

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

United States of America, Complainant, v. Scandia Interiors, Inc.,
Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100229.

ORDER

On December 21, 1990, Complainant filed a Motion to Inform the Court and to Compel Discovery. By this motion Complainant sought to have compelled the ``sanitized'' payroll records Respondent promised to provide to Complainant during the telephonic conference conducted on November 15, 1990.

On January 8, 1991, a Motion for Sanctions was filed by Complainant. Complainant's motion is based on Respondent's failure to comply with my Order Granting in Part and Denying in Part Complainant's Motion to Compel issued on December 18, 1990, my Order Directing Respondent to Disclose Payroll Records also issued on December 18, 1990, and failure to produce the ``sanitized'' payroll records it promised to produce during telephonic conference conducted on November 15, 1990.

On January 22, 1991, Complainant filed what I construed to be a Motion to Introduce Witness' Sworn Statements in Lieu of Hearing Testimony.

A telephonic conference was conducted with the parties on January 24, 1991, to discuss all pending matters. During the telephonic conference Respondent's counsel made an oral Motion to Withdraw as Counsel for Respondent based on Respondent's failure to pay counsel fees. The parties were asked to discuss the possibility of settlement with one another, and participate in a follow-up telephonic conference before I ruled on the pending motions.

On January 25, 1991, I conducted another telephonic conference with the parties to discuss the possibility of settlement. Since the parties were unable to reach a settlement of this case, I stated my preliminary rulings on the following pending motions: Respondent's Oral Motion to Withdrawn as Counsel for Respondent, Complainant's Motion to Inform the Court and to Compel Discovery, Complainant's Motion to Introduce Witness' Sworn Statements, and Complainant's Motion for Sanctions. Thereafter, Complainant renewed its Motion for Change of Venue, and noted Respondent's failure to comply with my Order Denying Complainant's Motion for Summary Decision issued December 17, 1990, which, in part, di-

rected both parties to file with the court and serve the opposing party with a list of all its premarked trial exhibits and a legible copy of all its exhibits on or before January 11, 1991. I denied Complainant's renewed Motion to Change Venue during the telephonic conference, and instructed Complainant to file an appropriate motion regarding Respondent's failure to comply with my December 17, 1990 Order.

Based upon the preliminary rulings I made at the telephonic conference conducted on January 25, 1991, I make the following findings and rulings on the presently pending motions:

(1) Respondent's Counsel's Oral Motion to Withdraw as Counsel for Respondent, made during telephonic conference on January 24, 1991, is denied for the following reasons-(a) the great risk of prejudice to Respondent corporation as a result of counsel's request to withdraw only two business days before the evidentiary hearing is scheduled to be conducted (Counsel admitted having difficulty sorting through the necessary corporate documents because they are stored in a box in the basement of the office building and there are no corporate officers or employees to help sort the documents; if counsel had difficulty, the corporation, with apparently no officers or employees, certainly will have difficulty obtaining the necessary documentation one day before trial.); and (b) the tardiness of counsel's unanticipated motion-Respondent's counsel never communicated to either the court or government counsel the problems he was encountering with Respondent corporation and preparation of his case; if counsel had communicated this information, prejudice to Respondent could possibly have been avoided, and other anticipatory action taken to avoid the problems associated with late withdrawal.

(2) Complainant's Motion to Inform the Court and to Compel Discovery filed on December 21, 1990, is granted, and Respondent is directed to provide Complainant with the ``sanitized'' payroll records by 12:00 p.m. (noon) on Monday, January 28, 1991.

(3) Complainant's Motion to Introduce Witness' Sworn Statements filed on January 22, 1991. I am withholding ruling on this motion until an offer is made by the Complainant at the evidentiary hearing, so that I may determine the relevance, probativeness, and reliability of the two sworn statements referred to in Complainant's motion based upon the factors set forth in Calhoun v. Bailar, 626 F.2d 145, 148-49 (9th Cir. 1980).

(4) Complainant's Motion for Sanctions filed 1/8/91 is granted in part. Since I am only now granting Complainant's Motion to Compel the ``sanitized'' payroll records, I am not authorized, pursuant to 28 C.F.R. section 68.21, to impose sanctions for Respondent's

failure to produce the ``sanitized'' payroll records, which it voluntarily promised to produce for Complainant.

Although I may not impose sanctions against Respondent for its failure to produce the ``sanitized'' payroll records, I may, and will, impose sanctions against Respondent, pursuant to 28 C.F.R. sec. 68.21, for its failure to comply with the two orders I issued on 12/18/90. Hence, I am granting Complainant's Motion for Sanctions to the extent that I am taking the following action: a. inferring and concluding that the information not disclosed would be adverse to Respondent; b. ruling that Respondent may not introduce into evidence any matters related to such nondisclosed information in support of any claim or defense; c. ruling that Respondent may not be heard to object to the introduction and use of secondary evidence to show what the withheld information would have shown; and d. striking the Respondent's affirmative defense that two named employees (Marilyn Gavender and Charlene Suggs) worked less than three days, and striking the mitigating defenses of good faith and size of business. I find that these sanctions are appropriate in view of the information and documents which Respondent has failed to provide as ordered, which I have set out below.

(a) In my Order Directing Respondent to Disclose to Complainant Payroll Records Relating to Employees I directed Respondent to disclose to Complainant its Exhibit B, a true and accurate copy of the payroll for the week ending after the date Marilyn Gavender was hired, and its Exhibit C, a true and accurate copy of the payroll for the week ending after the date Charlene Suggs was hired. Respondent contends Exhibits B and C support its affirmative defense that Ms. Suggs and Ms. Gavender worked for less than three days.

(b) In my Order Granting in Part and Denying in Part Complainant's Motion to Compel I directed Respondent to provide Complainant with the following information and documents: 1. All documents, except privileged or work product items, which Respondent has prepared to comply with the employment verification requirements of IRCA with respect to the individuals named in the Complaint (Complainant claims these documents are relevant to the issue of Respondent's good faith); 2. Answer several interrogatories which are relevant to the issue of size of business; 3. Respondent's financial report for 1990 (this also is relevant to the size of Respondent's business); 4. Unprivileged documents Respondent has prepared to inform its personnel staff about the requirement of section 274A of IRCA (these documents are relevant to the issue of good faith); 5. Provide supplementary responses to the interrogato-

ries 2, 7, 11, 13, and 16 (Answers to these interrogatories are relevant to the issues of good faith and size of business).

The parties should be prepared to present evidence on the following issues at the evidentiary hearing:

(A) Liability Issues (affirmative defenses):

1. Warrantless Search and Seizure-a. consent to inspection (Respondent argues that consent was improper because it was misled by government agent who told Respondent's counsel the I-9 inspection was only to educate Respondent), b. constitutionality of warrantless searches and seizures authorized by section 274A of IRCA and 8 C.F.R. section 274a.2(b)(2)(ii) (if this issue is reached at trial, the parties should be prepared to apply the three prong test set forth in N.Y. v. Burger, 482 U.S. 691 (1987)), c. an ALJ's authority to determine this constitutional issue.

2. Estoppel-Respondent contends that it was affirmatively misled by a government agent who told Respondent's counsel that the only purpose of the I-9 inspection was to educate Respondent. See United States v. Manos & Associates, Inc., dba The Bread Basket Restaurant, OCAHO Case No. 89100130 (Feb. 2, 1990).¹

3. Grandfather defense-Respondent argues that Thomas Roby and Jeffrey Brinkley were hired in 1985, and therefore it was not obligated under the Act to complete Forms I-9 for these two individuals.

(B) Civil Penalty Issues (mitigating factors):

1. Seriousness of violations-See United States v. Felipe, Inc., OCAHO No. 89100151 (Final Decision and Order), aff'd by CAHO November 29, 1989).

2. Unauthorized aliens-there is no indication that any of the individuals named in the Complaint are unauthorized aliens.

3. History of Previous violations-there is no indication that Respondent has previously been found in violation of section 274A of IRCA.

SO ORDERED: This 25th day of January, 1991, at San Diego, California:

ROBERT B. SCHNEIDER
Administrative Law Judge

¹In view of the fact that U.S. v. Manos and U.S. v. Felipe, infra., are not published in any official DOJ publication, the court will provide copies of these decisions to the parties on January 29, 1991.