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

United States of America, Complainant v. Basim Aziz Hanna, d.b.a. Ferris & Ferris Pizza, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100331.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND SETTING CASE FOR A HEARING TO DETERMINE APPROPRIATE CIVIL MONEY PENALTY

A. Procedural History

A Complaint was filed in this case on July 12, 1989, against Basim Aziz Hanna, d/b/a Ferris and Ferris Pizza, the Respondent, by the United States of America. The Complaint charges Respondent in 12 counts with violating Section 274(a)(1)(B) and/or Section 274A(b)(3) of the Immigration and Nationality Act by hiring twelve identified employees for employment in the United States without complying with the verification requirements of Section 274a(b) of the Act and/or failing to retain the Employment Eligibility Verification Forms (Form I-9) and make them available for inspection by officers of the Immigration and Naturalization Service.

On August 23, 1989, Respondent filed its Answer to the Complaint. With respect to each count of the Complaint, Respondent admitted that the employee was hired on or about the date alleged in the Complaint, but Respondent denied he was required to or failed to comply with Section 274A(b)(3) of the Immigration and Nationality Act. Respondent further alleged with respect to each count of the Complaint that the employee presented a social security number to Respondent, and some of the employees were United States citizens or legally entitled to work in the United States because they were resident aliens.

Respondent alleged five affirmative defenses in its Answer. These affirmative defenses are: (1) ``that this (sic) causes Respondent to discriminate in his hiring practices''; (2) ``that any further intrusion into the individuals right to work status is a violation of California Right of Privacy Laws''; (3) ``Respondent was presented with social security numbers and the Respondent submitted the

funds to Social Security according to the method prescribed by law. Respondent never received any information that these numbers were invalid or fraudulent or that no such numbers for these individuals existed''; (4) ``Respondent is not empowered nor equipped to enforce the Federal Laws governing illegal aliens. Respondent can only rely on documentation presented to them which show a right to work or that they a (sic) United States Citizens''; and (5) Respondent did not receive any instructions or information from INS on what forms were to be filed in order to comply with (sic) Immigration and Nationality Act § 274A(b)(3).

On October 18, 1989, Complainant filed a Motion, pursuant to 28 C.F.R. § 68.36, for Summary Decision as to liability on all counts of the Complaint. In support of its Motion, Complainant attached the affidavit of Steven W. Schultz, a Special Agent of INS, who conducted the I-9 inspection in this case, copies of Complainant's Request for Admissions and Respondent's answers thereto, and a copy of the Notice of Inspection dated March 23, 1989.

On November 3, 1989, Respondent filed a Motion for Continuance and an ``Opposition to Motion for Summary Decision,'' arguing that discovery from Complainant had not bee completed; and, once discovery was completed, it would show that there was no valid consent to the inspection by INS agents. Respondent further argued, citing Rule 56(f) of the Federal Rules of Civil Procedure, that Complainant's Motion should be denied until discovery was completed, because discovery would show that there were material facts at issue in the case.

On November 3, 1989, Respondent filed a pre-hearing statement, stating that there were five issues involved in the case as follows: (1) ``Did special agent Schultz explain to Basim A. Hanna the nature of the March 23, 1989 visit?'' (2) ``Were there unauthorized aliens employed by Basim A. Hanna?'' (3) ``Violations of the right of privacy?'' (4) ``Violations of the prohibition against discrimination''; and (5) ``There was no probable cause to entry (sic) Ferris and Ferris?''

On November 6, 1989, I held a pre-hearing conference with both parties to discuss the pending Motion for Summary Decision, Motion for Continuance and Motion to Compel Discovery. I made a preliminary ruling on these motions orally at the hearing, which was later formalized by a written Order dated November 13, 1989.

On November 13, 1989, I issued an Order granting inter alia Respondent's request for a continuance of the hearing to complete his discovery, and granting Complainant's Motion to Compel Discovery with respect to specified interrogatories and admissions, directing that all discovery be completed by December 15, 1989, and direct

ing Respondent to file any motions to suppress on or before December 15, 1989.

