

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

July 17, 1997

UNITED STATES OF AMERICA,)	
Complainant)	
)	8 U.S.C. 1324a Proceeding
vs.)	
)	OCAHO Case No. 96A00069
HAIM CO., INC.,)	
Respondent)	

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Background

On February 2, 1996, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon Haim Co., Inc. (respondent) Notice of Intent to Fine 95 EO 000104. That citation contained three (3)-counts alleging 30 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil money penalties totaling \$17,190 were assessed.

In Count I, complainant alleged that respondent knowingly hired and/or continued to employ the three (3) individuals named therein for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of 8 U.S.C. § 1324a(a)(1)(A) and/or § 1324a(a)(2). Civil money penalties of \$950 were assessed for each of those three (3) alleged violations, for a total of \$2,850.

In Count II, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to ensure proper completion of section 1 and also by having failed to properly complete section 2 of the Forms I-9 for each of the 25 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of \$600 were assessed for each of 15 of those alleged violations and \$450 for each of the remaining 10 alleged violations, for a total of \$13,500.

In Count III, complainant alleged that respondent had hired the two (2) individuals named therein after November 6, 1986, for employment in the United States and that respondent failed to ensure proper completion of section 1 of the pertinent Forms I-9, in violation of 8 U.S.C. § 1324a(a)(1)(B). Civil money penalties of \$420 were assessed for each of those two (2) alleged violations, for a total of \$840.

The wording of the NIF clearly advised the respondent of its right to file a written request for a hearing before an Administrative Law Judge assigned to this Office provided that such written request be filed within 30 days of its receipt of the NIF.

On February 26, 1996, Raymond J. Aab, Esquire, respondent's counsel of record, timely filed a written request for hearing.

On July 1, 1996, complainant filed the three (3)-count Complaint at issue, realleging the 30 violations set forth in Counts I through III of the NIF, as well as the requested \$17,190 total civil money penalties sum.

On July 3, 1996, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of the Complaint at issue, were served upon respondent and also upon respondent's counsel of record, Raymond J. Aab, Esquire.

On July 22, 1996, respondent's answer was filed. In that responsive pleading, respondent admitted that after November 6, 1986 it had hired for employment in the United States the 30 individuals named in the three (3)-count Complaint at issue. Respondent also denied having committed the substantive paperwork-type violations contained in Counts II and III, and stated that it lacked sufficient knowledge or information to form a belief as to the truth of the substantive allegations contained in Count I.

Respondent also asserted one (1) affirmative defense, to the effect that the "[m]itigating factors render the fines sought by the government excessive and unduly harsh."

On August 15, 1996, a telephonic prehearing conference was conducted and this matter was set for hearing in New York City on November 13, 1996.

On October 31, 1996, at the request of complainant's counsel, an Order Canceling Hearing was issued.

On May 19, 1997, complainant filed a pleading captioned Motion for Summary Judgment on the Pleadings requesting that summary decision be granted in its favor on the grounds that it is "entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings."

On June 12, 1997, respondent's counsel advised by letter that respondent's telephone had been disconnected and that his letters to respondent had been returned undelivered. As a result, he stated that he is unable to locate his client and is unable to respond to either complainant's discovery requests or to its dispositive motion.¹

Accordingly, complainant's May 19, 1997 Motion for Summary Decision is considered to be unopposed.

II. Standards of Decision

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed 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) (1996).

Section 68.38(c) 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. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. United States v. Limon-Perez, 5 OCAHO 796, at 5, aff'd, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Alberta Sosa, Inc., 5 OCAHO 739, at 5 (1994).

¹ Prior OCAHO rulings, involving similar factual settings, have held that a failure to respond to requests for discovery, motion practice and judicial orders invites the Administrative Law Judge to conclude that the alleged violations are proven, and therefore there is no genuine issue of material fact to preclude the entry of summary decision. See, e.g., United States v. Private Brands, Co., 7 OCAHO 941, at 5 (1997); United States v. Vickers, 5 OCAHO 819 (1995).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994).

Once the movant has carried this burden, the opposing party must then come forward with “specific facts showing that there is a genuine issue for trial.” Id.; Fed. R. Civ. P. 56(e). The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that “a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial.” 28 C.F.R. § 68.38(b) (1996).

The mere fact that respondent has failed to file a response does not mean that summary decision is to be granted automatically. Summary decision may properly be granted only if the facts as to which there is no genuine dispute show that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c) (1996); Champion v. Artuz, 76 F.3d 483, 486 (2d Cir. 1996) (per curiam).

III. Discussion

In support of its dispositive motion, complainant asserts that on January 13, 1997, respondent was served with Request for Admissions pursuant to 28 C.F.R. § 68.21 (1996). That procedural rule provides in pertinent part:

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party;

(1) A written statement denying specifically the relevant matters of which an admission is requested;

(2) A written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

Complainant further asserts in its motion that as of May 9, 1997, respondent had failed to respond to complainant's January 13, 1997 Request for Admissions.

Accordingly, because respondent did not respond within the 30 day period provided for at 28 C.F.R. § 68.21, it is found that each matter for which an admission was sought is deemed admitted. Given that fact, we review complainant's request for a summary decision.

In Count I of its July 1, 1996 Complaint, complainant alleged that subsequent to November 6, 1986, respondent hired and/or continued to employ the three (3) individuals named therein knowing that those individuals were not authorized for employment in the United States.

In order to prove the violations alleged in Count I, complainant must show that: (1) respondent; (2) after November 6, 1986; (3) hired for employment and/or continued to employ in the United States; (4) unauthorized aliens; (5) knowing that those aliens were unauthorized with respect to such employment. United States v. Alberta Sosa, Inc., 5 OCAHO 739, at 5 (1995).

With respect to elements 1 through 3, respondent admitted those allegations in its July 23, 1996 answer. However, complainant has not provided any evidence on the remaining two (2) elements of its prima facie case, thus precluding summary decision on the facts of violation for the three (3) individuals named in Count I.

In Count II, complainant alleged that respondent failed to ensure that the 25 individuals named therein properly completed section 1 of the Employment Verification Forms (Form I-9) and that respondent had failed to properly complete section 2 of the Forms I-9 for each of those 25 named individuals, all of whom were hired by respondent for employment in the United States after November 6, 1986.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available to INS personnel in the course of their inspections. 8 U.S.C. § 1324a(b). A failure to properly prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. § 1324a(b), is a violation of IRCA.

In order to prove the violations alleged in Count II, complainant must show that: (1) respondent hired for employment in the United States; (2) the 25 individuals named in Count II; (3) after November 6, 1986; (4) that respondent failed to ensure that those individuals properly completed section 1 of the pertinent Forms I-9; and (5) that respondent failed to properly complete section 2 of the pertinent Forms I-9.

Respondent admitted elements 1, 2 and 3 in its July 23, 1996 answer. To demonstrate the fourth and fifth elements, complainant has provided copies of the 25 pertinent Forms I-9, which respondent has admitted are true and correct copies of the Forms I-9 relating to the 25 individuals named in Count II. See Complainant's January 13, 1997 Request for Admissions, ¶ 14.

A review of the Forms I-9 for those 25 individuals indicates that section 1 and section 2 were not completed properly in the manner complainant has alleged.

Accordingly, complainant has shown that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for each of the 25 individuals named in Count II, all of whom had been hired by respondent for employment in the United States after November 6, 1986.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the violations set forth in Count II, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is being granted as it pertains to respondent's liability for the 25 section 1324a(a)(1)(B) facts of violation alleged in Count II.

In Count III, complainant alleged that respondent failed to ensure that the two (2) individuals named therein, who were hired by respondent for employment in the United States after November 6, 1986, properly completed section 1 of the pertinent Forms I-9.

In order to prove the violations alleged in Count III, complainant must show that: (1) respondent hired for employment in the United States; (2) the two (2) individuals named in Count III; (3) after November 6, 1986; and (4) that respondent failed to ensure that those individuals properly completed section 1 of the pertinent Forms I-9.

Respondent admitted elements 1, 2 and 3 in its July 23, 1996 answer. To demonstrate the final element, complainant has provided copies of the pertinent Forms I-9, which respondent has admitted are true and correct copies of the Forms I-9 relating to the two (2) individuals named in Count III. See Complainant's January 13, 1997 Requests for Admissions, ¶ 21.

A review of those two (2) Forms I-9 indicates that they were not completed properly in the manner complainant has alleged.

Accordingly, complainant has shown that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the two (2) individuals named in Count III, both of whom had been hired by respondent for employment in the United States after November 6, 1986.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the two (2) violations set forth in Count III, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the two (2) section 1324a(a)(1)(B) facts of violation alleged in Count III.

IV. Summary

Because complainant has shown that there are no genuine issues of material fact regarding the 27 facts of violation alleged in Counts II and III of its July 1, 1996 Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's May 19, 1997 Motion for Summary Decision is granted as to the facts of violation concerning those 27 infractions.

However, since complainant has failed to show that there are no genuine issues of material fact regarding the three (3) remaining facts of violation alleged in Count I, complainant's Motion for Summary Decision is denied as to the facts of violation concerning those three (3) alleged infractions.

An evidentiary hearing will be scheduled for the purpose of adducing relevant evidence concerning the alleged facts of violation involving the three (3) violations remaining at issue in Count I, as well as the appropriate civil money penalties for those infractions in the event that complainant proves those allegations.

In that hearing, also, we will address the appropriate civil money penalties to be assessed for those 27 paperwork violations in Count II and III which have been ruled upon in complainant's favor in this Order.

The civil money penalty sums which must be assessed in connection with the three (3) illegal hire/continue to employ violations in Count I, together with a mandatory cease and desist order, are those provided in the provisions of 8 U.S.C. § 1324a(e)(4).

Those civil money penalty sums to be assessed for the 27 proven paperwork violations in Counts II and III will be determined by giving the required due consideration to the five (5) criteria listed at 8 U.S.C. § 1324a(e)(5).

In view of this ruling, a telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted in New York City.

Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1997, I have served copies of the foregoing Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision to the following persons at the addresses shown, by regular mail, unless otherwise shown:

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