

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

United States of America, Complainant vs. Neighbors of Hawaii, d/b/a
``Tower of Power'' Respondent; 8 U.S.C. 1324a Proceeding; Case No.
90100166.

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

ROBERT B. SCHNEIDER, Administrative Law Judge

Procedural History and Statement of the Relevant Facts:

On April 18, 1990 the United States of America, Department of Justice, Immigration and Naturalization Service, (hereinafter the ``INS'') served a Notice of Intent to Fine on respondent, Neighbors of Hawaii, Inc., d/b/a ``Tower of Power''. The Notice of Intent to Fine included one count alleging seven (7) violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(1)(B).

In a letter dated April 19, 1990, respondent, through its president, Mr. Richard Y.S. Lee, requested a hearing before an administrative law judge.

The INS, through its attorney, June Y.I. Ito, filed a Complaint incorporating the allegations in the Notice of Intent to Fine on May 14, 1990. On May 15, 1990 the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the Administrative Law Judge in this case and designating the hearing to take place in or around Honolulu, Hawaii at a date, hour and specific location to be set by me.

On or about June 5, 1990 the respondent's copy of the Complaint was returned to OCAHO by the United States Postal Service as unclaimed. OCAHO telephoned the attorney for the INS, Dayna M. Dias, and requested her to attempt to personally serve respondent with a copy of the Complaint. INS was able to contact Mr. Lee and on June 19, 1990, he signed a Certificate of Service of Complaint in the Honolulu District Office, INS, which certified that INS
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Agent Pamela LeGates had presented him with a copy of the Complaint Regarding Unlawful Employment and also with a copy of the Notice of Hearing on Complaint Regarding Unlawful Employment.

On June 21, 1990 I issued an ORDER intended to clarify respondent's obligation to file its Answer to the Complaint on or before July 24, 1990. The ORDER directed respondent's attention to 28 C.F.R. Section 68.8. The ORDER was returned to me as unclaimed.

On July 16, 1990 a telephonic conference call was held between myself, Ms. Dias, representing INS, and Mr. Lee, representing Neighbors of Hawaii, during which I informed Mr. Lee that respondent's copy of the ORDER of June 21, 1990 had been returned to my office by the United States Postal Service as unclaimed. Mr. Lee confirmed that INS had provided the court with the correct address but claimed that he was unaware that an attempt had been made by the postal service to deliver said ORDER. I directed Ms. Dias to check with the United States Postal Service office which services Mr. Lee's location. By letter dated July 16, 1990, Ms. Dias reported to me that the Makiki Post Office, Supervisor of Mails and Delivery informed her that Mr. Lee's address is in a high rise complex which contracts with a company called ``Mail Box'', which receives all incoming mail from the postal carrier and delivers it to the tenants in the building pursuant to a private contract.

By correspondence dated July 15, 1990, respondent filed an ``Answer to Complaint Regarding Unlawful Employment''.

On or about July 20, 1990, INS filed a ``Government Motion for Partial Summary Decision'', (hereinafter ``Memorandum'') on the ground that no genuine issue of material fact existed requiring determination at hearing except as to the fine amount.¹ In the ``Government Memorandum In Support of Motion for Partial Summary Decision'' the INS noted that respondent had admitted the substantive allegations of the Complaint and not plead any affirmative defenses. The INS contends that it is entitled to a partial summary judgment as to all aspects of the case, with the exception of the appropriateness of the amount of monetary fine imposed.

On August 20, 1990, Ms. Dias called my office to inquire whether the court had received a response from Mr. Lee, on behalf of respondent, regarding the ``Government Motion for Partial Summary Decision''. We had not, but I informed Ms. Dias that I would allow respondent a few more days to respond. On August 24, 1990, I

¹The INS has attached to all its pleadings on file, a certificate of service indicating that a copy was sent to Mr. Lee.

issued an ORDER which instructed respondent to respond to the government's motion on or before September 4, 1990.