On December 1, 1989, Complainant filed its ``Reply to Respondent's Opposition for Summary Decision,'' arguing that Respondent's opposition does not raise or controvert any of the facts asserted without controversy.

As of this date, Respondent has not filed any motions to dismiss the Complaint, suppress evidence or a supplemental response to Complainant's Motion for Summary Decision setting forth specific facts supported by affidavit or documentary proof to clearly show that there are material issues in this case requiring an evidentiary hearing.

Respondent contends that Complainant must ``demonstrate the lack of any genuine issue of material fact as to affirmative defenses raised by Respondent.''

B. Legal Analysis As to Liability

Contrary to Respondent's contentions, Complainant is not required to show lack of genuine controversy regarding the affirmative defenses that he alleged in his pleadings. It is well-established that, in federal court, the moving party need not negate unsupported claims by the non-moving party; the moving party's burden is met by showing that there is an absence of evidence of some element on which the opposing party bears the burden of proof. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). Thus, as applied to the case of bar Complainant is only required to show that there is no genuine issue of material fact as to any of the elements necessary to prove liability for failing to present for inspection the employment eligibility verification forms.

Complainant has clearly shown in its Motion for Summary Decision, the attached affidavit of Agent Schultz, and other documents made a part of its Motion that Respondent was properly served with a notice of inspection and, when the INS agents came to the agreed time and place for the inspection, no employee verification forms were produced for inspection. I find that the inspection was done in conformity with the regulations which, contrary to Respondent's conclusive assertions, does not require any type of consent by the employer. On the contrary, the regulations clearly indicate that, ``any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act.'' See, 8 C.F.R. § 274a.2(b)(2)(ii)(1989).

As stated above, Respondent has not come forward, despite being given ample opportunity through the procedural mechanism of

may granting a continuance in this case, with specific facts duly supported by affidavits or other materials to rebut Complainant's affidavit and other documentation. The practice and procedure of summary decision jurisprudence clearly indicates that the party opposing summary decision has an affirmative obligation to present specific evidence and may not rest upon the mere allegations or denials of its pleading. See, e.g., Fed. R. Civ P. 56(e); and, Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978), cert. den., 99 S. Ct. 1044, 439 U.S. 1127; see also, U.S. v. Potampkin Cadillac Corp, 689 F. 2d 379 (2nd Cir. 1982) (``a genuine issue for trail precluding summary judgment is not created by a mere allegation in the pleadings nor by surmise or conjecture on the part of the litigants''); Local 314, National Post Office Mail Handlers v. National Post Office Mail Handlers, 572 F. Supp. 133, 140 (D.C. Mo. 1983) (``A memorandum stating in conclusory fashion that many issues of fact existed and that defendants `are surely entitled to present further evidence' did not meet the obligation imposed on the party opposing a motion for summary judgment.''); see generally, Wright, Miller & Kane, Federal Practice and procedure, vol. 10A, sect. 2739.

Moreover, it is well established that the party opposing the summary decision does not have the right to withhold its evidence until trial. See, Walker v. Hoffman, supra, at 1075; see also, Wright, Miller & Kane, at 521. The cases make clear that an opposing party cannot demand a trail because of the speculative possibility that a material issue of fact may appear at that time. See, Bollow v. Federal Reserve Bank of San Francisco, 650 F. 2d 1093, 1103 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (``A party cannot withstand a motion for summary judgment merely by asserting that the facts are disputed;. he must present evidence to the court that there is indeed a genuine issue of material fact.'') see also, Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Ceazan, 559 F. Supp. 1210, 1219 (D.C. Ca. 1983).

Thus, it is my view that Respondent's unduly conclusory arguments, allegations, and denials in its pleadings and opposition responses are insufficient to defeat Complainant's Motion and accompanying documentation. See, British Airway Bd. v. Boeing, 585 F. 2d 946, 952 (9th Cir. 1978) (unsworn averments by counsel in his briefs were insufficient to defeat a properly supported motion for summary judgment) see also, Wright, Miller and Kane, Federal Practice and Procedure, Civil 2d, Sections 2712, 2739; Moore's Federal Practice, 2d ed. para. 56. 04[1]. As stated well by one court, ``it is not the court's obligation to guess at what a litigant should have caused the record to contain.'' See, American Floral Service, Inc. v. Florist's Transworld Delivery Ass'n., 633 F. Supp. 201, 228 (D.C. Ill.

