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

July 24, 1996

ZELLEKA GETAHUN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00187
DUPONT MERCK PHARMACEUTICAL, Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *Background*

On October 24, 1994, the complainant, Dr. Zelleka Getahun, filed a Complaint against her former employer and respondent, The DuPont Merck Pharmaceutical Company, alleging discrimination based upon her Ethiopean national origin and her citizenship status, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324b, arising out of the termination of her employment by respondent on October 27, 1993.

That Complaint was filed following complainant's receipt of the July 25, 1994, determination letter of the United States Department of Justice's Office of Special Counsel (OSC) to the effect that respondent had not violated the provisions of IRCA in the course of having terminated her employment. That because complainant, as any asylee, had failed to timely file for and obtain a required work authorization document.

Complainant has affirmatively abandoned her national origin and citizenship status discrimination claims, leaving only her document abuse charge for consideration and decision.

More particularly, complainant alleges that in reverifying her employment eligibility, respondent requested to see her driver's license, an employment authorization document (EAD), and a receipt evidencing her application for permanent residency. To comply with those requests, complainant tendered her driver's license, a Memorandum of Decision and Order (asylum order) granting her asylum in the United States, along with receipts evidencing her applications for an EAD and permanent residency. Respondent nonetheless went forward with her termination.

Complainant seeks reinstatement of her former position as senior research chemist and backpay from October 27, 1993, together with attorney's fees.

Complainant alleges that respondent's request that she provide an EAD or receipt evidencing her application for permanent residency was made for the purposes of satisfying the requirements of 8 U.S.C. §1324(a)(b), and that that request was in effect a request for more or different documentation than is necessary for Form I–9 purposes, a document abuse practice which is proscribed by the 1990 amendments to IRCA, specifically those set forth at 8 U.S.C. §1324b(a)(6).

The choice of documents which a job applicant may present to a hiring person or entity in order to establish identity or work eligibility, or both, is exclusively that of the job applicant and not that of the hiring person or entity. At the risk of engaging in an unfair immigration–related employment practice, that of document abuse, the hiring person or entity may not refuse to accept documents which are facially valid nor may the hiring person or entity insist, as complainant has alleged, that a job applicant provide a specific document in order to establish employment eligibility. *U.S. v. Louis Padnos Iron & Metal Co.,* 1 OCAHO 414 (March 27, 1992); *U.S. v. A.J. Bart, Inc.,* 3 OCAHO 538 (July 15, 1993).

IRCA also makes it unlawful to "continue to employ [an] alien in the United States knowing the alien is (or has become)" unauthorized to accept that employment, *see* 8 U.S.C. §1324a(a)(2), and obligates an employer to reverify the employment eligibility of its employees not later than the date work authorization expires. *See* 8

C.F.R. §274a.2(b)(vii) (1993). If the employer has knowledge that an employee has become unauthorized and does nothing, that employer subjects itself to civil penalties. The Court of Appeals for the Ninth Circuit has held that "constructive knowledge" is enough to satisfy the knowing element of an illegal hire charge. *Mester Manfacturing Co. V. INS*, 879 F.2d 561 (9th Cir. 1989). In *Mester,* the court warned that "deliberate failure to investigate suspicious circumstances imputes knowledge." *Id.* at 567; *see also New El Rey Sausage Co. v. INS,* 925 F.2d 1153 (9th Cir.1991).[1]

The implementing regulations go further in defining the scope of constructive knowledge to include those situations in which an employer fails to complete or improperly completes Form I–9. *See* 8 C.F.R. §274a.1(l)(1)(i). The implementing regulations also provide a caveat that proscribes an employer from requesting more or different documents than are required under §1324a(b) of the Act, or from refusing to honor documents tendered that on their face reasonably appear to be genuine. *Id.* at §274a.1(l)(2). That because of Congress' concern that the employment eligibility verification scheme not be used for illegal discriminatory purposes.

An administrative law judge (ALJ) may require violators of IRCA's employment provisions to pay civil money penalties, and may issue a cease-and-desist order requiring future compliance with the statute. 8 U.S.C. §1324a(e)(4). A "pattern or practice" of employment violations may lead to criminal penalties. *Id.* at §1324a(f). A failure to adhere to the employment verification system, referred to as a "paperwork violation," will lead to a civil money penalty only, of a generally lesser amount than for an employment violation. *Id.* at §1324a(e)(5).

On November 22, 1994, respondent filed its answer to the Complaint. In that responsive pleading, respondent alleges that complainant's voluntary admission that her Immigration and Naturalization Service (INS) issued EAD had expired gave respondent constructive knowledge that complainant was not authorized to work in the United States. Respondent therefore requested complainant to complete Part 1 of Form I–9 and to provide any form of

[1] The Ninth Circuit has also noted that the doctrine of constructive knowledge must be sparingly applied in illegal hire cases so as to minimize the risk of liability and burden of compliance on employers. *See Collins Foods International, Inc. v. U.S. Immigration and Naturalization Service*, 948 F.2d 549, 555 (9th Cir. 1991). The Ninth Circuit's decisions are the only federal circuit precedent on this issue.

acceptable documentation so as to allow respondent to complete Part 2. The employer must ensure that the employee properly completes Section 1 of Form I–9. 8 C.F.R. §274a.2(b)(1)(i)(A). Respondent denies that complainant produced a driver's license, but avers that she produced, instead, an asylum order, which was determined to have been unacceptable for purposes of completing the Form I–9. In the belief that it was unable to meet its obligations under IRCA, respondent formally terminated complainant.

Respondent seeks dismissal of complainant's Complaint and an order granting its costs and attorney's fees.

On March 10, 1995, respondent filed a Motion for Summary Decision, along with a supporting memorandum and affidavits, in which it requested that, pursuant to the provisions of 28 C.F.R. §68.38a, summary decion be entered in its favor.

On April 10, 1995, complainant filed a Cross-Motion for Summary Decision, along with an affidavit and memorandum opposing respondent's motion and supporting her motion, in which complainant contends that she is entitled to judgment in her favor or, alternatively, that genuine issues of material fact exist which render the granting of respondent's dispositive motion inappropriate at this juncture.

On June 26, 1995, respondent filed a memorandum in opposition to complainant's cross-motion for summary decision.

On August 21, 1995, complainant filed a rebuttal memorandum.

On September 19, 1995, respondent filed a surrebuttal memorandum.

II. *Standards of Decision*

The rules of practice and procedure for administrative hearings before ALJs in cases involving allegations of unfair immigration-related employment practices provide for the entry of a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c).

Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, it has been held that case

law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this office. *Alvarez v. Interstate Highway Construction, 3 OCAHO 430 at 17 (1992).*

As to materiality, only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary decision. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. V. Zenith Radio,* 475 U.S. 574 (1986); *U.S. v. Lamont St. Grill*, 3 OCAHO 442 at 9 (1990).

One of the principal purposes of the summary decision rule is that of isolating and disposing of factually unsupported claims or defenses. However, a party seeking summary decision always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the movant has carried its burden, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 250.

III. *Discussion, Findings and Conclusion*

In filing this unfair immigration-related discrimination practice charge against respondent based upon document abuse, complainant relies upon the provisions of 8 U.S.C. §1324b(a)(1) and (6), which provide in pertinent part:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. {8 U.S.C. 1324b} (a) Prohibition of discrimination based on national origin or citizenship status.-
>
> (1) General rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual *(other than an unauthorized alien, as defined in section 1324a(h)(3) of this title*) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-(emphasis added)

* * * *

> (6) Treatment of Certain Documentary Practices as Employment Practices.-
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for *more or different documents than are required under such section or refusing to honor documents tendered* that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals. (emphasis added)

Before proceeding to a consideration of the parties' respective arguments for summary decision, it must be determined whether complainant has the requisite standing to assert a document abuse claim under §1324b(a). It is quite elemental that complainant must first show, by a preponderance of the evidence, that she was in fact an alien authorized to work in the United States at the time of the alleged discriminatory practice, i.e., that she was not an unauthorized alien. *See United States v. Strano Farms*, 5 OCAHO 748 (1995); *Huesca v. Rojas Bakery,* 4 OCAHO 654 (1994); *United States v. Guardsmark, Inc.,* 3 OCAHO 572 (1993); *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 861 (May 16, 1996). Complainant asserts that she has been work authorized at all relevant times to this dispute by dint of her status as an asylee.

IRCA defines the term "unauthorized alien" to mean "that the alien is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. §1324a(h)(3). Complainant does not assert in her Complaint or other responsive pleading that she was, at the time of the alleged discrimination, an alien lawfully admitted for permanent residence. We must therefore look to see if complainant was authorized to work under some other provision of the Immigration and Nationality Act of the United States (Title 8, Chapter 12 of the U.S. Code).

In the fall of 1990, the complainant applied for asylum pursuant to Section 208 of the Immigration and Nationality Act (INA). Under the then existing regulations, asylum applicants could simultaneously apply for interim employment authorization, 8 C.F.R. §208.7(a) (1993), and, unless the application was frivolous, such authorization was granted within 90 days for a period not to exceed one year. *Id.* at §274a.12(c)(8).

Complainant has indicated that her EAD expired in November 1991, and thus we can reasonably infer that she had applied for and was granted interim employment authorization in November 1990.

When complainant was initially hired by respondent on January 10, 1991, she had in hand and tendered her interim EAD.

Finally, we know that complainant was granted asylum on October 25, 1991, as evidenced by a Memorandum of Decision and Order issued by the Department of Justice.

Complainant argues, and correctly so, that upon having been granted asylum she was automatically granted employment authorization. However, the undersigned does not agree with complainant's further contention that she was not required to apply for and obtain a document from the INS evidencing such employment authorization or that the expiration of her interim EAD in November, 1991 was of no consequence. For this reason, complainant relies on the regulations relating to asylum procedures and those pertaining to IRCA. 8 C.F.R. §208.20 (1993) provided:

> When an alien's application for asylum is granted, he is granted asylum status for an indefinite period. Employment authorization is automatically granted or continued for persons granted asylum or withholding of deportation unless the alien is detained pending removal to a third country. Appropriate documentation showing employment authorization shall be provided by the INS.

Complainant's reliance and interpretation of this regulation concerning procedures for asylum is misplaced.

Initially, under IRCA regulations, an interim EAD issued while an asylum application is pending, pursuant to 8 C.F.R. §274a.12(c)(8), automatically expires on a date certain. This is confirmed by 8 C.F.R. §274a.14(a)(1)(i), which provides that work authorization granted pursuant to §274a.12(c) shall automatically expire upon the date specified on the EAD. While there is some room for disagreement, nothing in the language of the above-cited regulation suggests that an asylee need not affirmatively apply to INS to receive a replacement EAD once the interim EAD has automatically expired. Nor is there support for the contention that a grant of asylum extinguishes an interim EAD's expiration date and waives the requirement of obtaining a replacement EAD.

Indeed, the complainant does not disagree that a replacement EAD can easily be obtained at no charge to the recipient and that complainant had not in fact applied for such a replacement document on October 27, 1993.

In support of this interpretation, it is noted that 8 C.F.R. §208.20 was amended in 1994 and now plainly requires that an alien granted asylum, if intending to be employed, must apply to the INS for a document evidencing such authorization. The INS will issue an EAD within 30 days of the receipt of such an application.

Moreover, in order to determine obligations under IRCA, one must refer to the language of the statute and to the implementing regulations. In the event of a conflict between the regulations governing other portions of the INA and those pertaining to IRCA, the latter must be applied.

Turning then to IRCA's implementing regulations, they provide that an individual "*who seeks to be employed* in the United States, must apply to the Service for a document evidencing such employment authorization." 8 C.F.R. §274a.12(a) (1995) (emphasis added). This requirement applies to an "alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service." *Id.* at §274a.12(a)(5). There is no ambiguity in this language. Once complainant's interim EAD expired in November 1991, she was affirmatively obligated to obtain a new EAD.

Based on the foregoing, it is found that in order to accept employment in the United States incident to her status as an asylee, complainant was required to have applied for and to have obtained INS-issued work authorization. *Id.* Respondent has admitted that her interim EAD expired in November 1991. It is undisputed that complainant did not apply for or receive a replacement document evidencing her work authorization. Therefore, as she lacked INS-issued documentation evidencing her work authorization, she was not eligible to accept employment in the United States, and thus was not eligible for the document abuse protections of IRCA set forth at 8 U.S.C. §1324b(a)(6).

In view of that finding, respondent's motion for summary decision must be granted.

Since respondent is the prevailing party in this proceeding, consideration of respondent's request for attorneys fees is in order.

Having found that complainant does not have standing to proceed with an immigration-related employment discrimination claim, that fact does not support a further finding that complainant's case was

so devoid of substantive merit that fee shifting should be ordered. The Supreme Court has held that a court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S. Ct. 694, 16 F.E.P. 502 (1978). It is found that complainant has not been shown to have instituted these charges without a reasonable basis in law and fact. Accordingly, respondent's request that it be awarded reasonable attorneys' fees is being denied.

Order

Having abandoned her claims of immigration-related employment discrimination based upon national origin and citizenship status, and as there is no genuine issue as to any material fact regarding complainant's document abuse claim, respondent's Motion for Summary Decision is hereby granted.

Further, complainant's October 24, 1994 Complaint alleging immigration-related employment practices based upon national origin, citizenship status, and document abuse discrimination, in violation of 8 U.S.C. §1324(b) is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.