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

November 25, 2020

UNITED STATES OF AMERICA, Complainant, v. R&SL INC., D/B/A TOTAL EMPLOYMENT AND MANAGEMENT (TEAM), Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 19A00044

ORDER ON MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

On August 7, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government) filed a complaint against Respondent, R&SL Inc., d/b/a Total Employment and Management (Team)(Respondent or the company). The complaint reflects that the government served a Notice of Intent to Fine on August 13, 2018, and Respondent thereafter made a timely request for hearing. Respondent filed an answer to the complaint and a motion to dismiss on September 23, 2019. Complainant filed a response to the motion to dismiss and motion to amend the complaint on September 30, 2019. Respondent filed a response to the motion to amend on October 17, 2019. On November 7, 2019, the undersigned granted the motion to amend the complaint and denied the motion to dismiss.

On July 24, 2020, Complainant filed a motion for summary decision. Respondent filed a response on August 24, 2020. On September 14, 2020, Complainant filed a reply to Respondent's response and on September 25, 2020, Respondent filed a letter-pleading asking the Court not to consider Complainant's reply.

The Amended Complaint asserts that Respondent, a family-owned staffing agency with offices in Oregon and Washington, violated sections 274A(a)(1) and/or (2), and 274(a)(1)(B) of the Immigration and Nationality Act, 8 US.C. §§ 1324A(a)(1) and/or (2) and (a)(1)(B). Complainant seeks $2,691,518.15 in penalties for violations involving 1,853 employees. In support of the motion, Complainant submitted twelve group exhibits consisting of, among other things, an affidavit from ICE's Forensic Auditor, Sandra Hollcraft. Motion for Summary

Decision (Mot. Summ. Dec.) Ex. G-6. Respondent argues that the Complainant did not meet its burden of proof as to Count 1, there is a genuine issue of material fact as to Counts II and III, and Complainant did not sufficiently articulate the alleged violations in Count IV, nor do the violations demonstrate a lack of good faith. Opposition to Motion for Summary Decision (Opp'n). Respondent submitted 22 group exhibits in support of its opposition, including affidavits from Lovely Vasquez, its Payroll Manager and Randy Lustig, one of its owners. Opp'n, Ex. R-7 and 1.

II. STANDARDS

A. Summary Decision

"In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements." *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017).[1] The government also has the burden of proof with respect to the penalty and the government "must prove the existence of any aggravating factor by the preponderance of the evidence[.]" *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)) (internal citations omitted).

Under the Office of the Chief Administrative Hearing Officer (OCAHO) rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . 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. § 68.38(c).1 "An issue of fact is genuine only if it has a real basis in the record" and a "genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). Further, if the government satisfies its burden of proof, "the burden of production shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden[.]" *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Employment Verification Requirements

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *Metro. Enters.*, 12 OCAHO no. 1297 at 5. Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and employers must produce the I-9s for government inspection upon three days' notice. *Id.* at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii)). An employer must ensure that an employee completes section 1 of the I-9 on the date of hire and the employer must complete section 2 of the I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B). Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later. § 274a.2(b)(2)(i)(A).

"Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" *Metro. Enters., Inc.*, 12 OCAHO no. 1297 at 7 (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). As explained in *United States v. WSC Plumbing, Inc*., 9 OCAHO no. 1071, 11 (2001), dissemination of the Interim Guidelines to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. While this office is not bound by the Virtue Memorandum, the government is so bound, and failure to follow its own guidance is grounds for dismissal of those claims. *Id.* at 12. With respect to technical or procedural violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)-(B).

C. Good Faith Defense

In its answer, Respondent asserts that it complied with the I-9 requirements in good faith. Section 1324a(a)(6) provides that an entity is considered to have complied with the employment verification requirements notwithstanding a technical or procedural failure if the employer made a good faith attempt to comply. However, an employer cannot avoid liability under § 1324a(a)(1)(B) for technical or procedural verification failures if it fails to correct those failures within ten days after the date Complainant notifies the employer of the failure. *United States v. WSC Plumbing*, 9 OCAHO no. 1071, 2 (2001). A Notice of Technical and Procedural Failures generally serves as notice of such violations. Here, Respondent pleaded good faith as an affirmative defense in its Answer.

III. DISCUSSION

A. Complainant's Reply

On September 14, 2020, Complainant filed a reply to Respondent's opposition to the motion for summary decision. Complainant attached to the reply a declaration from ICE Auditor, Sandra Hollcraft. Complainant did not request leave to file the reply. On September 25, 2020, Respondent filed a letter-pleading arguing that Complainant did not seek leave to file the reply pursuant to the OCAHO rules and the reply improperly contains a new declaration. Respondent argues that a movant's alleged undisputed facts that it contends entitles it to summary decision should be included in the original motion, not in an improper reply.

Under the OCAHO rule regarding motions or requests, "[u]nless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed." 28 C.F.R. § 68.11(b). Complainant did not seek leave to file a reply and the undersigned did not otherwise permit Complainant to file a reply. Thus, Complainant's reply was filed in derogation of the OCAHO rules and is accordingly not considered. *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 1–2 (2019) (citing *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 1–2 (2012)).

B. Count I

Complainant originally alleged that Respondent knowingly hired or continued to employ two unauthorized workers. Complainant has withdrawn and seeks to strike the violation against one individual because the statute of limitations has run. Mot. Summ. Dec. at 8. As such, the violation related to one employee is STRICKEN. *See* Appx., Count I.[2] In support of its allegation regarding the remaining employee, Complainant asserts that Respondent knew the employee at issue was unauthorized for employment because Respondent received a Tentative Nonconfirmation (TNC) for this employee from E-Verify, there is no evidence that Respondent took any action to notify the employee of the TNC, and Respondent continued to employ him. Mot. Summ Dec. Ex. G-6 ¶11. Complainant asserts that the employee was unauthorized because it found that the social security number he provided was issued prior to his own date of birth, and was assigned to another person. *Id.*

Respondent argues that Complainant failed to establish that it knowingly hired or continued to employ an unauthorized worker. Respondent argues that Complainant has not provided evidence to show that the employee was unauthorized, as the evidence only shows that the social security number on the employee's I-9 belonged to someone else. Opp. at 7. Respondent also argues that the number on the employee's I-9 matched the number on the social security card he provided to verify his employment eligibility, so Respondent properly completed his I-9. *Id.* Additionally, Respondent argues that a TNC is not constructive notice that an individual is not authorized to work in the United States, citing the E-Verify Manual, ICE's guidance regarding No-Match

[2] *See* Appendix for a list of all names, violations, and determinations based on Complainant's request to strike and this Court's rulings.

letters from the Social Security Administration, and Ninth Circuit case law. *Id.* at 8-9. Respondent concludes that constructive notice must be narrowly construed and the determination must be based on the totality of the circumstances. *Id.* at 9. Respondent concludes that such a narrow construction not only preserves the delicate balance erected by IRCA's enforcement and discrimination provisions, but preserves employers' incentive to voluntarily participate in E-Verify, which would not be the case if a TNC from E-Verify is automatically construed to be constructive knowledge of an employee's unauthorized status. *Id.* at 11.

Section 1324a(a)(2) makes it "unlawful for a person or other entity . . . to hire or continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Knowing "includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(l)(1); *see United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8-9 (2015). The regulation explains that constructive knowledge may include situations where an employer fails to complete or improperly completes the I-9 Form; the employer "has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf." § 274a.1(l)(1); *see also United States v. Muniz Concrete and Contracting, Inc.*, 12 OCAHO no. 1278, 8–9 (2016).

Regarding Complainant's assertion that the employee in Count I was an unauthorized worker, Complainant provided printouts of its database search results, a record related to the employee at issue showing that he was issued a driver's license without a social security number, and the declaration of Hollcraft. Mot. Summ. Dec., Ex. G-6 at 3; Ex. G-8 at 19–21. The declaration and records provided only show that the social security number on his I-9 form does not belong to the employee at issue. OCAHO has found that a social security mismatch alone is not evidence that an employee is unauthorized to work in the United States. *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 16 (2016). OCAHO cautiously approaches the question of a worker's status when the worker has not had notice and an opportunity to present alternative employment documents. *Id.* As discussed below, the employee at issue did not have notice and an opportunity to challenge the social security information mismatch or present alternative documents. Thus, Complainant did not meet its burden to prove that the employee in Count I was unauthorized to work in the United States.

Additionally, regarding the knowing element of Complainant's claim, Complainant does not allege that Respondent had actual knowledge that the employee was unauthorized. Complainant points to Hollcraft's declaration, which includes a legal conclusion that Respondent had constructive knowledge of the employee's unauthorized status. This conclusion appears to be based upon the TNC, which is the only evidence of the employee's status as the driver's license does not include a social security number. As noted above and below, this is insufficient evidence of constructive knowledge.

The Ninth Circuit, the circuit in which this case arises, has found that "constructive knowledge" must be narrowly construed. *Aramark Facility Servs. v. Serv. Employees Intern. Union*, 530

F.3d 817, 825 (9th Cir. 2008); *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 55455 (9th Cir. 1991). OCAHO case law explains that "constructive knowledge may be found when an employer receives specific information from a governmental enforcement agency that casts doubt on the employment authorization of an employee, and the employer subsequently continues to employ the individual without taking adequate steps to reverify the individual's employment eligibility." *United States v. Associated Painters, Inc.*, 10 OCAHO no. 1151, 4–5 (2012). For example, OCAHO has found that an employer knowingly continued to employ an unauthorized worker because the employer continued to employ the individual after a government agent told the employer that the employee was unauthorized. *United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 223–24 (1994). The Ninth Circuit found a knowing continuing to employ violation when the employer continued to employ employees after the Immigration and Naturalization Service (INS) sent the employer a letter stating that the employees at issue used documents that did not pertain to them and might be unauthorized to work in the United States. *United States v. Noel Plastering and Stucco, Inc.*, 3 OCAHO no. 427, 296, 298–300 (1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1993); *see also United States v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 398, 408–11 (1989) (finding constructive knowledge when there was an INS letter stating that two employees were not authorized to work and an INS official's separate statement to the employer confirming they were not authorized); *modified on other grounds* by CAHO, 1 OCAHO no. 78, 542 (1989)).

In *Collins Food Int'l*, the Ninth Circuit considered whether an employer knowingly hired an unauthorized worker when the unauthorized worker presented a fraudulent social security card to satisfy the I-9 requirements. Regarding constructive knowledge, the *Collins* Court explained that the IRCA "is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens." *Id.* at 554. The Court further explained that "the doctrine of constructive knowledge has great potential to upset that balance and it should not be expansively applied." *Id.*at 554–55. The Ninth Circuit found that the employer did not have constructive knowledge because the employer did not have "positive information" that the employee was undocumented. *Id.* at 555. The Ninth Circuit distinguished *Collins* from other cases in which the Court found the employer had constructive knowledge because the INS specifically visited the employer and notified it that its employees were suspected unlawful aliens and should be terminated if inspection of their documents did not allay the concerns. *New El Rey Sausage*, 925 F.2d 1153, 1155 (9th Cir. 1991); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 564 (9th Cir. 1989).

In *Aramark Facility Servs. v. Service Employees Intern.*, 530 F.3d 817 (9th Cir. 2008), the employer received letters from the Social Security Administration (SSA) notifying it that the social security numbers of some of its employees did not match those in the SSA's database. *Id.* at 821. The Ninth Circuit found that "[g]iven the narrow scope of the constructive knowledge doctrine, the 'no-match' letters themselves could not have put Aramark on constructive notice that any particular employee mentioned was undocumented." *Id.* at 826. The Ninth Circuit reasoned that the SSA routinely sends no-match letters when an employee's W-2 records differ from the SSA's database regarding an employee's social security number. *Id.* The purpose of the letters are wage-based, rather than immigration related. *Id.* The court explained that social security no-match letters can be generated "for many reasons, including typographical errors, name changes, compound last names prevalent in immigrant communities, and inaccurate or

incomplete employer records." *Id.* Thus, a social security number "discrepancy does not *automatically* mean that an employee is undocumented or lacks proper work authorization." *Id.* Thus, the court held that the "no-match" letters are not intended by the SSA to contain "positive information" of immigration status, and could be triggered by numerous reasons other than fraudulent documents, including various errors in SSA's . . . database. Indeed the letters do not indicate that the government suspects the workers of using fraudulent documents. . . . Without more, the letters did not provide constructive notice of an immigration violation." *Id.* at 828-9. In this case, after the employee completed his I-9 form, Respondent entered the employee's information into E-Verify and received a TNC on February 24, 2016. Simultaneously, E-Verify issued a Further Action Notice (FAN) which stated that the reason for the notice was because the "[Social Security number] did not match: The name and/or date of birth entered for this employee did not match Social Security Administration records." Mot. Summ. Dec., Ex. G-8 at 005.