1986). Thus, I find and conclude that Respondent has failed to meet its obligation to present requisite evidence to show that a genuine issue of material fact exists on any legal element that could preclude my granting Complainant's Motion for Summary Decision. See e.g., Fed R. Civ. P. 56(e).

Accordingly, for the foregoing reasons, I find that Respondent has violated Section 1324a(a)(1)(B) of Title 8 of U.S.C., in that Respondent hired for employment in the United States those employees named in the twelve counts of the Complaint without complying with the verification requirements provided for in Section 1324a(b) of Title 8.

C. Civil Penalties

Since I have found that Respondent has violated Section 1324a(a)(1)(B) and Section 1324a(b)(3) of Title 8 with respect to all twelve counts of the Complaint, assessment of civil money penalties are required as a matter of law.

Section 1324a(e)(5) states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The regulations reiterate the statutory penalty provision, including the mitigating factors which should be taken into consideration for paperwork violations. See, 8 C.F.R. § 274a.10(b)(2).

The Complaint seeks a fine of $750.00 for each of the twelve counts for a total amount of $9,000.00. The pleadings filed in this case by Respondent allege facts which suggest that there are mitigating factors that I need to consider in determining an appropriate civil money penalty in this case. It is my view, therefore, that prior to making a decision on the amount of a civil penalty to assess against Respondent for violating each of the twelve counts of the Complaint, an evidentially hearing may be necessary to determine the actual facts which should be considered as mitigating factors in assessing civil penalties in this case. In this regard, recent decisions may be helpful to the parties in structuring respective arguments on the issue of determining an appropriate amount of civil monetary penalty. See e.g., United States v. Felipe, Inc., OCAHO Case No. 89100151 (ALJ Schneider, October 11, 1989).

Therefore, I am going to temporarily defer on making a finding on the amount of civil penalty to assess Respondent until after I

have held an evidentiary hearing concerning the issue of mitigation. Although I believe that an evidentiary hearing is probably necessary to determine a civil penalty in this case, I will accept a settlement on the amount of civil penalties pursuant to the provisions of 28 C.F.R. § 62.12 (1989).

D. Ultimate Findings of Fact, Conclusions of Law and Order

I have considered the pleadings, memorandum, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. That a party opposing a Motion for Summary Decision has an affirmative legal obligation to present specific evidence to show that a genuine issue of material fact exists or that the movant party is not entitled to summary decision as a matter of law. A party opposing a motion for summary decision may not rest upon the merely conclusory allegations or denials of its pleadings.

2. That, Respondent did not present requisite evidence to show that there was, in this case, a genuine issue of material fact, or that Complainant was not entitled to a judgment as a matter of law.

3. That, as previously found and discussed, I determine that no genuine issue as to any material facts has been shown to exist with respect to Counts one through twelve of the Complaint and that, therefore, pursuant to 8 C.F.R. § 68.36, Complainant is entitled to a summary decision as to all counts of the Complaint as a matter of law.

4. That Response violated 8 U.S.C. § 1324a(a)(1)(B), in that Respondent hired, for employment in the United States, the employees identified in Counts one through twelve of the Complaint, without complying with the verification requirements in Section 1324(b), and 8 C.F.R. Section 274a.2(b)(1)(ii)(A) and (B).

5. That Complaint is entitled to a civil monetary penalty to be assessed against Respondent as to each count of the Complaint in an amount to be determined after an evidentiary hearing or by settlement by the parties.

It is further ORDERED that an evidentiary hearing shall be held on Monday, March 12, 1990, at 9:00 a.m., to determine the issue of what, if any, mitigating factors I should consider in determining an appropriate civil penalty in this case.

SO ORDERED: This 26th day of February, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge