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

United States of America, Complainant v. Citizens Utilities Co., Inc., Incorporated, Telephone Division, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100211.

DECISION AND ORDER DENYIG RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND GRANTING COMPLAINT'S MOTION FOR PARTIAL SUMMARY DECISION

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DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AMD GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

E. MILTON FROSBURG, Administrative Law Judge

Appearances: SCOTT M. JEFFERIES, Esquire, for Immigration and Naturalization Service
NATHAN R. NIEMUTH, Esquire
WILLIAM T. LYNAM, Esquire, for Respondent

I. PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

On March 28, 1989, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on Citizens Utilities Company, Inc., Telephone Division. The Notice of Intent to Fine alleged twenty-one violations of § 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to properly complete Section 2 of the I-9 Form. In a letter dated March 29, 1989, Respondent, through its Human Resources Manager, John P. Rifakes, requested a hearing before an Administrative Law Judge.

The United States of America, through its Attorney Scott M. Jefferies, filed a Complaint incorporating the allegations in the Notice of Intent to Fine against Respondent on April 27, 1989. On May 2, 1989, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the administrative law judge in the case and setting the hearing date and place for August 22, 1989, at Kingman, Arizona.

Respondent, through its representative Rifakes, answered the Complaint on May 9, 1989, specifically admitting or denying each allegation and setting forth two affirmative defenses. The first af-

firmative defense alleges that Respondent complied with § 274A(a)(1)(B) of the Act by copying the documents presented by the applicants for purposes of complying with the verification requirements of the law. See, § 274A(b)(4) of the Act. Respondent's second affirmative defense alleges Complainant's failure to comply with retention and inspection requirements. See, 8 C.F.R. § 274a.2(b)(2)(ii).

On May 11, 1989, I issued an Order Directing Procedures for Prehearing, and on June 13, 1989, I issued an Order Directing Procedures for a Prehearing Telephonic Conference to be held on July 11, 1989. A second prehearing telephonic conference was ordered for July 25, 1989.

On July 12, 1989, Respondent submitted its Motion for Leave to File a First Amended Answer to Notice of Intent to Fine and Complaint. The amended answer contained a third affirmative defense related to the ``citation period'' of the Act. See, § 274A(i)(2). On July 18, 1989, Complainant submitted its response in opposition to Respondent's Motion. On July 24, 1989, I issued an Order to Show Cause Why Complainant's Request in Opposition to Respondent's Motion for Leave to File an Amended Answer Should Not Be Granted.

Respondent's Reply to my Order to Show Cause was submitted by Attorney Nathan R. Niemuth on August 3, 1989, thereby changing Citizens Utilities from a pro se to a represented respondent. On August 10, 1989, William T. Lynam, Esquire, submitted a letter of appearance advising that he would also represent Respondent.

On August 14, 1989, I ordered the hearing date continued indefinitely. On August 18, 1989, I granted Respondent time to file facts supporting its third affirmative defense. On September 25, 1989, I accepted Respondent's Amended Answer. On September 26, 1989, a third prehearing telephonic conference was ordered for October 4, 1989.

On October 26, 1989, Complainant submitted its Motion for Partial Summary Decision with supporting documents, on the grounds that no genuine issue of material fact exists as to Respondent's third affirmative defense and that Complainant is entitled to a Partial Summary Decision as a matter of law. On October 30, 1989, Respondent submitted its Motion for Partial Summary Decision, with supporting affidavit and memorandum, requesting a dismissal of eighteen of the alleged violations on the grounds that there is no genuine issue as to any material fact and Citizens is entitled to a partial summary decision as a matter of law.

Respondent submitted a Response in Opposition to Complainant's Motion for Partial Summary Decision on November 10, 1989.

On December 5, 1989, I issued a Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision on Respondent's Third Affirmative Defense. On January 3, 1990, the Chief Administrative Hearing Officer issued an Affirmation of my December 5, 1989, Order. On March 2, 1990 both Respondent and Complainant filed respective Motions for Summary Decision regarding the remaining counts and alleged affirmative defenses. The remaining affirmative defenses not disposed of in my December 5, 1989, Order involve issues regarding notice of inspection and the possibility of substantial compliance as a defense to liability for alleged paperwork violations.

II. STANDARDS FOR DECIDING SUMMARY DECISION

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . 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. § 68.36 (1988); see also, Fed. R. Civ. P, Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.'') and, U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D. N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

III. LEGAL ANALYSIS

Two issues are presented by the parties' respective cross-motions for summary decision. The first issue involves a question of notice of inspection. The second issue involves the proposed legal defense of ``substantial compliance.''

A. Notice of Inspection

The parties stipulate that a Notice of Inspection took place on February 14, 1989, and that it was properly noticed by INS. They do not agree on whether the INS completed its inspection on that date or whether it communicated that it required a second visit to complete its inspection. Respondent asserts that it was lead to believe that INS had completed its inspection on February 14, 1989, and that it did not know that INS was going to return on February 23, 1989.

In this regard, Respondent asserts in its Motion for Summary Decision that 8 C.F.R. § 274a.2(b)(2)(ii) entitled Respondent to a second notice when INS agents decided to return and complete their investigation on February 23, 1989. See, 8 C.F.R. § 274a.2(b)(2)(ii).

In a recent OCAHO case, Judge Robert Schneider, granting in part the government's motion for summary decision, dismissed respondent's legal defense of prejudice caused by inadequate notice of inspection. See, United States v. George Manos, d.b.a. Breadbasket, Inc., OCAHO Case No. 8910013, February 8, 1989 (Decision and Order).

In ``Breadbasket'', the respondent argued that it was entitled to a second notice from INS regarding an inspection which was ``rescheduled.'' Judge Schneider found that: (1) the INS was not required by statute or regulation to issue a second notice in situations wherein the original inspection had been administratively rescheduled; and, (2) respondent was not ``prejudiced'' by the second

inspection insofar as it was ready and able to submit to an inspection two weeks earlier.

Applied to the case before me, ``Breadbasket'' would not require the issuance of a second notice of inspection before the INS could return to complete their inspection.

The facts here are additionally compelling. It is clear that 20 of the 21 alleged counts in this case are based on the February 14, 1989, inspection. One of the charges, involving Milton Brown, arose as a result of the apparently unannounced February 23, 1989, follow-up ``inspection.''

By stipulation of the parties, I am going to dismiss the allegation against Respondent involving Milton Brown. It is my view, however, that the remaining 20 allegations arose as a result of the properly noticed inspection of February 14, 1989, and that, in this regard, Respondent has not been prejudiced by the possibly confusing and inconvenient administrative decision to return, apparently unannounced, to Respondent's place of business on February 23, 1989.

B. Substantial Compliance

Respondent also raises an issue regarding the possible applicability of the doctrine of substantial compliance.

In ``Breadbasket'', Judge Schneider partially denied the government's motion for summary decision on the grounds that the respondent had made a prima facie showing that it substantially complied with verification requirements of section 1324a. In his decision, Judge Schneider noted that:

> Like the concept of `reasonableness,' substantiality of compliance, if applicable, depends on the factual circumstances of each case. See e.g., Fortin v. Commissioner of Ma. Dept. of Welfare, 692 F.2d 790, 795 (lst Cir. 1982); and, Ruiz v. McCotter, 661 F.Supp. 112, 147 (S.D. Tex. 1986). As applied to statutes, ``substantial compliance'' has been defined as actual compliance with respect to the substance essential to every reasonable objective of the statute . . . See e.g., Stasher v. Harger-Haldeman, 58 Cal. 2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1962). Generally speaking, it means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

Id.

Judge Schneider applied this reasoning to the facts of the case before him, and found that the respondent therein had presented enough evidence to show that there was a genuine issue of material fact that it may have substantially complied with the record-keeping provisions of IRCA. He did not hold, in ``Breadbasket'', that ``substantial compliance'' was a conclusively valid defense to liability for alleged paperwork violations, but that, theoretically, it

might be. In other words, in the limited context of deciding a Motion for Summary Decision, it would appear, Judge Schneider gave preliminary consideration to ``substantial compliance'' as a potential legal theory of defense to liability for alleged paperwork violations. On the basis of this preliminary consideration, I believe, Judge Schneider denied the government's Motion for Summary Decision on those few counts in which he found a ``genuine issue of material fact'', premised on the still-untested defense of ``substantial compliance''. I concur in Judge Schneider's reasoning. The specific counts in question concerned factual circumstances in which a separate I-9 had been attached to the facially deficient I-9 that INS charged on in its Complaint.