A TNC means that the information entered into E-Verify does not match records available to the SSA and/or the Department of Homeland Security. Dept. Homeland Security, E-Verify Manual, 3.3 Tentative Nonconfirmation, https://www.e-verify.gov/e-verify-user-manual-30-case-results/33-tentative-nonconfirmation-tnc. Similar to the No-Match letters in *Aramark*, the E-Verify Manual explains that a TNC with the SSA can result for a variety of reasons including, the employee's citizenship or immigration status was not updated with SSA; the employee did not report a name change to SSA; the employee's name, Social Security number and/or date of birth are incorrect in SSA records; SSA records contain another type of mismatch; or the employer entered the employee's information incorrectly in E-Verify. *Id.* The E-Verify Manual states, "Employers may not terminate, suspend . . . or take any other adverse action against an employee because the employee received a TNC, until the TNC becomes a Final Nonconfirmation." *Id.* Further, the E-Verify Manual states, "If the employee chooses not to take action on the TNC, the employer may terminate employment with no civil or criminal liability . . . The case can be treated as a Final Nonconfirmation and the employer should close the case in E-Verify." *Id.*

The E-Verify Memorandum of Understanding with Employers further instructs that when E-Verfiy issues a TNC "[t]he Employer must promptly notify employees in private of the finding and provide them with the notice and letter containing information specific to the employee's E-Verify case . . . The Employer agrees to provide written referral instructions to employees and instruct affected employees to bring the English copy of the letter to the SSA. The Employer must allow employees to contest the finding, and not take adverse action against employees if they choose to contest the finding, while their case is still pending." E-Verify MOU at 3, para. 12 (6/10/2013). Further, the MOU states, "the Employer agrees not to take any adverse action against an employee based upon the employee's perceived employment eligibility status while SSA or DHS is processing the verification request unless the Employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(*l*)) that the employee is not authorized to work." *Id.* at 3 para. 13. The MOU specifically states that "an initial inability of the SSA or DHS automated verification system to verify work authorization [or] a tentative nonconfirmation . . . does not establish, and should not be interpreted as, evidence that the employee is not work authorized. In any of such cases, the employee must be provided a full and fair opportunity to contest the finding, and if he or she does so, the employee may not be terminated or suffer any adverse employment

consequences based upon the employee's perceived employment eligibility status . . . until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued." *Id.*

Complainant argues that the employee received a TNC and Respondent did not take appropriate action after the TNC; therefore, Respondent knowingly continued to employ the employee. Respondent contends that it attempted to contact the employee several times after receiving the FAN, but could not get ahold of him. Respondent contends that it did not terminate the employee because there was no Final Nonconfirmation. Respondent provided the affidavit of its Payroll Manager, Lovey Vasquez. Opp'n, Ex. R-7. Vasquez states that the employee at issue was terminated on April 16, 2016, and on September 14, 2016, "it was brought to our attention that he must be E-Verified. The report stated he needed to take further action regarding this matter. The Spanish and English version of the report was printed and mailed to his address . . . on September 14, 2016. He was called 3 times on September 20, 2016 to confirm he received the information, but he never returned [Respondent's] calls. I do not recall TEAM ever receiving any Final Nonconfirmation notice for [this employee]." *Id.* at 5.

There is no dispute that the TNC was issued in February 2016, and Respondent failed to take action required as it did not attempt to notify the employee of the TNC until September 2016, after the employee was terminated. Since Respondent did not take any action until September 2016, the evidence shows that the employee's E-Verify status remained a TNC. As stated in both the MOU and the Manual, the TNC does not establish, and should not be interpreted as evidence that the employee is not work authorized, and the employer cannot take any adverse action against an employee while their status is a TNC, unless the employee opts not to contest the TNC. E-Verify MOU at 3, para. 13. Here, since Respondent did not inform the employee of the TNC, the employee did not get the opportunity to choose whether to contest the TNC. The MOU indicates that if the employee does not contest the TNC, E-Verify will issue a Final Nonconfirmation. E-Verify MOU at 3, para. 13. An employer may terminate an employee if there is a Final Nonconfirmation. There is no evidence that E-Verify issued a Final Nonconfirmation; thus, Respondent appeared to be in a difficult position as it did not follow the rules initially, but the employee's E-Verify status remained a TNC and Respondent could not terminate him both pursuant to the program, and because he had already departed.

The Court acknowledges that Respondent did not follow the E-Verify Manual requirements, the MOU requirements, and the instructions on the TNC. However, based on the totality of the circumstances, narrowly construing constructive knowledge, and considering all of the E-Verify instructions stating that an employer cannot terminate an employee until there is a Final Nonconfirmation, the Court finds that there is no issue of material fact. Complainant did not establish that Respondent had constructive knowledge that the employee in Count I was unauthorized to work in the United States. Nor did Complainant prove that the employee at issue was unauthorized to work in the United States. Thus, Complainant did not establish that Respondent knowingly hired or continued to employ an unauthorized worker. As such, the violation alleged in Count I is DISMISSED.

C. COUNT II

In the Complaint, Complainant alleges that Respondent failed to prepare and/or present I-9s for 518 employees. In its Motion, Complainant seeks to strike five violations. Complainant's request to strike five violations is GRANTED and those five violations are DISMISSED. Thus, Complainant contends that Respondent is liable for the remaining 513 violations. Complainant provided employee records and quarterly tax reports as evidence that Respondent did not prepare and/or present I-9s for these 513 employees.

Respondent contends that there is an issue of material fact regarding whether it provided I-9s for the employees at issue. Respondent contends that the Notice of Inspection required Respondent to provide I-9s for its employee within three days of the date it was served. Respondent asserts that it has several offices in Washington and Oregon, and its I-9s were located in the employees' files in those different locations. Respondent contends that because it only had three days to produce 4,000 I-9s to Complainant, it did not have time to make copies, and it provided Complainant with its original I-9s. Respondent's payroll manager, Lovey Vasquez, states that Complainant told her that "the original I-9's belong to and were the property of the government, we had to quickly turn them over to the government, the original I-9's would be returned to us, and we would be fined if these were delivered late. She said she would send us a receipt once she . . . received our original I-9's." *Id.* at 1. Contrary to its normal practice in which Complainant provides an itemized receipt including a list of every I-9 provided, Complainant provided a receipt that stated "3 large boxes of original Forms I-9 . . . All other subpoena items provided via email on 9-20-2016." Opp'n, Ex. R-8.

Vasquez claims that she drove to each location, and after gathering all of the files, "[w]e used the alphabetized Employee New Hire Report to mark each person off the list as we pulled their I-9 and placed into boxes for shipment to ICE. I remember checking off each person with either a pencil or pen, off the list." Opp'n, Ex. R-7 at 1–2. She further states that she recalls "checking off all the employee names on the [Employee New Hire Report], sending ICE a I-9 form for each person on the list, and I was surprised when a few years later, I learned that ICE said TEAM failed to produce I-9s for more than 500 employees– almost a quarter of the names on the list." *Id.* at 2.

Finally, Respondent contends that Complainant agreed to strike the five above-mentioned I-9s because Respondent pointed out that it did provide I-9s for those five individuals. Thus, Respondent contends that construing the facts in the light most favorable to Respondent, there is an issue of material fact regarding whether Respondent did provide I-9s for the employees listed in Count II and Complainant did not find them among the 4,000 I-9s that Respondent provided. In support of its contention that Respondent failed to prepare and/or present I-9s for the 513 individuals, ICE provided a portion of Respondent's quarterly tax reports containing the specific employee's name, and/or a portion of Respondent's employee list pertaining to the employee. *See* Mot. Summ Dec., Ex. G-9. In addition, Hollcraft states in her declaration, "I reviewed weekly payroll reports and the quarterly reports provided to determine if any Forms I-9 were missing. In total, I initially determined that the company had failed to prepare or present 518 Forms I-9 that fell within retention requirements . . . Subsequent to filing of the Complaint, ICE determined that issues regarding naming conventions resulted in the erroneous inclusion of five employees in this Count. With those five violations withdrawn, 513 violations remain in Count II." Hollcraft Decl. at 3. Complainant also cites to a chart it provided with its Amended

Complaint, which lists the employees, alleged violations, and provides notes detailing each alleged violation. *See* Mot. Am. Compl. 6-26. For these violations, it states that the Form I-9 was not provided. The chart does not detail how the author came to that conclusion, nor does it contain the author's name or a supporting affidavit. Only authenticated evidence may be considered on summary decision. *Villegas-Valenzuela v. United States*, 103 F.3d 805, 811 n.6 (9th Cir. 1996). Without the author's name or an affidavit authenticating the chart, the chart is not admissible as evidence. *Id.*; *see United States v. Carpio-Lingan*, 6 OCAHO no. 914, 5 (1997). Further, even if the chart was admissible, the chart appears to be Complainant's own assessment of the alleged violations, and the majority of the violations are evidenced by the actual I-9 forms presented.

Thus, Complainant's evidence for this Count consists of Hollcraft's statement above and portions of Quarterly Tax Reports and payroll reports that show that the employee worked for Respondent during the time period for which Respondent should have retained their I-9s. Construing the facts in the light most favorable to the non-moving party, the Court finds there is a genuine issue of material fact regarding whether Respondent provided the 513 I-9s in this Count. Vasquez's affidavit conflicts with Hollcraft's declaration and Complainant has not provided any other evidence that Respondent failed to present the 513 I-9s at issue.

D. COUNT III

Complainant originally alleged that Respondent failed to timely prepare and/or present I-9 forms for 276 employees.[3] In its motion, Complainant moves to strike sixty-one violations. As such, the sixty-one violations that Complainant identifies are STRICKEN. Thus, Complainant contends that the remaining 215 I-9s were not timely prepared and/or presented.

To timely complete the I-9 form, the employer must ensure that the employee completes section 1 of the I-9 within one day of the date of hire and the employer must complete section 2 of the I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B).

Respondent contends that there is an issue of material fact regarding the employees' hire dates because it is a staffing company and it is not clear when the date of hire is as it relates to the completion of the I-9. Respondent argues that as a staffing agency two dates are relevant to the hiring date: "(1) the date when an employee accepts an offer to be staffed and is entered into the assignment pool (earlier date); and (2) the date an employee is actually assigned to a job (later date)." Opp'n at 14.

Respondent cites 8 C.F.R. § 274a.2, which defines "hire" as "the actual commencement of employment of an employee for wages or other remuneration." Respondent states that the only guidance specific to staffing companies regarding the hiring date is buried in the E-Verify Frequently Asked Questions. E-Verify, https://www.e-verify.gov/faq/staffing-agencies-may-complete-form-i-9-once-an-employee-accepts-an-offer-and-is-in-an. The E-Verify FAQs state, "When completing Section 2 of Form I-9, staffing agencies may choose to use either the date a

[3] The names of the employees in Count III are listed in the Appendix.

new employee is assigned to their first job or the date a new employee accepts an offer and is entered into the assignment pool as the first day of employment." *Id.*

While Respondent's argument regarding the lack of guidance for staffing agencies when completing the I-9 form is well taken, there is no genuine issue of material fact based on the evidence. In support of its claim, Complainant provided the following: I-9 forms; relevant pages of Respondent's Monthly Payroll Records showing the employee's name, paycheck date, and number of hours worked for that paycheck; and pages of Respondent's Quarterly Reports. Mot. Summ. Dec. Ex. G-10. The evidence shows that for the 213 I-9s at issue, using the later date, the employees began working and receiving wages prior to completing section 2 of the I-9.[4]

Respondent points to the discrepancies in the hire dates listed on the I-9 versus the date the employees began working for wages, arguing that this discrepancy creates a genuine issue of material fact. Opp. at 14. Despite the hire date provided on the I-9, the payroll records and quarterly reports resolve any issue as to whether the Form I-9s were timely completed. The monthly payroll and quarterly reports show that 213 employees started work and received wages (the latest date possible) before section 2 was completed. A visual inspection of the I-9s and supporting documents revealed that Respondent failed to timely prepare I-9s for 213 employees listed in Count III.