On October 3, 1990, Ms. Dias called to inquire whether the court had as yet received a response from Mr. Lee, on behalf of respondent, regarding the government's motion and my ORDER of August 24, 1990. The file revealed that respondent has not filed a response to the motion as permitted by 28 C.F.R. 68.9(b). On or about October 12, 1990, the INS filed a ``Motion for Order of Partial Summary Judgment''.

After careful consideration of the pleadings and papers before me, and mindful of the procedural history of this case, I conclude that no genuine issue of material facts exists as to the seven violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(B), set forth in Count I of the Complaint. Therefore, complainant, the INS, is entitled to summary decision as a matter of law.

Legal Standards for a Motion for Summary Decision:

The federal regulations applicable to this proceeding, set out at 28 C.F.R. 68.36 (1989), authorize an administrative law judge to ``enter a summary decision for either party if the pleadings, affidavits, 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.''

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact. Complainant argues that the Supreme Court has issued a trilogy of decisions which strengthens the summary judgment process, and are applicable to the motion for partial summary decision which this case concerns. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, (1986). Respondent has not refuted complainant's contentions with regard to summary decision.

Legal Analysis Supporting Decision:

Complainant argues in its Memorandum that the pleadings establish that no genuine issue of any material fact exists requiring a hearing and that the complainant is entitled to summary decision as a matter of law, except as to the issue of the appropriations of the fine amount. Complainant notes correctly that respondent admitted the factual allegations of Count I A, B, C, and D regarding all seven of the named employees listed therein.

Although respondent did request a hearing in its Answer, that request does not challenge the allegations in the Complaint regard-

ing ultimate liability for the alleged violations of law. I find the respondent's hearing request to be directed solely to the issue of the reasonableness of the fine amount, for the following reasons; first, because it requests this court issue an order that the \$3220 fine is excessive and asks that it be reduced, and second, because paragraph 2 of the Answer references the ``Written Request for Hearing'' found in Exhibit ``B'' of the Complaint, dated April 19, 1990, which states as follows:

``I am not contesting the fact that I-9's were not prepared for the 7 individuals listed on the notice of intent to fine but rather wish to have the amount of the fine per individual reconsidered.''

Accordingly, for the foregoing reasons, I find that respondent has admitted the allegations of Count I as to each of the seven (7) violations of 8 U.S.C. 1324a(a)(1)(B) and does not request a hearing except insofar as the appropriateness of the fine amount of \$460 per violation, set forth in the Complaint.

Findings of Fact, Conclusions of Law, and Order:

I have considered the pleadings, memorandum and supporting documents submitted in support of the Motion for Partial Summary Decision. I have noted the respondent's nonresponsiveness regarding the same. ACCORDINGLY, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I find that no genuine issue of material fact exists as to all seven (7) named employees in Count I of the Complaint, and therefore, complainant INS is entitled to a summary decision as a matter of law pursuant to 28 C.F.R. Section 68.36.

2. That respondent violated 8 U.S.C. Section 1324a(a)(1)(B), 8 U.S.C. Section 1324a(b), and 8 C.F.R. 274a.2(b), in that Respondent hired for employment in the United States the seven (7) named employees identified in Count I of the Complaint without preparing or presenting for inspection the Employment Eligibility Verification forms (Form I-9) for each employee.

3. That respondent has not contested the allegations in Count I of the Complaint, but rather contests the amount of the civil monetary penalty assessed by the INS.

4. That the complainant, INS, is entitled to summary decision as a matter of law, except insofar as the court shall reserve the issue of the appropriateness of the fine amount for further consideration.

5. That respondent will henceforth not be heard to contest liability for the violations alleged in the Complainant. That the parties

may present and/or refute evidence as to the appropriateness of the fine amount at such time as the court shall determine.

6. That, pursuant to 8 U.S.C. Section 1324a(e)(6), and as provided in 28 C.F.R. 68.52, this Decision and Order shall become the final decision and order of the Attorney General as to all violations alleged in the Complaint unless, within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 6th day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge