

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

GLORIA ONDINA-MENDEZ,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	Case No. 01B00045
SUGAR CREEK PACKING CO.,)	
Respondent.)	MARVIN H. MORSE Administrative Law Judge

ORDER DENYING MOTION FOR SUMMARY DECISION
(September 20, 2001)

I. BACKGROUND AND PROCEDURAL HISTORY

A. Procedural History

On August 14, 2000, Complainant Gloria Ondina-Mendez (Mendez) filed a charge against Sugar Creek Packing Co. (Sugar Creek) with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), alleging unfair immigration related employment practices in violation of § 274B of the Immigration and Nationality Act, codified as 8 U.S.C. § 1324b. The charge form specified “document abuse” as the alleged unfair immigration related employment practice. In an attachment to the charge form, Mendez claimed that she was discriminated against and fired from her job at Sugar Creek on July 24, 2000. Mendez explained in the attachment that her employment authorization card had expired; however, in the Temporary Protective Status (TPS) program, she could have an extension on her employment authorization until December 5, 2000. She also explained that she requested that the Immigration and Naturalization Service fax a copy of the “extension” to her, which she obtained and showed to Sugar Creek, but Sugar Creek told her she was fired unless she showed the employer an unexpired employment authorization card.

By letter dated December 21, 2000, OSC informed Mendez that its initial 120-day period to investigate the charge had expired, and that the investigation would be complete within 90 days. OSC informed Mendez that she may file her own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

By letter dated April 4, 2001, OSC informed Sugar Creek that it determined that there was insufficient evidence of reasonable cause to believe that Mendez had been discriminated against. Mendez filed her OCAHO complaint on March 1, 2001.

Mendez alleges that she was discriminated against because of her national origin and citizenship status, and that Sugar Creek fired her because her "employment permit" was expired and that Sugar Creek refused to accept her "receipt & letters and all evidence I had received from INS showing that my employment permit was being processed." The complaint alleges that Sugar Creek refused to accept the documents she presented to show she can work in the United States, i.e., her Kansas ID, documents faxed by the INS, money order stub, and notices of action and extension permits from the INS. She alleges also that Sugar Creek asked for more documents than required to show that Mendez was authorized to work in the United States by insisting on an employment authorization card. Mendez does not want to be re-hired, but seeks back pay.

On March 3, 2001, Sugar Creek timely filed an answer which denied that Mendez was discriminated against because of her national origin or citizenship status. Sugar Creek admitted that it terminated Mendez. Sugar Creek claims it terminated her because her employment authorization document (EAD) had expired and she failed to provide documentation to establish that she was a person whose EAD was automatically extended through December 5, 2000. Sugar Creek alleges it asked Mendez to provide her EAD showing that there were A-12 or C-19 notations on her form I-766, or the equivalent statutory citations for EADs issued on form I-88B. Sugar Creek explained that 65 Fed. Reg. 36719 (2000) [INS Notice No. 2065R-00] limited the automatic extension to Honduran nationals with employment authorizations bearing those notations. The Notice provides as follow:

In addition to extending the re-registration period, this notice extends until December 5, 2000 the validity of Employment Authorization Documents (EADs) that were issued to Honduran nationals (or aliens having no nationality who last habitually resided in Honduras) under the initial TPS designation and that are set to expire on July 5, 2000. To be eligible for this automatic extension of employment authorization, an individual must be a national of Honduras (or an alien having no nationality who last habitually resided in Honduras) who previously applied for and received an EAD under the initial January 5, 1999 designation of Hondurans for TPS. This automatic extension is limited to EADs bearing an expiration date of July 5, 2000 and the notation:

- "A-12" or "C-19" on the face of the card under "Category" for EADs issued on Form I-766; or,
- "274(A).12(A)(12)" or "274A.12(C)(19)" on the face of the card under "Provision of Law" for EADs issued on Form I-688B.

