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

United States of America Complainant v Collins Foods Interna tional Inc d/b/a Sizzler Restaurant Respondent 8 U S C 1324a Proceeding Case No 89100084

DECISION AND ORDER GRANTING COMPLAINANTS MOTION FOR PARTIAL SUMMARY DECISION

Procedural History and Statement of Relevant Facts

On January 13 1989 the United States of America Immigration and Naturalization Service served a Notice of Intent to Fine on Collins Foods International Inc d/b/a Sizzler Restaurant The Notice of Intent to Fine in Counts numbered I through IX alleged violations of Sections 274A(a)(1)(A) 274A(a)(2) and 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) In a letter dated February 7 1989 Respondent through its Attorney Terry A Mon tagne requested a hearing before an administrative law judge

The United States of America through its Attorney John Holya filed a Complaint incorporating the allegations in the Notice of Intent to Fine against Respondent on February 13 1989 On Febru ary 22 1989 the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Em ployment assigning me as the administrative law judge in this case and setting the hearing date and place for June 20 1989 at Phoenix Arizona

Respondent through its attorney Jon E Pettibone answered the Complaint on March 23 1989 specifically admitting or denying each allegation and setting forth Respondent s affirmative defense

On March 27 1989 I issued an Order Directing Procedures for Prehearing in this case and on April 13 1989 I issued an Order Directing Procedures for a Prehearing Telephonic Conference on May2 1989

Attorney Jon E Pettibone submitted copies of Respondents Re sponse to Complainant s First Request for Production of Documents

and Respondents Answers to Complainants First Set of Interroga tories on May 15 1989 On May 17 1989 Attorney Pettibone sub mitted a copy of Respondents First Request for Production of Doc uments

On May 25 1989 Attorney Thomas E Walter submitted Com plainant s Memorandum (Motion) for (Partial) Summary Decision with supporting documents on the basis that no genuine issue of material fact existed as to Counts I1 through IX of the Complaint On June 5 1989 Respondent submitted its Response to Motion for Partial Summary Judgment admitting the factual allegations of Counts II through IX and denying the appropriateness of the pro- posed fines for the reasons set forth in Respondent s affirmative de fenses

Also on June 5 I issued an Order Directing Procedures for a Second Prehearing Telephonic Conference to be held on June 14 1989 and in preparation for the June 20 1989 hearing date I issued a subpoena at the request of Complainant

On June 9 1989 Attorneys Walter and Pettibone submitted Pre- hearing Statements for Complainant and Respondent respectively I issued an Order Confirming Hearing Date on June 14 1989 in forming counsel and parties of the time and location in which this matter would be heard

On June 20 1989 the hearing in this matter was conducted in Phoenix Arizona and oral arguments were heard on the Motions for Summary Judgment on Counts II through IX of the Complaint A hearing on the merits was conducted on Count I

Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding set out at 28 C F R Section 68 authorize an administrative law judge to enter summary decision for either party if the pleadings affida vits 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 See 28 C F R Section 6836 (1988)

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any materi al fact *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 out- come of the litigation *Anderson* v *Liberty Lobby* 477 U *S* 242 106 S Ct 2505 2510 (1986)

Legal Analysis **Supporting** *Decision* **to Grant Motion**

Complainant argues in its Memorandum in Support of Motion for Summary Decision that the pleadings and discovery establish that no genuine issue of any material fact exists and that the Complainant is entitled to summary decision as a matter of law on Counts II through IX of the Notice of Intent to Fine which is incorporated by reference into the Complaint Counts II–IX contain factual allegations of paperwork violations for eight individuals specifically that the Employment Eligibility Verification Form 1–9 was improperly prepared on violation of Section 274A(a)(1)(B) of the Act

Respondent admitted the factual allegations of Counts II through IX in its Answer and as an affirmative defense denied the appropriateness of a fine for paperwork only violations because there was no allegation that the eight individuals in Counts II through IX were unauthorized aliens

Respondent argues in its Response to Motion for Partial Summary Judgment that the Immigration and Naturalization Service has a policy and practice of not issuing fines for paperwork violations except in limited circumstances not applicable here Respondent cites an INS memorandum by Commissioner Alan Nelson which has been published in various professional publications and provides in pertinent part that

> **No fine should be assessed for paperwork only violations unless there is an overall refusal by the employer to comply or in situations where although illegal aliens have been apprehended the evidence of employer knowledge is unclear**

See e g ***Employers Immigration Compliance Guide*** Newsletter October 1988 Matthew Bender Publications by Frye & Klasco

While Counts II–IX are for paperwork violations Count I of the Complaint alleges a violation of Section 274A(a)(1)(A) which is a charge of hiring an individual knowing that he or she is an alien not authorized to work in the United States

Respondent argues that Complainant ignores the latter part of the quotation which limits the applicable exception to the no fine policy to situations in which knowledge of the unauthorized status of the apprehended aliens cannot be conclusively attributed to the employer Respondent proposes that because Complainant alleges a knowing hiring in Count I it cannot here effectively claim knowledge is unclear as to Count I thereby making appropriate the fines for the paperwork only violations in Counts II–IX

Respondents interpretation of the language is that where unauthorized aliens are apprehended and the Forms I-9 ***for them***

have not been properly completed tines may be imposed for those paperwork violations if there is insufficient evidence that *those* aliens were knowingly hired Respondents view is that in such circumstances the issuance of fines for the improper completion of Forms I-9 would be more understandable and more reasonable

Contrary to Respondent s position Complainant interprets the policy to read that where illegal aliens are apprehended a notice of intent to fine ***should*** issue and one may issue for paperwork violations when illegal aliens are apprehended but evidence of employer knowledge is unclear

Additionally Complainant argues that Respondent s assertion of the policy and practice is unfounded in law and fact because the basis of Respondents argument is merely an internal INS memorandum which does not appear in either the statute 8 U S C 1324a the regulations 8 C F R 274a or the operating instructions O I s Complainant asserts that there is no established policy nor is there a practice of allowing employers to violate the employment eligibility verification requirements as long as they do not violate the knowingly hire or knowingly continue to employ provisions of the law

I am persuaded by Complainants arguments None of Respondent s pleadings controvert or otherwise dispute any of the factual allegations set forth in Complainant s pleadings In its Answer Respondent admitted the factual allegations and denied the appropriateness of the proposed fines Respondent reiterated that position in the Response to Motion for Summary Judgment It is my view that these admissions can properly be used as the basis for a finding that Respondent has raised no genuine issue of material fact

The inappropriateness of the fines of which Respondent speaks is essentially irrelevant for the purposes of determining actual liability under section 274A(a)(1)(B) Such a factor may however be considered in determining the amount of the fine pursuant to Section 274A(e)(5)

Accordingly for the foregoing reasons I find that Respondent has violated Section 274A(a)(1)(B) of the Immigration and National ity Act 8 U S C Section 1324a(a)(1)(B) in that it hired for employment in the United States those individuals named in Counts 11 through IX of the Complaint without complying with the verification requirements provided for in Section 274A(b) of the Act 8 U S C Section 1324a(b)

Civil Penalties

Since I have found that Respondent has violated 8 U S C Section 1324a(a)(1)(B) in that Respondent hired for employment in the United States individuals without complying with the verification requirements in section 1324a(b) of the Act with respect to Counts II-IX of the Complaint assessment of civil money penalties are required as a matter of law

8 U S C Section 1324a(e)(5) states in pertinent part that

> **With respect to a violation of subsection (a)(1)(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**

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 fines as to Counts II–IX for $100 and $200 per individual for a total of $1 300 In order to determine whether or not the fine requested by the Complainant is appropriate I am required by the regulations to consider the mitigating factors described above Respondent has alleged facts in his pleadings and in oral argument in mitigation of the civil penalties that could be assessed in this case

I have given due consideration to the mitigating factors As to the size of the business while perhaps not a major employer neither is Respondent a small business Regarding good faith the good faith of the Respondent was not at question here Respondent apparently had an established procedure for complying with the requirements of IRCA and has admitted from the beginning that the procedure notwithstanding the I-9 Forms on eight individuals were not completed properly It was not alleged that the individuals were unauthorized aliens or that Respondent had a previous history of violations at this restaurant

Consequently it is the seriousness of the violation factor which appears to be the basis of Respondents argument in its affirmative defense Without using the actual words the Respondent seems to be saying that paperwork violations alone unconnected to a charge of hiring that same individual knowing that he or she was unauthorized to work are not sufficiently serious to warrant a civil penalty This view is not supported by the text of the legislation which specifically provides for hiring violations at one subsection and for

paperwork violations at another See Sections 274A(a)(1) (A) and (B) of the Act 8 U S C Sections 1324a(a)(1) (A) and (B)

Nonetheless eight violations may be seen as a small number of paperwork violations for a large employer and clearly eight violations do not reflect a flagrant disregard for the law in this instance It is appropriate then that I consider this mitigating factor in regard to the amount of the civil money penalties assessed

At first reading the tines ranging as they do from $100 to $200 per individual are at the lower end of the amounts allowable according to the legislation and appear to be appropriate according to the listed factors

However although not listed among the factors it is also appropriate that I consider whether the amount of the fines assessed appear to the arbitrary See ***United States of America*** v ***Leo Yruegas d/b/a Chito s Mexican Restaurant*** Office of Chief Administrative Hearing Officer Case No **88100194** March 10 **1989** In that case the ALJ issued a Judgment by Default on charges of violations of 8 U S C Section 1324a(a)(1)(B) on which varying penalty amounts were assessed in the Complaint without explanation by the Complainant The ALJ noting that no explanations were given for the variations reduced one paperwork penalty to correspond with the others A similar situation exists in the instant case

I note that the fines assessed in Counts II III VI and VIII are $200 per individual On Counts IV V and VII the fines are $100 per individual

The single allegation in Counts II and IV is that the employer failed to ensure that the employee correctly completed section 1 of the Form I-9 The fine assessed in Count II is $200 and the fine in Count IV is $100 In view of the identical factual allegations the fines appear to be arbitrary

The dual allegations in Counts III and VI are that the employer failed to properly complete section 2 of the Form I-9 and that the employer failed to update the Form I-9 The fines assessed in Counts II and VI are $200 per individual

Similarly Counts V and VII allege only the failure of the employer to properly complete section 2 of the Form I-9 and assess a fine of $100 per individual

However Counts VIII and IX of the Complaint allege only that the employer failed to update the Form I-9 and yet they assess a fine of $200 per individual Once again the fine appears to be arbitrary in comparison to the other single allegations

Since there is no explanation and to avoid arbitrary treatment of like violations the fines in Counts II VIII and IX are reduced

from $200 per individual to $100 The total amount assessed for Counts II through IX is reduced from $1 300 to $1 000

Findings of Fact Conclusions of Law and Order

I have considered the pleadings memoranda supporting documents and oral argument 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 As previously found and discussed I determine that no genuine issues as to any material facts have been shown to exist with respect to Counts II through IX of the Complaint Therefore Complainant 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) in that Respondent hired for employment in the United States the individuals identified in Counts II—IX without complying with the verification requirements in Section 1324a(b) and 8 C F R Section 274a 2(b)

3 Respondent s affirmative defense of the inappropriateness of the fines is not a material fact as to liability for the paperwork violations it is rather related to the factor of seriousness to be considered in mitigation of the penalty assessed

4 That pursuant to 8 U S C Section 1324a(e)(6) and as provided in 28 C F R Section 68 52 this Decision and Order shall become the final decision and other of the Attorney General as to Counts II through IX of the Complaint unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it

IT IS SO ORDERED this 13th day of July 1989 at San Diego California

E Milton Frosburg
Administrative Law Judge
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