However, Complainant did not establish violations related to two I-9s. Complainant named one employee twice in Count III, so Respondent will not be liable twice for one violation.[5] Secondly, the date on section 2 of one I-9 is dated the same day as the date of hire. Mot. Summ. Dec., Ex. G-10 at 870. Complainant's chart incorporated in the amended complaint indicates that ICE served a Notice of Technical and Procedural Violations on Respondent and included this I-9 claiming that the section 2 attestation date was one month after the hire date. Mot. Am. Compl. at 52. Complainant claims that, in response, Respondent's employee changed the attestation date to match the hire date. *Id.* However, as discussed above, the chart is not evidence. Hollcraft's declaration mentions requesting additional information about the discrepancies between the hire dates and the section 2 attestation dates, but she does not mention this specific violation and instead states that "the company's response to the date discrepancies was simply the statement 'authorized rep no longer employed.'" Mot. Summ. Dec., Ex. G-6 at 2. This I-9 did not contain such a notation, and instead, just has the initials "MC" near the attestation date. Mot. Summ. Dec., Ex. G-10 at 870. Complainant also did not provide a copy of the alleged Notice of Technical and Procedural Violations. Thus, Complainant did not provide any evidence that there was a discrepancy between the hire and section 2 attestation date on this I-9 or that Respondent changed the section 2 attestation date after Complainant notified it of a discrepancy. As such, Complainant did not prove a violation related to this I-9.[6]

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[4] The Violations Chart attached indicates Complainant's alleged hire date, and the date the employee records show that the employee received a paycheck (check date) when it does not match the listed hire date, or the date that the employee appeared on the quarterly report if it is prior to or near the time of the alleged hire date.

[5] Employee numbers 140 and 147 under Count III of Violations Chart. Appx.

[6] Employee number 234 under Count III of Violations Chart. Appx.

As such, two violations are DISMISSED because there is no issue of material fact as to whether Complainant can prove that Respondent failed to timely prepare these I-9s. Sixty-one violations are DISMISSED because Complainant has asked the Court to strike them based on the statute of limitations. Finally, there is no issue of material fact regarding the remaining violations. Complainant has established that Respondent is liable for 213 violations in Count III for failure to timely prepare and/or present I-9s.

E. COUNT IV

Complainant alleges that Respondent failed to ensure that the employees properly completed section 1 and/or that Respondent failed to properly complete sections 2 or 3 of the I-9s for 1,224 employees.[7] Complainant states that Respondent did not provide copies of any of the documents it reviewed to verify each employee's employment eligibility. Mot. Summ. Dec., Ex. G-6 at 1. Respondent contends that Complainant failed to state the specific violation for each of the I-9s at issue.

Complainant's chart, incorporated in the amended complaint, details Complainant's specific allegations regarding each violation. Additionally, a visual inspection of the I-9s reveals that 1,015 I-9s contain at least one substantive violation, including but not limited to, a missing or blank I-9 page, no employee attestation in section 1, no employer attestation in section 2, no check mark indicating work authorization status in section 1, no alien number listed or apparent, no section 3 reverification for employees whose work authorization expired, untimely completion of section 2 because the employer backdated the section 2 attestation, no or invalid List A, B, and/or C documents, and complete or partial missing expiration dates or document numbers for documents in section 2.[8]

1. Checked Wrong Box or Multiple Boxes in Section 1

On many I-9s, the employee checked more than one box or the wrong box in section 1. For most of these violations, the employee checked the U.S. citizen box in section 1, but provided their Lawful Permanent Resident card in section 2, or checked both the U.S. citizen and Lawful Permanent Resident box in section 1. OCAHO has found it is a substantive violation when the box(es) checked in section 1 are contradictory. *United States v. Ketchikan Drywall Servs.*, 10 OCAHO no. 1139, 15 (2011). "A lawful permanent resident may become a citizen, but no one can be both simultaneously." *Id.* Thus, this Court finds that the I-9s with a checkmark indicating the employee is both a U.S. citizen and Lawful Permanent Resident, and those indicating the employee is a U.S. citizen but provided a Lawful Permanent Resident card in section 2, contain substantive violations. Additionally, some checked both U.S. citizen and non-citizen national boxes in section 1. A person cannot be both a citizen and a non-citizen at the same time.

[7] See Appendix for specific violations.

[8] The Violations Chart in the Appendix details the substantive violation(s) contained in the Forms I-9.

Seven individuals checked the non-citizen national box, but provided a Lawful Permanent Resident card in section 2. The Form I-9 instructions narrowly define a non-citizen national as "[a]n individual born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad." USCIS Form I-9 at 4. The Form I-9 defines a lawful permanent resident as "[a]n individual who is not a U.S. citizen and who resides in the United States under legally recognized and lawfully recorded permanent residence as an immigrant." *Id.* A non-citizen national is not an immigrant, and therefore the checks are contradictory. *See Ketchikan Drywall*, 10 OCAHO no. 1139 at 15. Further, while the employees did not check the lawful permanent resident box in section 1, their Alien numbers were provided in section 2. Thus, Respondent is liable for seven violations when the employee checked the non-citizen national box, but provided a Lawful Permanent Resident card.

Finally, one individual checked the U.S. citizen box and the Lawful Permanent Resident box, but it appears that the employee attempted to correct the mistake as the checkmark for the U.S. citizen box is bolded, while the other is fainter. Mot. Summ. Dec., Ex. G-11 at 719. As such, Respondent is not liable for a violation related to this I-9.[9]

2. Backdated I-9s and Lack of Printed Name of Employer Representative

Complainant charged Respondent with backdating a number of Form I-9s. Complainant provided information related to hire dates of the employer representatives who signed section 2 of the allegedly backdated I-9s. Specifically, Complainant provided the I-9s or payroll information showing that the employer representatives were hired after the date of their section 2 signatures on the I-9s at issue. Mot. Summ. Dec., Ex. G-7. Based on the evidence of the representatives' hire dates, they could not have signed section 2 of these I-9s on the dates purported because they did not work for Respondent on those dates. Thus, the Court finds that many I-9s in Count IV were not timely completed because the section 2 attestation date predated the hire date of the employer representative who signed section 2. *See* Appx., Count IV.

Additionally, several I-9s lacked the printed name of the employee who signed section two, and that signature did not appear on other I-9s. OCAHO has held that when the employer representative fails to print their name in section two, the signature does not appear on other I-9s, and there is no indication who the signatory in section 2 is, the violation can be classified as substantive. *United States v. Agri-Systems*, 12 OCAHO no. 1301, 13 (2017). As such, the Court finds Respondent liable for substantive violations related to these I-9s.

3. Section 2 Attestation Signed With Signature Stamp

Further, Complainant claims that twenty-four I-9s contain a violation because section 2 was signed using one employee's, L.B., signature stamp.[10] Complainant provided examples of I-9s

[9] Employee number 230 under Count IV of the Violations Chart. *See* Appx.

[10] The Violations Chart in the Appendix includes a number next to each employee. The violations related to the signature stamp correspond to the following employees' I-9s: 16, 97,

that L.B. signed and those I-9s signed using her signature stamp. Mot. Summ. Dec., Ex. G-7h. Complainant contends that the handwriting in section 2 on the I-9s with the stamped signature does not match the handwriting on those I-9s that L.B. actually signed and therefore L.B. did not attest to reviewing the documents in section 2 on twenty-four I-9s. "A person or entity must attest under penalty of perjury on a Form I-9 that it has verified that an individual employee is not an unauthorized alien, and such attestation is manifested by either a handwritten or an electronic signature." *Agri-Systems*, 12 OCAHO no. 1301 at 13 (citing 8 U.S.C. § 1324a(b)(1)(A)). ICE's regulations provide that section 2 attestation must be signed "with a handwritten signature or electronic signature in accordance with 8 C.F.R. § 274a.2(i)." 8 C.F.R. § 274a.2(b)(1)(ii)(B). A stamp is not a handwritten signature. Further, the evidence shows that L.B. signed some I-9s with a handwritten signature, while other I-9s were signed using her signature stamp. A visual inspection reveals that the handwriting in section 2 of the stamped I-9s does not match the handwriting in section 2 of those with a handwritten signature. Thus, the Court finds Respondent did not properly complete the section 2 employer attestation on twenty-four I-9s when the employer representative signed section 2 with a stamp.

4. Issuing Authority and Document Description for List B or C Documents

Complainant alleges eight I-9s contain substantive violations based on the issuing authority entered in section 2 when the employee presented a birth certificate as a List C document.[11] Specifically, Complainant alleges a substantive violation because the employer did not include the state or county that issued the List C document. For all of these alleged substantive violations, the employer included "Department of Health" or "DOH" as the issuing authority. Second, Complainant claims that the List B document on one I-9 is missing the county or state that issued the identification document because under issuing authority Respondent wrote "Dept. of Corrections." Mot. Summ. Dec., Ex. G-11 at 3575. Complainant has not pointed to any authority that failure to include the state or county in the issuing authority for a List B or C document is a substantive violation. *See* Mot. Summ. Dec., Ex. G-11.

It is a substantive violation if the employer fails, in section 2, to "provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in section 2 of the Form I-9, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection[.]" Virtue Memorandum at 3. While the I-9 instructions provide that if the List B or C document is issued by a state entity, the employer should include the state that issued the document, Complainant has not pointed to any authority showing that a failure to include the state or county that issued the document is a substantive violation, rather than a technical or procedural violation. *See* USCIS, Instructions for Form I-9, at 8 (Oct. 21, 2019). Instead, it appears that Respondent complied in good faith with the employment verification requirements. As such, Respondent is not liable for the violations

132, 151, 219, 418, 553, 568, 580, 586, 706, 721, 753, 837, 865, 919, 962, 1088, 1097, 1105, 1144, 1150, 1189, 1196.

[11] The violations related to the issuing authority correspond to the following employees' I-9s: 157, 201, 446, 898, 1080, 1158, 1161, 1209 under Count IV of the Violations Chart. *See* Appx.

related to eight I-9s related to the absence of a portion of the issuing authority on List B or C documents.

Similarly, Complainant claims that one I-9 contains an incomplete document description or issuing authority. Mot. Summ. Dec., Ex. G-11 at 2073. However, reviewing the I-9, the I-9 contains both issuing authority and document name for both the List B and C documents. Complainant seems to take issue with the issuing authority and document descriptions names, but Complainant has not offered an argument or analysis showing that this I-9 contains a substantive violation. As such, Respondent is not liable for violations related to this I-9.[12] Additionally, Complainant argues that one I-9 contains an abbreviation in List B that Complainant does not recognize; therefore it is a substantive violation since Respondent did not provide Complainant with copies of the documents. Complainant does not provide any authority or argument as to why this should be considered a substantive violation. As such, Respondent is not liable for violations related to these two I-9s.[13]

5. List B document Not Issued By State or Outlying Possession of United States

Complainant also claims that one employee provided an invalid List B document because the document was not issued by a state or outlying possession of the United States.[14] The document at issue is titled "Job Corps ID." *See* Mot. Summ. Dec. Ex. G-11 at 3657. Jobs Corps is a program administered by the U.S. Department of Labor. U.S. Department of Labor, Job Corps, *available at* https://www.dol.gov/general/topic/training/jobcorps. List B documents are not limited to those issued by state entities, instead, the employee can present an "[i]dentification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address[.]" 8 C.F.R. § 274a.2(b)(1)(v)(B)(v); Handbook, 12.0 Acceptable Documents for Verifying Employment Authorization and Identity. Complainant did not establish that the identification card at issue lacked a photograph or the information required by ICE's regulation and Complainant did not establish that the identification card was not issued by a federal government entity. As such, Respondent is not liable for the violation related to this I-9.

6. List B Documents Allegedly Issued After Section 2 Completed

Complainant also claims that two I-9s were not timely completed because the List B document was not issued until after section 2 was completed.[15] In both instances, the employee presented identification cards issued by Washington State and the employer completed the required information in List B. Mot. Summ. Dec., Ex. G-11 at 462, 484. The information in List B does

[12] Employee number 662 under Count IV of the Violations Chart. *See* Appx.

[13] Employee numbers 662 and 1080 under Count IV of the Violations Chart. *See* Appx.

[14] Employee number 1157 under Count IV of the Violations Chart. *See* Appx.

[15] Employee numbers 149, 156 under Count IV of the Violations Chart. *See* Appx.

not state when the cards were issued and the identification cards are not attached. *See id*. Hollcraft's affidavit also states that Respondent did not provide photocopies of any of the employees' documents. Mot. Summ. Dec., Ex. G-6 at 1. Complainant has not shown that the List B documents were issued after the section 2 attestation date, and therefore, Complainant has not established a substantive violation related to these two I-9s.

7. Section 3 Reverification

Complainant claims that Respondent failed to complete the section 3 reverification on eight I-9s when Respondent rehired the employees. The I-9 Manual explains that if the employer rehires an employee within three years from the date the employer completed their previous I-9 form, the employer may either use that form or complete a new one. I-9 Manual, 5.2 Reverifying or Updating Employment Authorization for Rehired Employees. The I-9 Manual further provides instructions for completing section 3 if the employer chooses to use the employee's previous I-9 form. *Id.* Other than Complainant's own handwritten notes on the payroll records, Complainant did not provide any evidence that the employee had a break in employment triggering the section 3 requirement. For these violations Complainant provided the I-9 form and quarterly reports showing that the employee was employed at some point after completing the I-9, but nothing showing that the employee was terminated after completing the original I-9 and rehired later. Mot. Summ. Dec., Ex.G-11 at 216–17, 1229, 2289–90, 2522–23, 2804–07, 2808–12, 2821–2825, 3861–63. As such, Complainant did not establish that Respondent failed to complete section 3 on eight Forms I-9, because Complainant did not show that Respondent was required to complete section 3 on these I-9s.

8. Undated Signatures in Sections 1 and/or 2

Complainant argues that two I-9s contain substantive violations because the employee's signature and the employer's signature are not dated.[16] *Id.* Ex. G-11 at 2855–56, 3769. The Virtue Memorandum, which Complainant purports to follow and included as an exhibit, classifies the failure to ensure that the employee dates section 1 and the failure of the employer to date section 2 as technical or procedural violations. Virtue Memorandum at 4–5.[17] An employer may not be held liable for a technical or procedural violation without notice and an opportunity to correct it. *United States v. Forsch Polymer Corp.*, 10 OCAHO no. 1156, 3 (2012); *see* 8 U.S.C. § 1324a(b)(6). Thus, Complainant did not establish a substantive violation related to these two I-9s.

[16] Employee numbers 911 and 1191 under Count IV of the Violations Chart. *See* Appx.

[17] Complainant served a Notice of Technical and Procedural Failures. The Notice is not in the record, but based on Hollcraft's affidavit, and ICE's internal chart, the Notice of Technical and Procedural Failures only covered violations in Count III regarding timeliness violations, and did not notify or provide Respondent with the opportunity to correct the technical and procedural violations in Count IV. Mot. Summ. Dec., Ex. G-6; Mot. Am. Compl., Ex. Form I-9 Review Chart. There is no other evidence that Respondent had notice or an opportunity to correct the technical and procedural violations in Count IV.

9. Social Security Number in Section 1 Mismatch

Complainant also alleges a substantive violation related to one I-9 and alleges that the social security number entered in section 1 does not match the social security number on the List C document or the payroll records.[18] Mot. Summ. Dec., Ex. G-11 at 403. Complainant alleges that the number in section 1 belongs to a different employee who was hired on the same day, and speculates that the employer must have written the number in section 1. The Virtue Memorandum, which Complainant included as an exhibit, does not list the violation alleged as a substantive violation. *See* Virtue Memo. As discussed above, substantive violations are typically those that undermine the employment verification process, such as ensuring the employee signed the form or failing to review or complete the information required for List A, B, or C documents and copies of the documents are not attached. Virtue Memo. Appx. A. Technical or procedural violations include violations that can be corrected, like a missing date of hire or no business name or address in section 2. Virtue Memo. Appx. B. The Form I-9 at issue was otherwise properly completed and Respondent reviewed valid documents to confirm the employee's status. Additionally, the I-9 Handbook states that "Employees may voluntarily provide their Social Security number, or leave this field blank." Handbook for Employers, 3.0 Completing Section 1 of Form I-9. Thus, the employee is not required to enter their social security number in section 1. Complainant only speculates as to why this number is different from the employee's actual social security number and does not provide any argument as to why this violation should be considered a substantive violation. Based on the instructions in the Handbook and the Virtue Memorandum, the Court finds that Complainant did not prove the violation related to this I-9 was substantive, and Respondent complied in good faith with the I-9 requirements. Thus, Complainant did not establish a substantive violation related to one Form I-9.

10. Missing Section 1 or Illegible Section 1

Complainant claims the employee in one I-9 did not check the box in section 1. However, the I-9 at issue is missing page one, the only page provided does not contain the employee's name, and Complainant did not provide evidence to show that the I-9 provided belonged to the purported employee.[19] Mot. Summ. Dec. Ex. G-11 at 1203–04. Thus, the violation related to that individual's I-9 is dismissed. Similarly, section 1 of three I-9s are not legible, so the undersigned cannot definitively determine to whom section 1 corresponds and whether the I-9s contain a substantive violation.[20] *Id.* at 227, 265, 945. Thus, Complainant failed to establish a violation related to these four I-9s.

11. Section 1 Allegedly Missing Signatures or Printed Names

[18] Employee number 131 in Count IV of the Violations Chart. *See* Appx.

[19] Employee number 387 in Count IV if the Violations Chart.

[20] Employee numbers 74, 86, 305 in Count IV of the Violations Chart.

Additionally, Complainant alleges that three employees did not sign section 1 of their I-9s.[21] Mot. Summ. Dec. Ex. G-11 at 394, 1488. A visual inspection of these three I-9s reveals that the employees signed section 1, just in the wrong spot. *Id.* Complainant has not established that this is a substantive violation. Further, Complainant alleges a substantive violation because one I-9 lacks the employee's printed name in section 1.[22] Ex. G-11 at 2146. However, the name is printed in section 1, albeit not in the correct spot. The printed name matches the signature and the printed name in section 2. *Id.* at 2146–47. Thus, Complainant did not prove that this I-9 contained a substantive violation.

12. Employer Representative's Name Change

One employee, E.B., signed the employer attestation on many of the I-9s. Complainant alleges that E.B. backdated a number of I-9s because she changed her name from E.B. to E.E. in October 2015, but she used her new name, E.E., when she signed and dated a number of I-9s prior to October 2015. Some of the I-9s that were allegedly backdated contained other substantive errors, however, 178 I-9s did not contain another substantive error. Thus, Complainant seems to allege that these 178 I-9s were not timely prepared.

In support of its assertion, Complainant provides E.B.'s I-9 form in which the reverification section shows that she presented a driver's license reflecting her name change in October 2015, and Respondent's employee list and quarterly payroll reports, showing that her new name was not reflected on the reports until 2016. Mot. Summ. Ex. 7a, 7b.

Complainant presented a number of I-9s that E.B. signed using her original name before she was hired. She also signed one I-9 in 2013 using her new name, E.E. E.B. was hired in 2013 and on all other I-9s that year, she used her original last name, E.B. *See* Mot. Summ. Dec., Ex. G-11 Beginning in 2014 through 2015, she signed I-9s using both E.B. and E.E. Respondent did not specifically address this allegation.

Generally, OCAHO has found that an employer backdated I-9s when the signature in section 2 predates the employment of the employee who purportedly signed it on that date, or when the dates on the Form I-9 predate that version of the form. *U.S. v. Schaus*, 11 OCAHO no.1239, 8 (2014); *United States v. Immacuclean Cleaning Servs.*, 13 OCAHO no. 1327, 9 (2019). Complainant claims that E.B. backdated all forms I-9 prior to October 24, 2015, when she completed section 3 of her I-9 with her new identification reflecting her name change. *See* Mot. Summ. Dec., Ex. G-7 at 2. Complainant notes that Respondent's reports do not reflect the name change until 2016, even though she presented her new identification in 2015. *Id.* at 3.

The employee's updated I-9 only shows that E.B. completed her I-9 Form on that date. There is no evidence presented as to when she legally changed her name. While the use of both names, coupled with the date she changed her name on her I-9, as well as the fact that she did backdate a number of I-9s may raise an inference that she backdated forms in 2014 and 2015, in a motion

[21] Employee number 128, 479, 1106 of Count IV of the Violations Chart.

[22] Employee number 684 under Count IV of the Violations Chart.

for summary decision, all reasonable inferences must be drawn in favor of the non-moving party. Here, it is also possible that E.B. had informally changed her name, but had not obtained or brought in new identification, or that she referred to herself using both names.

Although Respondent has not produced any contradictory evidence, because inferences may be drawn for both parties, the Court finds a genuine issue of material fact as to whether E.B. backdated 177 I-9s between 2014 and 2015.

Nonetheless, Complainant provided one I-9 that E.B. signed in 2013 with her new last name.[23] This is the only I-9 she signed in 2013 with the new last name and the evidence shows that she signed all other I-9s in 2013 using her original last name, E.B., and some of those signatures predated her employment with Respondent. Thus, the Court finds that the I-9 related to one employee was not timely prepared because E.B. used her new last name in 2013, when she signed the employer attestation. As such, Complainant's motion for summary decision as to 177 violations in Count IV is DENIED.

Thus, the Court finds that Respondent is liable for failure to ensure proper completion of section 1 and/or failure to properly complete section 2 or 3 of I-9 forms for 1,015 I-9s employees. However, Complainant did not establish that Respondent is liable for 32 alleged violations in Count IV, and there is a genuine issue of material fact as to 177 violations.

IV. CONCLUSION

Complainant's Motion for Summary Decision is GRANTED IN PART and DENIED IN PART. Pursuant to Complainant's withdrawal of one violation in Count I, one violation in Count I is DISMISSED. Complainant did not establish that Respondent knowingly hired or continued to employ the remaining employee in Count I. As such, the violations in Count I are DISMISSED. Pursuant to Complainant's withdrawal of five violations in Count II, five violations in Count II are DISMISSED. The Court finds there is an issue of material fact in Count II regarding whether Respondent provided the remaining 512 I-9s to Complainant.

Pursuant to Complainant's withdrawal of sixty-one violations in Count III, sixty-one violations in Count III are DISMISSED. Complainant did not establish that Respondent failed to timely prepare two I-9s in Count III. Thus, summary judgment is denied as to two violations in Count III, and they are DISMISSED. Complainant established that Respondent failed to timely prepare and/or present 213 violations in Count III. As such, Respondent is liable for failing to timely prepare and/or present I-9 forms for 213 employees.

Complainant established that Respondent failed to ensure proper completion of section 1 and/or properly complete section 2 or 3 for 1,015 I-9 forms in Count IV. As such, Respondent is liable for failure to ensure proper completion of section 1 and/or failure to properly complete sections 2 or 3 for 1,015 employees.

[23] Employee number 152 under Count IV of the Violations Chart.

There is a genuine issue of material fact as to 177 violations in Count IV, thus Complainant's motion for summary dismissal is DENIED as to these violations. Complainant failed to establish a substantive violation related to 32 I-9 forms in Count IV. As such, 32 violations in Count IV are DISMISSED.

The Court will convene a prehearing conference as soon as practicable to schedule the remainder of the case.

SO ORDERED.

Dated and entered on November 25, 2020
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Jean King
Chief Administrative Law Judge