demonstrates that Respondent has failed to produce I-9s for fifty-eight (58) of its current and former employees who were hired after November 6, 1986. The Respondent has admitted this fact in its Answers to Complainant's Request for Admission.

However, Respondent claims an excuse for not producing the aforementioned employment verification forms. Respondent has apparently asserted that many of the I-9s in its possession have been destroyed or stolen during a burglary which occurred on July 16, 1989.

Complainant has addressed Respondent's burglary excuse in its instant Motion for Partial Summary Decision. However, it did not present any evidence which shows that this excuse is without basis. Complainant merely stated that nine of the fifty-eight employees were hired after the date of the alleged burglary. This is confirmed by a review of the Complainant's evidence.

In this summary decision proceeding, the Complainant has the initial burden to show the lack of any disputes of material fact. Furthermore, any disputes in factual inference must be resolved in the Respondent's favor.

Even a cursory inspection of the Complainant's Motion shows that Respondent's liability cannot be conclusively established with respect to forty-nine of the fifty-eight I-9s. This is because the burglary excuse may exonerate the Respondent as to those I-9s. Hence there remains a dispute of material fact.

As to nine of the fifty-eight I-9s, Complainant convincingly demonstrated that the Respondent failed to comply properly with IRCA's paperwork requirements. The Respondent did not dispute this assertion in its Answer to Motion for Summary Judgment. It only stated in a conclusory manner that these missing I-9s were either missing, stolen or were not prepared. Hence, there is no dispute of material fact on this aspect of Complainant's first cause of action.

Therefore, it appears that Respondent has violated IRCA's paperwork requirements as to nine of its employees. The nine employees

are: Brenda Barrows, April Coventry, Clare Crespo, Jennifer Henry, Ba Minh, James Puentes, Veronica Rendon, Marjorie Serrano, and William Steen Jr.

B. Second Cause of Action

In this cause of action, Complainant alleges that Respondent failed to complete the I-9s for three of its employees within three business days after the dates of their hire. In an effort to show that no dispute of material fact exists for this cause of action, Complainant presented documentary evidence, depositions and the sworn statements of witnesses. Complainant also presented photocopies of the three relevant I-9s.

On the face of the three I-9s, the Respondent appears to have timely completed the I-9 forms. This is apparently contrary to Complainant's assertions. However, the Complainant claims that Respondent in fact had backdated these three forms.

Complainant's evidence for the alleged backdating consists almost entirely of depositions and sworn statements. The most probative evidence presented by the Complainant on this charge consists of the depositions and sworn statements of the three employees whose I-9s are under consideration. While the Complainant's evidence is generally consistent, the Respondent argues that much of this evidence is untrustworthy for various reasons. In addition, Respondent has pointed to certain depositions which contradicted Complainant's assertions. But there is also some doubts as to the trustworthiness of Respondent's evidence in that they may or may not be characterized as self-serving statements. However that is not an issue in the current summary decision proceeding.

In the second cause of action, there appears to be a ``battle of depositions and sworn statements''. This ``battle'' may best be resolved during a hearing where the demeanors of the persons making the statements can be observed. A hearing will also afford the parties' counsels the opportunity to conduct cross examinations of the witnesses. I believe there exists a genuine dispute of material fact as to this cause of action. Therefore, I will not grant Complainant's Motion for Partial Summary Decision as to the second cause of action.

C. Third, Fourth & Fifth Causes of Action

The Complaint's remaining causes of action all relate to alleged improper completion of certain I-9 forms by the Respondent. The Complainant presented party admissions, documents, as well as depositions in support of its contention that no genuine issues of material fact exist as to these alleged IRCA violations.

Complainant's evidence are internally consistent and unequivocal. In particular, the photocopies of the relevant I-9s, which the Respondent already has admitted to be genuine reproductions, clearly show that they were improperly completed by the Respondent as alleged in the Complaint.

In its Answer to Motion for Summary Judgment, the Respondent did not present any evidence to counter the claims contained in Complainant's third, fourth and fifth causes of action. However, it now asserts that it has substantially complied with IRCA since only one or two blanks were not completed for each of the I-9s referred to in these three causes of action. The Respondent also claims substantial compliance on the ground that it did not hire any illegal aliens.

``Substantial compliance'' is defined as actual compliance with respect to the substance essential to every reasonable objective of the statute. See U.S. v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211, April 27, 1990 (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision). Prior OCAHO cases hold that ``substantial compliance'' may be an affirmative defense in paperwork cases. See U.S. v. Manos and Associates, OCAHO Case No. 89100130, February 8, 1990 (Order Granting in Part Complainant's Motion for Summary Decision). However such cases also clearly hold that employers' failure to sign or to copy the required information onto the I-9 forms do not constitute substantial compliance. U.S. v. Richfield Caterers, OCAHO Case No. 89100187, April 13, 1990 (Decision and Order) (IRCA's paperwork requirements are substantive in nature and cannot be defended by a claim of substantial compliance).

Here, the Respondent has been charged with failing to ensure that three of its employees state their employment status under penalty of perjury. It is also alleged that Respondent has failed to date one I-9 form, and that it failed to verify the employment eligibility for two of its employees in a proper manner. Such omissions do not in any way demonstrate that the Respondent has actually complied with every reasonable objective of the statute. Hence, this claim cannot prevent the issuance of a partial summary decision with respect to the third, fourth and fifth causes of action.

D. The Vindictive Prosecution Defense

The only other affirmative defense presented by the Respondent which is relevant to the issue of liability is its claim of ``vindictive prosecution'' by the INS in this matter.

``Vindictive prosecution'' is a constitutional defense based on alleged due process violations by government entities. In the typical ``vindictive prosecution'' claim, the party would allege that the government enhanced the charges pending against him in retaliation for his constitutionally protected activities. United States v. Napue, 834 F.2d 1311, 1329-1330 (7th Cir. 1987).

In the present case, the Respondent claims that the multiplicity of charges and the severity of fines assessed against it by the INS were measures imposed in retaliation for its prior complaint regarding an alleged illegal entry by the INS.

There is some question as to whether this tribunal can consider a defense based upon due process grounds. Despite this fact, it appears that the Respondent has presented insufficient factual evidence of ``vindictive prosecution'' in this case. In order to maintain this defense, Respondent must demonstrate two essential elements. It must first show that similarly situated persons did not face similarly severe charges and fines. It must also show that the INS' action in this matter was based upon an improper motive. See United States v. Aguilar, 871 F.2d 1436, 1474 (9th Cir. 1989); see also United States v. Napue, supra. Respondent has presented no factual evidence to support either of these elements.

It also does not appear that the Respondent has actively employed discovery tools to obtain evidence which may support its ``vindictive prosecution'' allegations. In cases where sufficient time for discovery has not produced evidence to support bare allegations, courts have granted summary decisions despite the existence of such allegations. See Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986). Hence, Respondent's ``vindictive prosecution'' defense is not sufficient to raise disputes of material fact which can preclude this tribunal from granting a partial summary decision in this case.

Findings of Fact and Conclusions of Law

Based upon the showing provided by the Complainant, I conclude:

1. That no genuine issues of material fact exist as to the allegations contained in the Complaint's first cause of action with respect to nine employees. Therefore, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) by failing to produce, for inspection, nine of its employees' employment verification forms. Complainant is thus entitled to a partial summary decision on its first cause of action as to the following nine employees:

- A. Brenda Barrows
- B. April Coventry
- C. Clare Crespo
- D. Jennifer Henry
- E. Ba Minh
- F. James Puentes
- G. Veronica Rendon
- H. Marjorie Serrano
- I. William Steen Jr.

2. That no genuine issues of material fact exist as to the allegations contained in the Complaint's third, fourth and fifth cause of action. Hence, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B) by failing to properly complete the employment verification forms of six of its employees. The six employees are: Ali Shamsi, Rodney Surber, Homero Arroyo, Julie McCormick, Rene Martinez and Carole McLaughlin. Complainant is entitled to a partial summary decision with respect to the above employees as a matter of law.

3. That Complainant is not entitled to partial summary decision as a matter of law with respect to the remaining allegations contained in the Complaint.

ACCORDINGLY, IT IS HEREBY ORDERED:

That Complainant's Motion for Partial Summary Decision is granted in part and denied in part.

Dated: February 21, 1991.

GORDON J. MYATT

Administrative Law Judge
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San Francisco, California 94103