EFFECTIVE DATES: The extension of the TPS designation for Honduras is effective

July 6, 2000, and will remain in effect until July 5, 2001. The re-registration period began May 11, 2000 and will remain in effect until July 5, 2000. All EADs that were issued to Honduran nationals (or aliens having no nationality who last habitually resided in Honduras) under the initial Honduras TPS designation and that are set to expire on July 5, 2000 are automatically extended until December 5, 2000.

Sugar Creek denies that it refused to accept Mendez's receipt and letters and all evidence she received from the INS showing that the employment permit was being processed. Sugar Creek stated that the receipt provided by Mendez showed that she had submitted an I-765 for renewal of her EAD in May 2000 with the required fee, but the receipt did not show any notations described in INS Notice No. 2065R-00 concerning her EAD request. Sugar Creek also denies that it refused to accept the documents Mendez listed in her Complaint as the ones she provided her employer, and denies that it asked for too many or wrong documents than required to show authorization to work in the United States. Sugar Creek said that it accepted the documents, but requested that Mendez provide the documentation required under the Notice, i.e., showing the notations C-12 or C-19 or equivalent statutory citations, or a current employment authorization card.

Sugar Creek says it asked Mendez's sister, Idalia Mendez, also a Honduran national employee of Sugar Creek, to assist in determining whether Mendez had documentation which would show the required notations. Idalia Mendez told Sugar Creek that the INS has seized Mendez's EAD.

Sugar Creek allegedly contacted the INS whose representative "generally advised Respondent that the extension of stay for Honduran nationals did not automatically extend all work authorizations and specifically advised Respondent that Complainant did not have a current work authorization." Sugar Creek states that it reluctantly terminated Mendez after obtaining the INS advice because she could not establish that she was legally authorized to work in the United States.

Sugar Creek admits that Mendez was qualified for her job and was a good worker, and was terminated because she was unable to document eligibility to be employed in the United States. Sugar Creek's answer states that Mendez has an unqualified offer of re-employment contingent only upon providing appropriate documentation.

On July 18, 2001, Sugar Creek filed a motion for summary decision, with memorandum in support. Sugar Creek describes the same facts it provided in its answer. Sugar Creek argues that it is undisputed that Mendez had an EAD that expired on July 5, 2000, and that the documents provided by Mendez after her EAD expired, a copy of an application for renewal of her EAD and a copy of a receipt for an international money order to the INS for \$100.00, did not include the information required by the INS Notice No. 2065R-00. Sugar Creek acknowledges that at some point Mendez provided them with a copy of the Notice.

On August 31, 2001, after obtaining an extension of time to respond to the motion in order to obtain an attorney, Mendez by counsel filed a response to the motion for summary decision. Mendez argues that the undisputed facts show that her documentation reflected that she could work in the United States. Attached to the motion and memorandum are two employment authorization cards, one expired July 5, 2000, the other expired July 5, 2001. Mendez also attaches an affidavit in which she states:

Sugar Creek Packing Company asked me to provide evidence that I had the right to work in the United States. I presented to Sugar Creek Packing Company my identification card. My identification card is attached hereto as Exhibit A. Exhibit A reflects two identification card [sic] that I held. The first one was issued for June 5, 2000. [sic] The second was issued after that date.

Mendez argues that Sugar Creek fails to address the fact that her card includes the C-19 designation, proving that she was entitled to continue to work in the United States. Further, Mendez argues that the undisputed facts establish by a preponderance of the evidence that had Respondent examined the card, which Mendez claims Sugar Creek admits she submitted to it, Sugar Creek would have known that she had the appropriate status for the automatic extension.

II. SUMMARY DECISION

A. Standards for Summary Decision

Similar to Rule 56(c) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which provides for the entry of summary judgment in federal courts, OCAHO Rules authorize the ALJ to enter summary decision in favor of a moving party where the pleadings, affidavits, or other record evidence show that there is *no* genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c).

Only facts that might affect the outcome of the proceedings are deemed material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact must have a “real basis in the record” to be considered genuine. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Title 28 C.F.R. § 68.38(c) also assigns the relative burdens of production on a motion for summary decision. The moving party has the initial burden of identifying those portions of the complaint “that it believes demonstrates the absence of genuine issues of material fact.” *United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 932 (1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-35 (1986)). “The moving party satisfies its burden by showing that there is an absence of evidence” to

support the non-moving party's case. *Id.* The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.

The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and judicially-noticed matters. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). However, “[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for evidentiary hearing.” 28 C.F.R. § 68.38(e); *United States v. Valenca Bar & Liquors*, 7 OCAHO no. 995, 1104 (1998). As summarized in *Valenca Bar & Liquors*, on assessing the existence of genuine issues of material fact, all reasonable inferences should be drawn in favor of the non-moving party and if a genuine issue of material fact is gleaned from this analysis, summary decision is not appropriate. *Id.*

B. Discussion

The affidavits and other exhibits supporting Sugar Creek's motion and Mendez's response suggest conflicting issues of material fact.

Mendez asserts that she had C-19 status, which under the language at INS Notice No. 2065R-00, entitled her to an automatic extension of work authorization. The Mendez affidavit asserts that she presented her employment authorization card to Sugar Creek when it asked her to provide evidence that she was authorized to work in the United States, stating that a copy of the card is attached as an exhibit. However, prior to her response to Sugar Creek's motion, Mendez did not state she showed a card to Sugar Creek. In fact, her complaint lists the documents she showed to Sugar Creek when asked for evidence of her work authorization after July 5, 2000, and states that Sugar Creek asked for her card, claiming that by doing this Sugar Creek asked for too many or wrong documents than required to show she was authorized to work. The exhibit includes two authorization cards, one that expired July 5, 2000, which includes the C-19 designation and one that expired July 5, 2001, and includes the A-12 designation. It is not completely clear which of the two identification cards Mendez presented to Sugar Creek when it requested documentation showing she was authorized to work in the United States after July 5, 2000. Further, the response to the motion appears to be the first time Mendez has tendered the card expired July 5, 2000 to the bench; the information provided with her Complaint only included the card expired July 5, 2001. Her affidavit states that when she gave Sugar Creek her authorization card and Sugar Creek asked for further proof of work authorization, she gave it INS Notice No. 2065R-00.

Sugar Creek claims that Mendez did not provide an expired EAD or other documentation showing the notations required by INS Notice No. 2065-00. Sugar Creek seems to say that Mendez did not show **any** authorization card when it asked her to provide documentation that she was

authorized to work in the United States. However, Sugar Creek does state that Mendez provided an EAD that expired on July 5, 2000 as part of her I-9 documentation in response to which, Mendez argues that Sugar Creek admits that Mendez submitted a card, and thus should have known her status as described in the Notice. In contrast, it does not appear that Sugar Creek admits that Mendez showed a card when it asked for work authorization on or about July 5, 2000, but rather states she provided the EAD as part of her Form I-9 documentation when she was hired. In addition, Sugar Creek states Mendez provided the Notice after she did not provide any documentation proving she was authorized to work.

Whether and what Mendez provided as work authorization is in dispute. I am unable to conclude that there is not a genuine dispute of material fact. At this juncture the motion for summary decision is denied. The disputed facts create a cloud that may be cleared up at a prehearing conference. At a minimum, counsel and the bench will explore the potential for resolving the dispute on an agreed paper record, leaving for judicial determination the consequences of actions taken without need for a confrontational evidentiary hearing.

Within the next several days, my office will schedule a second prehearing conference in consultation with the parties.

Respondent's Motion for Summary Decision is denied.

SO ORDERED.

Dated and entered this 20th day of September, 2001.

Marvin H. Morse
Administrative Law Judge