In the case before me, Respondent asserts that some of Complainant's allegations regarding specific violations should be dismissed because:

1. By copying the identity and employment eligibility documents and retaining those documents with the I-9 Forms, Respondent complied with the requirements of 8 C.F.R. § 274a.2 pertaining to List B and List C documents;

2. Respondent properly accepted the social security cards of employees Rifakes and Ward in verifying their employment eligibility;

3. Respondent's omission of the printed name and title of the company official who signed I-9 forms and its omission of its company name and address are negligible violations, if violations at all;

Unfortunately, Respondent does not support its contentions with an affidavit or plead in a requisitely fact-specific manner. See, Fed. R. Civ. P., Rule 56(e). Moreover, I am not convinced that the facts, even as conclusorily alleged by Respondent, support a conclusion that Respondent ``substantially complied'' with the verification and record-keeping provisions of IRCA.

The most detailed of Respondent's three arguments is its first one. Though not specifically stated, Respondent appears to rely on an INS regulation which permits an employer to attach relevant identification and immigration documents to the Form I-9. See, 8 C.F.R. § 274a.2(b)(3). Respondent appears to contend that this regulation authorizes compliance in an alternative manner to that of properly completing a Form I-9. In other words, Respondent appears to be arguing that ``retaining'' photocopies of employee documents can be done in lieu of properly completing a Form I-9 Employment Eligibility Verification Form. This issue was thoroughly addressed and rejected in ``Breadbasket'', supra. In Breadbasket, Judge Schneider concluded that:

> I do not agree with the interpretation Respondent urges in support of its argument that it substantially complied with the verification and record-keeping pro-

> visions of IRCA by copying the documentation of its employees consistent with 8 C.F.R. § 274a.2(b)(3). Specifically, it is my view that the language of this regulation is clearly permissive and supplemental to the mandatory completion of the Form I-9 Employment Eligibility Verification Process, and is not intended to serve as an alternative mode of complying with the law. Cf. 8 C.F.R. § 274a.2(b)(l).
>
> In analyzing 8 C.F.R. § 274a.2(b)(l) of the regulations, it is unequivocally clear that an employee and employer `must' complete their respective section of the I-9 Form. Alternatively, the section of the regulations which Respondent urges in support of its substantial compliance argument reads, as stated, that an employer `may, but is not required to' copy appropriate verification documentation. There is simply no way that this section of the regulations can be read, in my view, to substitute, even in the more interpretively elasticized context of a substantial compliance argument, for the mandatory requirement to properly complete, retain, and present Forms I-9 for all employees authorized to be employed in the United States.
>
> In this regard, I conclude that Respondent's reliance on 8 C.F.R. § 274a.2(b)(3) is misplaced, and presents neither a `genuine issue of material fact' nor a legal defense that has sufficient prima facie validity to warrant a further hearing on the merits.

Id.

In United States v. J.J.L.C., Inc., T/A. Richfield Caterers and/or Richfield Regency, OCAHO Case No. 89100187, April 13, 1990, (Decision and Order), Judge Marvin H. Morse, also addressed the theory of Substantial Compliance in great length and found that the Respondent had not substantially complied with verification requirements by attaching copies of employee documentation to the I-9s, but failed to perform other prescribed I-9 duties. As applied to the case at bar, I entirely concur with the Judges' reasoning on these issues.

Additionally, with respect to Respondent's third argument, it is my view that Respondent has not presented its argument with sufficient specificity to make a prima facie showing that there is a genuine issue of fact or that it would prevail on the legal merits as a matter of law if this proceeding went to an evidentiary hearing.

Accordingly, in careful consideration of the case law and statutory interpretations, as set out above, and the facts of the case at bar, I am hereby denying Respondent's motion for summary decision, and granting Complainant's motion for all allegations except the one involving Milton Brown.

C. Civil Money Penalties

It is my judgment that Respondent has violated Title 8 United States Code, § 1324a(a)(1)(B), in that it hired for employment in the United States after November 6, 1986, twenty individuals without complying with the verification requirements in 8 U.S.C. § 1324a(b)(l), § 274A(b)(l) of the Act, and 8 C.F.R. § 274A.2(b)(l)(ii). Having found the violation, I must assess a civil money penalty

pursuant to § 274A(e) of the Act, which requires the person or entity to pay a civil penalty.

The statute states, in pertinent part, that:

> With respect to a violation of subsection (a)(l)(B), 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.

8 U.S.C. § 324a(e)(5).

In assessing fines, it is important to remember that although the Respondent's business may be considered large both parties have stipulated that none of the twenty individuals listed in Count I of the Complaint was an unauthorized alien. Additionally, Citizens Utility has no history of previous violations of the Act. The maximum fine for twenty violations of the Act would be $20,000. Complainant suggests a fine of $150 for each and every violation, or a total of $3000. While neither party requested an evidentiary hearing on civil penalties, it is clear however, from the record, that the twenty paperwork violations are separable.

The most serious violations of the Act involved Lawrence E. Cheramy, Linda M. Grooms, Milton E. Haws, and Eunice E. Olsen. In each instance the I-9 forms were not signed by the employer, attesting under penalty of perjury, that the documents were carefully examined. The fines for each of these violations shall be set at $150.

In the cases of thirteen individuals, April L. Bothwell, Younce E. Hunnicutt, Patricia Krinock, Leslie D. LaFond, Helen L. MacLean, Jay R. Martin, Catherine E. Morrell, Peggy L. Price, Linda W. Riethmayer, David L. Sanders, Jaime L. Sayre, Justine S. Watkins, and Shirley Wendt, the I-9 forms were not dated. Though the forms were otherwise complete, without a date it is impossible to determine whether the employer verified the eligibility of the employee within 3 business days of entry on duty, as required by statute. The fines for each of these violations shall be set at $125.

The I-9 forms for both Amy Rifakes and Harriet Ward were complete, but Respondent accepted a metal or plastic facsimile of a social security card, in violation of the instructions contained on page eleven of the seventeen page Handbook for Employers (Form M-274). While certainly not an insignificant violation of regulations, Respondent did demonstrate good faith in the completion of the I-9 forms for these two employees. The fines for each of these violations shall be set at $125.

In the case of the last violation, employee Debra J. Beesley, the certification section of the I-9 form was incomplete. Respondent had neglected to ensure that this section contained a printed name, title, and employer name and address. Since the form was however, otherwise complete, the fine for this violation shall be set at $125.

Accordingly, I find that the amount of the penalty for Count I of the Complaint is $2,600.00

III. ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings memoranda, stipulations, and arguments submitted by the parties. Accordingly, and in addition to the findings and conclusions previously mentioned, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondent Citizen Utility Co., Inc., Incorporated, Telephone Division, violated § 1324a(a)(1)(B) of Title 8, § 274A(a)(1)(B) of the Immigration and Nationality Act, in that it hired for employment in the United States after November 6, 1986, the following individuals without complying with the verification requirements in 8 U.S.C. § 1324a(b)(1), § 274A(b)(1) of the Act, and 8 CFR § 274A.2(b)(1)(ii):

Debra J. Beesley
April L. Bothwell
Lawrence E. Cheramy
Linda M. Grooms
Milton E. Haws
Younce E. Hunnicutt
Patricia Krinock
Leslie D. LaFond
Helen L. MacLean
Jay R. Martin
Catherine E. Morrell
Eunice E. Olsen
Peggy L. Price
Linda W. Riethmayer
Amy L. Rifakes
David L. Sanders
Jaime L. Sayre
Harriet E. Ward
Justine S. Watkins
Shirley Wendt

2. That Respondent received proper notice by the INS of the February 14, 1989 inspection of records, and that inspection found twenty paperwork violations of the Act.

3. That, by stipulation of the parties, allegation regarding Milton Brown, which arose during Complainant's return to Respondent's place of business on February 23, 1989, are dismissed.

4. That Respondent did not substantially comply with the ACT by copying employee identity and employment eligibility documents and attaching them to the I-9 form, rather than filling out the I-9 form correctly, and in its entirety, since the regulations only permit an employer to attach such identification to I-9 form in addition to completing each section of the form itself.

5. That Respondent did not substantially comply with the Act by accepting commercially produced social security card fascimiles for two employees, specifically prohibited in the instructions to the I-9 form.

6. That based on the argument presented, that Respondent did not substantially comply with the Act by omitting its company name and address from the I-9 forms.

7. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of Two Thousand Six Hundred Dollars ($2,600.) for Count I of the Complaint.

8. That all motions not previously ruled upon are hereby denied.

9. That, pursuant to 28 CFR Section 68.52, this decision and order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date the Chief Administrative hearing Officer shall have modified or vacated it.

IT IS SO ORDERED: This 27th day of April, 1990, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge